BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Newport Coast Securities, Inc. New York, NY, Douglas A. Leone Sandy Hook, CT, and Andre V. La Barbera Dix Hills, NY, Respondents.	DECISION Complaint No. 2012030564701 Dated: May 23, 2018

Firm and registered representatives excessively traded and churned the accounts of customers; firm and registered representative made unsuitable recommendations; registered representative conveyed inaccurate account values to a customer; and firm failed to supervise reasonably the registered representatives who excessively traded and churned customers' accounts. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Payne L. Templeton, Esq., Joel T. Kornfeld, Esq., Jill L. Jablonow, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For Respondent Newport Coast Securities, Inc.: Richard Nummi, Esq.

For Respondent Douglas A. Leone: Pro Se

For Respondent Andre V. La Barbera: Steven Fuller, Esq.

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Decision

Newport Coast Securities, Inc. ("Newport"), Douglas A. Leone, and Andre V. La Barbera appeal an October 17, 2016 Extended Hearing Panel ("Hearing Panel") decision. The Hearing Panel found that Leone, La Barbera, and Newport excessively traded and churned the accounts of customers. The Hearing Panel also found that La Barbera and Newport recommended qualitatively unsuitable investments. The Hearing Panel further found that Leone conveyed inaccurate account values to one customer. Finally, the Hearing Panel found that Newport failed to supervise reasonably the activities of the firm's registered representatives.

For this egregious misconduct, the Hearing Panel imposed definitive sanctions. In short, the Hearing Panel expelled Newport from FINRA membership and fined the firm $1 million; barred Leone and La Barbera from associating with any FINRA member in any capacity; fined Leone $400,000; and fined La Barbera $125,000. In addition, the Hearing Panel ordered that Newport, Leone (jointly and severally with Newport), and La Barbera (jointly and severally with Newport) pay restitution to their respective customers, with the fine amounts offset by proof of restitution payments.

After careful consideration of the substantial record in this matter, we affirm the Hearing Panel's findings of violations against Newport, Leone, and La Barbera. We also affirm the expulsion of Newport and bars of Leone and La Barbera and the orders of restitution. We modify, however, the fine amounts levied against each respondent and eliminate the offset.

I. Background

Rubicon Financial Services purchased FINRA member Grant Bettingen, Inc. in June 2008. In fall 2009, Grant Bettingen changed its name to Newport. By the end of 2010, Newport employed approximately 120 to 130 registered persons who worked across the United States. In many instances, a registered representative's home was considered a branch office of the firm. Some registered representatives were supervised by branch managers, while others were overseen by principals located in the firm's main office in Irvine, California.

On August 3, 2016, Newport filed a Uniform Request for Broker-Dealer Withdrawal ("Form BDW"), to terminate its registration with the Commission, all self-regulatory organizations ("SROs"), and all jurisdictions. On September 6, 2016, FINRA cancelled Newport's registration for nonpayment of outstanding fees. The Commission terminated the firm's registration on October 2, 2016.

Leone entered the securities industry in 1993 as an unregistered cold-caller. From October 2008 to March 2013, Leone was associated with Newport as a general securities representative and investment banking limited representative. Leone was assigned to Newport's Long Island, New York branch office. Leone, however, worked primarily out of his home.

From March 2013 to March 2017, another FINRA member employed Leone. Since that time, Leone has not been associated with a member firm. On August 7, 2017, Leone was barred from association with any FINRA member pursuant to FINRA Rule 9552(h) for his failure to

provide requested information. *See* https://brokercheck.finra.org/individual/summary/2453784#timelineSection.

La Barbera began in the securities industry in June 1990. In 1998, he formed a commission and expense sharing partnership with David Levy and Antonio Costanzo. Each partner had his own customers. La Barbera, Levy, and Costanzo together moved from firm to firm before becoming associated with Newport. From July 2008 to July 2012, La Barbera, Levy, and Costanzo were registered representatives of Newport. La Barbera worked from his home in New York and obtained customers primarily through cold calling. La Barbera is currently associated with another FINRA member.

II. Procedural History

This case originated from FINRA's Department of Member Regulation's 2011 sales practice examination of Newport's Long Island branch offices. Staff's examination found indications of excessive and unauthorized trading. A 2012 referral to FINRA's Department of Enforcement ("Enforcement") followed.

On July 28, 2014, Enforcement filed a nine-cause complaint that alleged misconduct during the period September 2008 through May 2013.[1] The complaint named eight respondents: Newport, Leone, La Barbera, Levy, Costanzo, Donald Bartelt, Marc Arena, and Roman Tyler Luckey. Levy, Costanzo, and Bartelt defaulted (together, the "Defaulting Respondents").[2]

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[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[2] The allegations against the Defaulting Respondents were deemed admitted by the Hearing Officer pursuant to FINRA Rule 9269(a)(2). In addition, the Hearing Officer made findings and conclusions set forth in the default decision that were supported by the extensive evidentiary record compiled during the hearing related to the charges against Newport, Leone, and La Barbera. For example, 10 customers of the Defaulting Respondents testified during the hearing against Newport before the Hearing Panel.

The Hearing Officer issued the default decision contemporaneously with the Hearing Panel decision in this matter. In the default decision, the Hearing Officer found that the Defaulting Respondents (1) engaged in quantitatively unsuitable trading in the accounts of customers, in violation of NASD Rules 2310 and 2110, FINRA Rules 2111 and 2010, and NASD IM-2310-2; and (2) churned the accounts of customers, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, FINRA Rules 2020 and 2010, and NASD Rules 2120 and 2110. The Hearing Officer further found that Levy and Costanzo made qualitatively unsuitable recommendations of transactions involving leveraged or inverse exchange-traded products to customers, in violation of NASD Rules 2310 and 2110 and FINRA Rule 2010 and that Levy and Costanzo attempted to impede FINRA's disciplinary process, in violation of FINRA Rule 2010.

[Footnote continued on next page]

Arena and Luckey settled the charges against them.[3] We address in this decision the causes against Newport, Leone, and La Barbera.

The first cause of action alleged that Leone, La Barbera, and Newport, acting through Leone, La Barbera, and the Defaulting Respondents, engaged in excessive trading in certain customers' accounts, in violation of NASD Rules 2310 and 2110, NASD IM-2310-2, and FINRA Rules 2111 and 2010. The second cause of action alleged that Leone, La Barbera, and Newport, acting through Leone, La Barbera, and the Defaulting Respondents, churned certain customers' accounts, in willful violation of Securities Exchange Act of 1934 ("Exchange Act") Section 10(b), Exchange Act Rule 10b-5, FINRA Rules 2020 and 2010, and NASD Rules 2120 and 2110. The third cause of action alleged that La Barbera and Newport, acting through La Barbera, Levy, and Costanzo, recommended that certain customers purchase leveraged or inverse exchange-traded products without reasonably believing that the securities were suitable for these customers based on their disclosed age, investment objectives, financial background, and risk tolerance, in violation of NASD Rules 2310 and 2110 and FINRA Rule 2010. The fourth cause of action alleged that La Barbera mischaracterized as unsolicited 22 trades in the account of one customer and thereby caused Newport's books and records to be inaccurate, in violation of NASD Rules 3110 and 2110 and FINRA Rule 2010. The fifth cause of action alleged that Leone conveyed false account values to one customer, in violation of FINRA Rule 2010 and NASD IM-2310-2. The sixth cause of action alleged that Newport failed to address red flags that its registered representatives were excessively trading and churning customers' accounts, in violation of NASD Rules 3010 and 2110 and FINRA Rule 2010. Finally, the ninth cause of action alleged that Newport lacked adequate procedures and systems necessary to supervise its registered representatives' sales of structured products and inverse and/or leveraged exchange-traded products, in violation of NASD Rules 3010(a) and (b) and FINRA Rule 2010.

The Hearing Panel conducted a hearing over 19 hearing days. The Hearing Panel heard testimony from 32 witnesses, including Leone and eight of his customers and La Barbera and three of his customers. Enforcement also presented documentary evidence and the testimony of 10 customers of the Defaulting Respondents in support of the allegations against Newport. The Hearing Panel found the testimony of all of the customer witnesses to be "highly credible" and "did not find either Leone or La Barbera to be credible." The Hearing Panel admitted into

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[cont'd]

For these violations, the Hearing Officer barred the Defaulting Respondents. The Hearing Officer also fined Levy and Costanzo $150,000 each and fined Bartelt $250,000, subject to offset by amounts paid in restitution. The Hearing Officer ordered the Defaulting Respondents to pay their customers restitution, jointly and severally with Newport, in the amounts set forth in Addendum A to this decision.

[3] At Newport, Arena was Leone's immediate supervisor, and Luckey supervised La Barbera, Levy, and Costanzo.

evidence more than 600 exhibits submitted by Enforcement and 72 exhibits submitted by the respondents.

The Hearing Panel found that Newport, Leone, and La Barbera violated the federal securities laws and NASD and FINRA rules as alleged in causes one (excessive trading), two (churning), three (qualitative suitability), five (conveying false account values),[4] and six (failure to supervise) of the complaint.[5] The Hearing Panel determined that the violations were closely interrelated and batched sanctions against each respondent. The Hearing Panel expelled Newport and fined the firm $1 million; barred Leone and La Barbera in all capacities; fined Leone $400,000; and fined La Barbera $125,000. Finally, the Hearing Panel ordered that Newport pay $853,617.04 in restitution to customers, with $325,853 of that amount imposed jointly and severally on Leone and $86,940.35 imposed jointly and severally on La Barbera. The Hearing Panel further ordered that the respondents' respective fines would be offset by the restitution that each respondent can demonstrate was paid to the customers.

Leone, La Barbera, and Newport appealed the Hearing Panel's decision to the National Adjudicatory Council ("NAC") under FINRA Rule 9311. While Leone and La Barbera contest the findings of liability and sanctions imposed,[6] Newport is no longer contesting liability, the fine, or the order to pay restitution.[7] Newport's sole issue on appeal is the expulsion of the firm. We address the findings and sanctions in detail below.

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[4] In addition to a violation of FINRA Rule 2010 for providing inaccurate account values to one customer, Enforcement alleged that Leone violated NASD IM-2310-2. The Hearing Panel found only a violation of Rule 2010, and we decline to review the dismissal of IM-2310-2 in this appeal.

[5] The Hearing Panel dismissed cause four (causing inaccurate books and records) against La Barbera and cause nine (inadequate supervisory procedures related to exchange-traded products) against Newport, due to a lack of evidence. Enforcement did not cross appeal, and we decline to review the dismissals in this appeal.

[6] Leone was represented by counsel when he timely filed a notice of appeal, which requested oral argument. Leone timely filed his appellate brief pro se after his counsel withdrew from representing him. Leone, who continued representing himself, failed to appear at oral argument before the subcommittee of the NAC ("Subcommittee") empaneled to consider this appeal. We consider Leone's appeal based upon the written record, including his appellate brief.

[7] In its notice of appeal, Newport appealed the findings of liability and all of the sanctions imposed by the Hearing Panel. At oral argument before the Subcommittee, Newport's counsel revised the firm's issues on appeal, making clear that the firm is no longer contesting liability or any sanctions with exception of the expulsion.

III. Excessive Trading and Churning of Customers' Accounts

We affirm the Hearing Panel's findings that Leone, La Barbera, and Newport excessively traded customers' accounts in violation of NASD Rule 2310, NASD IM-2310-2 (for conduct from September 2008 through July 8, 2012), FINRA Rule 2111 (for conduct after July 8, 2012),[8] NASD Rule 2110, and FINRA Rule 2010.[9] We also affirm the Hearing Panel's related findings that the volume of trading engaged in by Leone, La Barbera, and Newport in customers' accounts constituted churning, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, FINRA Rules 2020 and 2010, and NASD Rules 2120 and 2110.[10]

A. Facts

1. Leone's Customers

The excessive trading and churning allegations against Leone are based on the trades that he executed on behalf of eight customers. All of these customers testified at the hearing. Five of these customers, DG, RR, LC, MJ, and BS, opened accounts with Leone after he cold-called them. RR referred the other three, PH, JB,[11] and CP, to Leone after Leone asked him to refer his friends and neighbors.[12]

Leone's general practice when opening new accounts was to send to a customer who had orally agreed to open an account a fully completed "New Account Approval Form" for a customer's signature.[13] In the account opening forms, Leone highly exaggerated the customers'

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8 *See FINRA Regulatory Notice 11-25*, 2011 FINRA LEXIS 45, at *2-4 (May 2011).

9 NASD Rule 2110 applies to conduct through December 14, 2008, and FINRA Rule 2010 applies to conduct after December 14, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008).

10 The Hearing Panel made no findings as to whether the respondents' violations were in willful violation of the Exchange Act. As noted above, Enforcement did not cross appeal, and we decline to exercise our discretionary review of this issue.

11 The allegations against Leone of providing inaccurate account values are based on email communications that Leone provided to customer JB.

12 All of the customers' identities are revealed in Addendum B to this decision. Addendum B is included in the copy of this decision provided to the parties and the Commission only.

13 After collecting customers' information for the new account forms, Leone either telephoned his supervisor, Arena, and orally conveyed the information or, alternatively, entered the information on a scratch pad and then faxed his notes to Arena. Arena entered the information on the new account form and the pre-completed form was sent to the customer for signature.

prior investment experience and mischaracterized their investment objectives and risk tolerances. Leone also exaggerated some customers' income and net worth. Leone often executed initial trades in the customers' accounts before the customers had signed the new account documents and had funded their accounts.

a. DG

DG was the president of a family-owned sheet metal company and approximately 43 years old. He has no formal education past high school. He opened an account with Leone at another FINRA member and moved his account to Newport in October 2008 when Leone moved to the firm. His account was open until April 2010. Prior to opening an account with Leone, DG's prior investment experience was limited to mutual fund shares that he held in an individual retirement account ("IRA").

When he opened his Newport account, his objective was to "make a little bit of money," but he did not discuss an objective with Leone. DG's Newport new account documents were already completed when he received them and indicated that he had 20 years' experience investing in stocks, when in fact he had none; his investment objective was "Capital Appreciation (High Risk, capital growth invested primarily in stocks and options)"; his income was $250,000 to $499,999; his net worth was over $1 million; and his liquid net worth was $250,000 to $499,999. DG did not read the new account documents closely and did not correct any erroneous information other than the amount of his liquid net worth, which he changed to $65,000-$124,999. DG testified that he never called Leone to place or suggest trades, and that he had no understanding as to what Leone was buying or selling in his account or what Leone would be charging him for the trades.[14] DG testified that he received account statements and confirmations, but did not monitor the account because he was concentrating on managing his business.

In 2010, DG made Leone and Newport aware that he was not interested in "high risk" investing when he received a Newport "Active Trading Authorization" form, which stated in part, "I am a sophisticated Investor with substantial personal experience in trading stocks." The pre-completed form for DG's signature contained a list of risk tolerance descriptors, of which "high risk" was circled. DG signed the form and placed a large "X" through the form before faxing the document to Leone. DG testified that he is "not a high risk person." The copy of the form that Newport provided to Enforcement during the investigation and that Enforcement offered into evidence appears to have been altered by obscuring DG's "X."

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[14] DG's account had 112 transactions in one security and more than 40 transactions in four other securities. The weighted average holding period ranged from 1.34 days to 2.91 days.

DG invested approximately $160,000 in his account[15] and withdrew $45,665.29 from the account.[16] Leone made more than $6 million in total purchases and $6 million in total sales in DG's account. DG's account had an annualized turnover rate[17] of 135.25 and an annualized cost-to-equity ratio[18] of 166.57 percent. DG paid $76,309.07 in costs and sustained losses of nearly $115,000.

b. RR

RR owned a furniture company and a furniture restoration business. In 2009, when RR opened his Newport account with Leone, he was approximately 52 and the sole employee of his businesses. His prior investment experience was limited to mutual funds and an individual account at another FINRA member in which he held "some regular stocks" that the broker at that firm recommended. RR invested approximately $41,000 in his Newport account.

RR did not believe his Newport new account documents were pre-completed when he received and signed them. When he asked Leone about the requested information, Leone told him that he should just sign where indicated. RR stated that he was willing to sign incomplete new account documents because Leone had earned his trust through their multiple conversations. The completed new account documents admitted into evidence indicate RR's investment objective was "Short term growth with high risk (Appreciation with acceptance of high risk)." RR, however, told Leone he was "a moderate to low risk investor." The documents indicated RR's income was $65,000 to $124,999, his net worth was over $1 million, his liquid net worth was $65,000 to $124,999, and that RR had 10 years' experience investing in stocks. RR did not ask Leone to open a margin account and did not know what a margin account was, but RR nonetheless signed an included "Customer Account, Margin and Short Account Agreement." Leone never explained margin costs to RR. When RR ultimately noticed that Leone was trading using margin, he told Leone to "get me out of margin, I don't want to be a part of margin, I can't afford to have . . . this type of account."

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15 DG invested approximately $93,000 in cash and transferred securities held in his prior account with Leone, which were valued at $67,000 at the time of the transfer.

16 DG withdrew $30,000 before closing the account and received $15,665.29 when he closed it.

17 "The turnover rate [or ratio] represents the number of times in one year that a portfolio of securities is exchanged for another portfolio of securities and is calculated by dividing the total account purchases by the average account equity and annualizing the number." *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *32 & n.41 (May 29, 2015) (internal quotation marks and alterations omitted).

18 "The cost-to-equity ratio measures the amount an account has to appreciate annually just to cover commissions and other expenses and is obtained by dividing total expenses by average monthly equity." *Id.* at *32 (internal quotation marks omitted).

RR testified that Leone recommended all the purchases and sales in his account and that he did not realize how much trading Leone was doing in his account. RR also had no discussions with Leone or understanding that he would execute multiple transactions in the same security, often on the same day.[19] RR understood that Leone would be charging him commissions of $75-$100 per trade, but in fact the confirmations show that Leone charged RR commissions as high as $1,000 for a single trade.

In March 2010, Newport sent RR an Active Trading Authorization form that contained a list of risk tolerance descriptors, with the objectives "growth" and "high risk" circled. RR testified that Leone told him to sign and return the document, but he did not recall circling or signing anything. RR stated that he "would never have put growth or high risk on anything." RR told Leone that he was a "moderate to low risk investor."

With RR's $41,000 investment, Leone made more than $8.2 million in purchases and total sales of more than $8.4 million. RR paid $98,024.36 in total costs. RR's account had an annualized turnover rate of 123.85 and annualized cost-to-equity ratio of 145.86 percent. RR was the only one of Leone's customers at issue in this proceeding who did not suffer losses.

c. LC

LC is retired and a veteran with a disability. After his military discharge, LC worked for a transportation management company. He then owned, and subsequently sold, a computer learning center for children. He also owned another computer business that he sold around 2007. When LC was in the military, he and his wife were members of an investing club with several other couples. They researched companies and invested, but lost all of their investments about a year later. In 2010, LC had a managed retirement account with a former employer with a value of about $100,000. LC could not recall the underlying investments. He also had an individual account at another FINRA member holding five or six blue chip stocks with a value of about $40,000.

In his cold call to LC, Leone told him that he traded stocks of companies that were not well known and positioned himself to make money quickly based on movements in the price of those stocks. Leone told LC that he would not charge LC any fees if he invested and did not make money. In October 2010, LC and his wife agreed to invest with Leone and signed pre-completed Newport new account documents. LC was approximately 56 years old at the time. The new account documents drastically overstated LC's net worth as over $1 million. LC testified that, "if we had $500,000, we would be lucky," and that amount would include the value of their home. The documents indicated their annual income was $125,000 to $249,999, when in reality it was about $3,000 per month. The documents indicated their investment objective was "Short term growth with high risk (Appreciation with acceptance of high risk)," but LC testified that he "never . . . had enough money to accept high risk" and that was not his objective.

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[19] For example, RR's account had 108 transactions in one security and more than 60 trades in four other securities. The weighted average holding period ranged from 2.46 days to 6.04 days.

LC testified that Leone initially called him regularly to talk about his investment recommendations. LC tried to track his investments using a stock-tracking application, but Leone did not call him before making trades in his account. Thus, LC could not follow Leone's trading. LC stated that while Leone would tell LC what he was buying and selling, Leone did not ask for his permission to make the trades.[20] Moreover, LC recalled instances when he would discuss a stock with Leone and instruct him not to buy or sell it. Leone, however, would ignore the instructions and make the trades anyway.

LC also repeatedly sought, but never received, a commission schedule from Leone. Leone never disclosed to LC what charges he would incur and ignored LC's email questions about commissions being charged. He had only Leone's vague promise that transactions that did not make a profit would be commission free. They had no discussions of how much Leone could make on LC's profitable trades. When LC saw on one confirmation that he had been charged a $5,000 commission for a single trade, he furiously confronted Leone over the telephone. LC's account was losing money, and Leone had previously promised him no commission charges on unprofitable trades. Leone told LC that he had to charge commissions to show his manager that the account was profitable for the firm.

LC never previously had used margin and told Leone that he had no interest in it "whatsoever." Nonetheless, LC's new account documents reflect that margin use was approved. LC's signature appears on a Customer Account, Margin and Short Account Agreement dated 10 days after the date of his new account forms. LC testified that he did not recall signing it, and that the signature on the document purporting to be his wife's was not her handwriting.

At the end of December 2010, LC's Newport account was invested in a single stock, BSD Medical Corp. During that month alone, Leone conducted $3.3 million in transactions in LC's account, with purchases totaling $1.7 million and sales totaling $1.6 million. The margin balance in LC's account was $150,000. LC spoke to Leone about these outlandish numbers, and Leone told him not to worry. LC noticed that the purchases of BSD were frequently split into multiple separate, near simultaneous transactions. Leone told him that this was because he could only buy small lots of the stock, as others were only selling small lots. This pattern of trading continued throughout December. LC later realized that Leone was trading in this manner as a way to generate additional commissions. He tried to call Leone and Newport to discuss this, but no one would answer his calls.

In April 2011, LC closed the account by transferring his holdings to another FINRA member. After closing the account, LC attempted to contact Newport staff about his problems with Leone, but was unsuccessful. LC invested approximately $82,000 in his Newport account. Leone made in LC's account nearly $5 million in total purchases and nearly $5 million in total sales. The annualized turnover rate in the account was 129.32 with an annualized cost-to-equity ratio of 173.92 percent. LC paid $67,149.01 in costs and suffered losses of more than $55,000.

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[20] For example, Leone effected in LC's account 204 transactions in one security and more than 20 transactions in three others. The weighted average holding period ranged from one day to 5.92 days.

d. MJ

MJ is a refrigeration technician and owns a commercial refrigeration business. He has a high school education. MJ had an account with another FINRA member in which he held corporate bonds and mutual funds. Leone called MJ several times before MJ decided to invest $5,000 with him in October 2010. MJ was 44 years old at the time. MJ explained to Leone that he needed the money to be liquid for his business. MJ invested additional funds in the following months, which came from profits from his company and closing his other brokerage account, for a total investment of approximately $22,000.

According to MJ, Leone did not ask him for information about his financial status. The Newport new account documents indicated MJ's income was $125,000 to $249,999, his net worth (excluding primary residence) was over $1 million, and his liquid net worth was $65,000 to $124,999. MJ stated that his actual net worth was $600,000 to $700,000. The documents indicated MJ's investment objective was "Short term growth with high risk (Appreciation with acceptance of high risk)," but he testified that he wanted to keep his money safe with some growth, if possible. The new account documents also overstated his investment experience as 10 years when in reality it was 18 months. He nonetheless signed the documents without noting the inaccuracies. MJ also signed the included Customer Account, Margin and Short Account Agreement, authorizing the use of margin in the account. MJ testified that Leone never discussed the use of margin with him, that MJ was afraid of trading on margin because of the risk, and he had never used margin before trading through Leone and Newport.

Early on, Leone discussed trades in MJ's account with him. Subsequently, MJ recalled few discussions with Leone and increased difficulty in obtaining a response from him. MJ testified to this point: "It's fair to say after he got my money I wasn't in contact with him" and that Leone "could not have called me on all of [the trades in the account]."

In February 2011, MJ's accountant raised concerns about the level of trading in his Newport account.[21] The total dollar value of securities purchased in the account in January 2011 was $191,795.36, and the account's value as of February 28, 2011, was $5,437.15.

MJ and his accountant were unsuccessful in their efforts to contact Leone directly. After contacting Newport's home office, Leone called MJ and MJ told Leone to stop all trading and the use of margin in the account. Leone nonetheless continued trading in the account and the account value dropped further through September 2011. Leone never discussed the reasons for the losses or the commissions that MJ was paying him. MJ never formally closed the account, which had a value at the end of September 2011 of $849.72, because Leone and Newport did not respond to his requests to close it.

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[21] For example, MJ's account had 66 transactions in one security and more than 20 transactions in three other securities. The weighted average holding period ranged from 2.49 days to 5.46 days.

Leone made total purchases in MJ's account of more than $880,000 and total sales of approximately $875,000. For the period from September 2010 through September 2011, when all the trading in the account took place, the annualized turnover rate was 151.91 and the annualized cost-to-equity ratio was 280.14 percent. MJ paid $16,159.76 in total costs and suffered losses of approximately $21,000.

e. BS

BS is a certified public accountant and partner in an accounting firm. He opened his first brokerage account with another FINRA member firm in 1999 and invested strictly in mutual funds recommended by a broker. He also has had accounts with other brokers, in some of which he traded on margin. Immediately before opening his Newport account, BS had incurred significant losses from margin trades in another account, which he subsequently closed, and had become cautious of using margin as a result. At the time of the hearing, BS had two accounts at another firm and relied on a broker to recommend his investments in those accounts.

Leone cold called BS in March 2011 during tax season when BS was working 60 to 80 hours per week. BS was approximately 45 years old at the time. Leone told BS that he invested in high-market-cap companies and used stop-loss orders to prevent a customer's loss of more than 10 percent in any investment. Leone did not discuss the commissions he would charge, and BS assumed he would be paying $200 to $500 per trade. BS and Leone did not discuss how frequently the account would be traded, but BS recalled the strategy was to buy, hold, and wait for the opportunity to sell. BS had told Leone that he needed any money that he invested with Newport later in the year for quarterly tax obligations.

Later in March 2011, BS signed Newport account opening documents, which indicated that his annual income was over $1 million, his net worth was over $1 million, and his objective was "Short term growth with high risk (Appreciation with acceptance of high risk)." This was not BS's objective, which was growth and capital appreciation.[22] BS was "okay with investing in . . . stocks and bonds with some degree of return," but he had not agreed to high-risk investing. The documents also incorrectly indicated BS had over 10 years' experience investing in stocks, averaging 100 trades a year with an average value of $25,000; and 10 years' experience investing in bonds, averaging 20 purchases a year with an average value of $100,000. In reality, BS never transacted more than 20 stock purchases in a year and no more than $10,000 in any one purchase, and his bond investing experience was limited to about three bond issues in his lifetime and owning bond mutual funds. BS did not notice the inaccuracies when he signed the new account documents. He merely signed the forms where Leone had indicated.

The new account documents indicated that BS's account was approved for margin. BS unequivocally testified that he and Leone had not discussed the use of margin. BS was averse to margin based on his prior "bad experience" using it. BS did not realize his account was

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[22] The form also incorrectly listed BS's marital status as single and the number of his dependents as one (when he had five).

approved for margin and was not aware that Leone was using margin to trade until he received an account statement showing a margin balance.

BS funded the account with two deposits, one on March 28, 2011, and the second on April 11, 2011, totaling $77,630. He deposited no additional funds in the account. BS did not focus on the Newport account because he was too busy with his accounting business. In April and May 2011, BS discussed the account with Leone on a weekly basis, talking about whether the account was up or down, but Leone assured him that everything was "fine." Leone generally decided which stocks to buy and sell as well as the timing and the quantity. Leone did contact BS about initial purchases of a stock in his account and contacted BS sporadically if he was going to sell. BS stated, however, that "there may have been one purchase in that account that I would have recognized at the time of purchase."

In May 2011, BS received an Active Trading Authorization form from Newport, which asked him to verify his primary investment goals. BS did not recall having a conversation with Leone prior to receiving, signing, and returning the form. BS indicated on the form his objectives of growth and capital appreciation, but not speculation. After BS returned the form to Newport, Leone left him a voicemail telling him that he needed to re-submit the form and select speculation as his objective. BS declined and testified that speculation was never his goal for the account.

BS received his March 2011 account statement in April, but did not receive another one until June.[23] BS was not aware of the level of trading in the account until he started receiving his account statements in June and a large number of confirmations. In June, when BS received his statement detailing the account's activity for May, BS was surprised to see that the level of Leone's trading and that his account's value had declined by more than $25,000.[24] When BS could not reach Leone, he called Newport's Irvine headquarters and was told that his account's value had fallen to about $30,000 and that the account was margined.[25] BS then told Newport to stop all trading in the account.

After BS called Newport's headquarters in June 2011, BS received a call from Arena, Leone's supervisor, who told BS that he was taking over his account going forward. BS recalled that Arena had told him that the stock in his account had a temporary decline and would rebound. Arena had recommended that BS wait and see if the stock would recover. Arena also had

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[23] BS testified that he received his April 2011 account statement in mid-June and that the mailing had been damaged.

[24] For example, BS's account had 59 transactions in one security and more than 12 transactions in four other securities. The weighted average holding period ranged from one day to 6.5 days.

[25] BS could not recall with whom he spoke on the telephone from Newport.

recommended leaving the account margined. BS followed Arena's recommendations because more than half the account's value was already gone.

BS's Newport account was open from March 2011 through January 2012. With the exception of the opening purchase in March and a few sales in July and August 2011 to close out positions in the account, all of the trading took place in a three-month period from April through June 2011, when BS halted trading in his account. Total purchases and sales in the account were more than $1.9 million each. Focusing on the period when the majority of the trading in the account took place (March 2011 through June 2011), the annualized turnover rate was 172.84 and the annualized cost-to-equity ratio was 120.12 percent. BS paid total costs of more than $13,000 and sustained total losses of more than $70,000.[26]

f. JB

JB is a shoe sales representative. JB's neighbor, RR, referred him to Leone. By retaining Leone, JB hoped to replicate the trading gains that RR had reported to him. In March 2010, when JB was approximately 48 years old, he opened an account by depositing $65,000 with Leone at Newport. JB's prior investment experience was limited to mutual fund shares in an IRA managed by his parents' financial advisor.

JB received and signed the pre-completed Newport new account opening documents without reading them carefully or correcting inaccuracies. The documents incorrectly stated that he owned his own business and indicated that his annual income was $500,000 to $999,999, that his net worth was over $1 million, and that his investment objective was "Short term growth with high risk (Appreciation with acceptance of high risk)." JB never told Leone that this was his objective. Rather, JB's objective was only "growth, I just wanted to . . . have the money make money." The documents also inaccurately stated that JB had 10 years' experience investing in stocks, averaging 100 purchases a year with an average size of $10,000, and 10 years' experience investing in bonds, averaging 10 purchases a year with an average size of $10,000. The documents indicated that Newport had approved the account for day trading and the use of margin. JB had not discussed these types of trading with Leone.

JB stated that he rarely discussed with Leone the purchases or sales in his account. Rather, Leone chose which stocks to buy in his account, when to buy or sell, and the amount of stock. JB had no discussions with Leone or understanding regarding transaction costs and did not know the costs of his transactions. Leone had also charged mark-ups on several of JB's purchases. JB did not understand the concept a mark-up in the context of stock purchases and did not know Leone had been charging mark-ups.

JB's accountant advised him to close the account after receiving tax information from Newport in spring 2011 that showed that Leone had engaged in more than $3.8 million in

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[26] In December 2011, BS filed an arbitration claim against Newport, Leone, and Arena. BS stated that he settled with Newport for $17,500 and with Leone and Arena for $5,000 each.

transactions.[27] JB attempted to close the account, but Leone persuaded him to leave it open in an effort to recoup losses. JB finally closed the account in May 2011.

In JB's account, Leone made total purchases and sales of more than $4 million each. The annualized turnover rate was 144 and the annualized cost-to-equity ratio was 171.5 percent. JB paid total costs of $49,113.46 and suffered total losses of over $63,000.

g. CP

CP is a college-educated interior designer and commercial furniture sale representative who owns her own company. RR referred CP to Leone. Leone contacted CP and discussed his success in trading RR's account. CP was intrigued because she wanted a better return than banks were paying in order to pay for her daughter's college education. CP did not have securities investment experience other than inheriting her late husband's IRA worth approximately $200,000, which was managed by another broker.

CP initially opened an individual account at Newport and invested $15,000 in September 2009. She was approximately 56 years old at the time. At Leone's direction, and for reasons she did not understand, her account was changed, first to a joint account with her daughter and then to an account in the name of her business in January 2010. When CP opened the individual account, she crossed out a pre-populated "yes" under "Margins Approved" in the new account opening documents and wrote, "I do not want to participate in any margin accts or short selling." CP's friend had advised her against using these trading techniques, although CP testified that she did not understand what either of those terms meant.

When CP's account was changed to a joint account with her daughter, who was 11 or 12 years old at the time, and then to an account in the name of her business, she executed new account opening documents. She did not include the statement regarding margin accounts and short selling on those documents, believing she had already expressed her intentions clearly when she first opened an account. Despite CP's original intentions, Leone and Newport authorized her business account as a margin account.

CP testified that she told Leone that she did not "have a ton of money," she could not afford to lose her investment, and her income in a good year was $60,000. The new account form for her business account, however, indicated that her annual income was $125,000-$249,999, and that her investment objective was "Short term growth with high risk (Appreciation with acceptance of high risk)." It also inaccurately indicated that her net worth excluding primary residence was in excess of $1 million when in reality it was closer to $250,000. The form also stated that she had "10+" years of experience investing in stocks, averaging 50 purchases a year with an average value of $10,000. In reality, CP traded in her IRA very infrequently.

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[27] For example, JB's account had 75 transactions in one security and more than 35 transactions in four other securities. The weighted average holding period ranged from 1.82 days to 4.76 days.

CP was not aware of the use of margin in her account and did not discuss trades with Leone before they were made. CP stated that Leone never discussed with her the possibility that he would be buying and selling the same stock within a single day, or on the next day.[28] CP attempted to reach Leone several times in order for him to explain the activity in her account, but was usually unsuccessful. When she did speak to Leone about her losses, he assured her that he would recoup them in time. Leone did not discuss with CP the commissions he was receiving on these transactions.

CP closed her Newport account in July 2010. By this time, Leone had made purchases totaling approximately $385,000 and total sales of about $381,000. The annualized turnover rate in the account was 85.81 with an annualized cost-to-equity ratio of 105.22 percent. CP paid total costs of $4,757.09 and sustained losses of nearly $9,000.

h. PH

PH is RR's wife. PH and RR kept their finances separate except for a joint account to pay household bills. After her first husband died in 1997, PH opened an account at another FINRA member using life insurance money. She otherwise had no prior investing experience. In October 2009, when she opened her Newport account, she was approximately 48 years old and owned and managed a dry cleaning business. At that time, the annual revenue of the business was about $1 million and her net income from the business was $60,000 to $70,000. As of 2009, the value of PH's other brokerage account was approximately $1.5 million. She had never used margin before investing with Newport.

RR persuaded PH to open an account with Leone, describing him as a "good guy" who had been making him a lot of money. The new account documents listed her annual income as $65,000 to $124,999 and her net worth as "$1 million - over." The documents listed her investment objective as "Short term growth with high risk (Appreciation with acceptance of high risk)." The documents also indicated that Newport approved the use of margin in the account. PH testified that Leone did not discuss the use of margin in her account because she never would have agreed to it. She wanted her money to grow, but not by using high-risk trading strategies. Leone told her to sign the pre-completed new account forms and return them quickly with a check. PH signed the documents without realizing that they mischaracterized her investment objectives and authorized Leone to use margin. PH made an initial $20,000 deposit into her Newport account with Leone in October 2009.

Soon after PH opened the account, she began to receive trade confirmations. She believes she reviewed a few of them. PH, however, did not understand the use of margin, the level of trading, or the amount of fees she had been paying in the account until it was too late. Leone did not discuss with PH the fees he was charging. Leone never discussed with her the stock he was buying and selling in her account. Sometimes she was in the room when RR spoke

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[28] For example, CP's business account reflects 18 transactions in one security and 10 or more transactions in three securities. The weighted average holding period ranged from 1.83 days to 4.54 days.

to Leone about his account, but she never spoke to Leone herself. While she knew there was trading going on in her account because of all the mail she was receiving, she had "no clue . . . what he would buy, what he would sell, [I] just trusted him to be making me money."[29]

Ultimately, PH became aware that she was losing money in her account by reviewing the bottom line in her account statements. In June 2010, she and RR together called Newport and instructed the firm to close their accounts. Leone made total purchases and sales in PH's account of more than $1 million each. The annualized turnover rate in the account was 108.12 and the annualized cost-to-equity ratio was 147.69 percent. PH paid total costs of $14,340.25 and suffered losses of over $14,500.

2. La Barbera's Customers

Enforcement based the excessive trading and churning allegations against La Barbera on the trades that he executed in the accounts of four customers. Three of these customers, DB, CA, and RG, testified at the hearing. The fourth, DR, did not.[30]

Like Leone, La Barbera obtained customers primarily through cold calling. He only opened accounts, other than IRA accounts, with aggressive growth and speculation as the accounts' objective and risk tolerance. He testified that he did not recall any of the account-opening conversations with these four customers. He asserted, however, that any information that he completed on the customers' new account documents, he obtained directly from the customers.

La Barbera executed trades in the accounts of these four customers on either a riskless principal basis, when he charged the customers a mark-up or mark-down (on short positions), or on an agency basis, when he charged the customers commissions. La Barbera had discretion under Newport's policies to decide whether to charge mark-ups or mark-downs or commissions on trades and the amount so long as it was below five percent. The customers' confirmations generally reflect that La Barbera charged mark-ups on opening positions and commissions on trades closing out positions, but this was not always the case as La Barbera was inconsistent in how he charged fees. La Barbera testified that whenever he recommended a trade to a customer, he disclosed the cost of the trade. As the Hearing Panel observed, however, La Barbera could not explain how he determined whether he would charge a mark-up (or mark-down) or commission or how he determined the amounts that he would charge for a trade. While La Barbera claimed that his "normal process" was to charge a "markup of 55 cents a share," the customers' confirmations show wide variations in the amounts that he actually charged.

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[29] For example, PH's account had 31 transactions in one security and 15 or more transactions in five other securities. The weighted average holding period ranged from 2.07 days to 7.68 days.

[30] The qualitative suitability allegations against La Barbera set forth in cause three of the complaint stem from the trading in DB's and DR's accounts.

Newport's trade confirmations for riskless principal trades did not show the total dollar amount of the mark-up or mark-down on the trade. Under the heading "Trade Amount," the confirmations showed a "transaction charge" of $0.00. Lower on the page, under the heading "Additional Trade Information," they showed the "reported trade price" and the "mark up/down" on a per share basis, but did not reflect the total mark-up or mark-down on a transaction. A customer could only determine the percentage and total amount of the mark-up or mark-down by performing mathematical computations. As a result, the Hearing Panel found that "inexperienced or unwary investors, such as DB, CA, and RG could not be expected to understand that they were being charged markups or markdowns on riskless principal trades, or the amounts of those charges."

a. DB

At the time of the hearing, DB was 64 years old and owned a mechanic shop in Kansas. In 2011, when DB opened his Newport account with La Barbera, his business had a net income of $40,000 to $45,000. DB had little hands-on investing experience and little knowledge of investment concepts. For example, he thought short-selling entailed selling a stock after holding it for a short period, and he did not know what a private placement was. He had a long-standing account at another brokerage firm that he invested conservatively based on the broker's recommendations, which DB always followed. DB also had two other brokerage accounts, one that he opened after a cold call years earlier at a now shuttered firm.

In 2011, DB received a cold call from La Barbera. DB described La Barbera as a "very fast talker," "very persistent," and "very sure of himself," and seemed unwilling "to take no for an answer." He urged DB to buy stock in a company called Savient Pharmaceutical. La Barbera told him the company had a "cancer drug" that was "about to be approved by the FDA." La Barbera explained that when that happened, "the stock was going to go up tremendously" and there was "no possibility" of DB losing money on the stock. In order for La Barbera to "get his foot in the door," he stated he would not charge DB anything for the transaction. DB then agreed to buy 1,000 shares of Savient at $7.85 a share.[31]

La Barbera sent DB the Newport new account documents and told him that the forms were merely a formality and to sign where indicated. The new account documents indicated that DB's annual income was $75,000, his net worth (excluding primary residence) was $3 million, and his liquid net worth was $2.5 million. These amounts were inaccurate, and DB did not convey them to La Barbera. In 2011, his income was $40,000, his net worth was approximately $800,000 to $900,000, excluding his home, and his liquid net worth was $600,000. The documents also inaccurately listed his investment objective as "Aggressive Growth" and "Speculation" as his risk tolerance. DB testified to a moderate risk tolerance and denied telling La Barbera that he wanted to speculate. The documents indicated that DB had 30 years' experience investing in equities, which was also inaccurate and overstated. Because of these

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[31] The price of the stock dropped and was sold from DB's account a few months later at $3.812.

inaccuracies, DB did not believe that the account documents were completed when he signed them and that La Barbera told him that he would "go ahead and fill it out."

In July 2011, around the time when DB signed the new account documents, he also signed a form letter that La Barbera, Levy, and Costanzo prepared and utilized for their customers (the "Short Term Trading Letter"). The Short Term Trading Letter stated, in part, "we have been executing a strategy designed around short term trading. . . . [T]he risks involved in short term trading include but are not limited to significant principal losses, increased commission costs, and tax consequences." The letter did not quantify the amount of "increased commissions" that DB might incur from short-term trading or disclose that he might be charged mark-ups or mark-downs on trades.

Thereafter, La Barbera started actively trading in DB's account. DB never met La Barbera in person and only spoke to him when La Barbara called for authorization to make a trade. DB testified that La Barbera made all the decisions about what to buy, what to sell, and when to trade. And DB never rejected any of La Barbera's recommendations. In most instances, La Barbera sold a position and used the proceeds to buy another stock, each time telling DB the new purchase was "really taking off" or "about to explode." La Barbera also executed short sales in DB's account, but DB did not understand short selling and had no recollection of La Barbera discussing short selling with him.

La Barbera also was charging DB for his services. Usually, in opening a position, La Barbera executed the trade on a riskless principal basis and charged a mark-up (or mark-down on a short sale). In closing out positions, La Barbera generally executed the trade on an agency basis and charged a commission. DB testified that La Barbera never told him that he was charging for his services or anything about what he was charging. DB had no understanding of mark-ups and mark-downs and was unaware he was paying them. DB thought that La Barbera had continued to waive charges as he tried to recoup trading losses.

DB deposited approximately $63,300 in his Newport account. La Barbera made approximately $1.4 million in total purchases and $1.3 million in total sales from July 2011 through May 2012. For this period, the annualized cost-to-equity ratio in DB's account was 142.07 percent, and the annualized turnover rate was 39.98. DB paid total costs of $49,712.13 and suffered losses of over $38,500. DB closed his account in July 2012.[32]

b. CA

CA manages a family business that operates a lumberyard and building material supplier. Prior to opening an account at Newport, CA owned a retirement account that he invested primarily in mutual funds recommended by a broker at another member firm.

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[32] For the period DB's account was open at Newport, the annualized cost-to-equity ratio was 127 percent and the annualized turnover rate was 35.

In 2010, La Barbera cold called CA and told him that he had some "hot stocks" and gave him one to watch. CA was 33 years old at the time. CA followed La Barbera's recommendation to buy stock in a video game company called Take Two. CA testified that when he asked about costs, La Barbera said he made commissions only when CA made money. La Barbera said nothing at any time about mark-ups or mark-downs, and CA had no understanding of mark-ups or mark-downs in the context of securities transactions. With respect to investment objectives, CA told La Barbera that he hoped to "grow the account and make money."

CA signed the Newport new account documents in June 2010 after he had already made a purchase in the account. CA was directed to sign the documents where they were marked with arrows and return them and payment for the stock as quickly as possible. The documents listed his income as $200,000, his net worth as $2 million, and his liquid net worth as $150,000, all of which were correct at that time. The documents also listed his investment objective as "Aggressive Growth" and his risk tolerance as "Speculation." CA testified that his objective and risk tolerance were pre-completed, and he had not discussed these with La Barbera. CA's new account documents also included a signed margin agreement, which CA did not recall signing. La Barbera first discussed using margin with CA after the account was open, and CA had refused to invest more money. In turn, La Barbera recommended buying the stock on margin. CA also signed a Short Term Trading Letter when he opened his account.

The trading in CA's account was all done based on La Barbera's recommendations, which CA followed. La Barbera would call CA to discuss purchases before making them, but sold positions without CA's knowledge or prior approval. When La Barbera called him to recommend purchases in the account, La Barbera had already sold the prior positions to generate money for the new purchases.

A few months after CA opened the Newport account, his wife was hospitalized and she remained there for several months. During this time, CA's business was experiencing a severe downturn. CA therefore was not focused on his Newport account. CA received Newport account statements but opened only the first one, and he put the confirmations he received in a file without opening them.

CA invested approximately $57,000 with La Barbera. La Barbera actively traded in the account over a seventeen-month period between June 2010 and October 2011. During this period, La Barbera executed 59 trades, totaling approximately $721,000 in purchases and approximately $667,000 in sales. The annualized turnover rate during this period was 16.69 and the annualized cost-to-equity ratio was 67.23 percent. Total costs were $29,268.90 and total losses were nearly $54,000.

c. RG

RG is a veterinarian in Colorado, who, like DB and CA, opened an account with Newport and La Barbera after receiving a cold call.[33] RG's prior investment experience consisted of owning mutual funds held in a managed IRA, and a purchase in 1988 of $500 worth of stock in a computer company.

RG opened an account with Newport in January 2011 when he was approximately 46 years old. RG received the Newport new account documents with the majority of information already completed. The documents listed his income as $85,000, his net worth (excluding primary residence) as $800,000, and his liquid net worth as $75,000. The documents listed his investment objective as "Aggressive Growth" and his risk tolerance as "Speculation." According to the documents, he had 25 years of experience investing in equities. RG testified that he did not carefully review the form before he signed and returned it to La Barbera. RG did not tell La Barbera or anyone else at Newport that his objective was aggressive growth, that his risk tolerance was speculation, or that he had 25 years of experience investing in equities. RG also signed a margin agreement as part of his new account documents, but did not read the agreement before he signed it. RG had never before traded on margin, and he did not speak to anyone at Newport about using margin in his account.

RG's Newport account was open from January 2011 through May 2012. During that time, RG deposited a total of approximately $16,851 with Newport and La Barbera. La Barbera recommended all the trades in RG's account and actively traded in it over a period of eight months between January 2011 and August 2011. RG testified that he followed La Barbera's recommendations because he put his trust and faith in La Barbera, who said he had been in the business for 20 years. La Barbera told RG that Newport would not charge anything for his first transaction. Thereafter, however, La Barbera started charging RG mark-ups, which RG was unaware he was paying. La Barbera did not discuss his charges or explain mark-ups or mark-downs to RG. RG was also unaware that La Barbera was trading on margin until he received an account statement showing an interest charge. RG had told La Barbera he had no more money to invest, and later he realized that La Barbera was continuing to make purchases on margin in order to continue trading his account.

From January 2011 through August 2011, La Barbera made total purchases in RG's account of more than $173,000 and total sales of approximately $140,000. During that period, RG paid total costs of approximately $7,200.[34] The annualized cost-to-equity ratio during that time was 74.35 percent and the annualized turnover rate was 18.02 percent.

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[33] RG did not recall with whom he spoke on the cold call. La Barbera thereafter was the Newport representative listed on RG's new account documents and the person who serviced RG's account.

[34] RG paid total cost of $7,959.32 for the entire time the account was open and sustained approximately $15,800 in losses.

d. DR

DR had settled an arbitration claim filed against La Barbera and Newport and did not testify at the hearing. The Hearing Panel admitted into evidence documents related to DR's Newport account and La Barbera's trading in that account. DR's Newport new account documents reflect that DR was an Iowa farmer with an annual income of $200,000. DR's net worth (excluding his primary residence) was listed as "1 Mil +," with a liquid net worth of $50,000. The new account documents reflected that DR had 15 years of experience investing in equities and 15 years of experience investing using margin. The documents listed DR's investment objective as "Aggressive Growth" and his risk tolerance as "Speculation."

DR invested approximately $122,000 in his Newport account that was open from September 2008 until December 2011. During this time, there were 115 trades in the account (total purchases of approximately $1.525 million and total sales of approximately $1.413 million). This trading resulted in an annualized cost-to-equity ratio of 68.4 percent and an annualized turnover rate of 20.39. DR paid total costs of $51,233 and suffered losses of $119,605.

3. The Defaulting Respondents and Their Customers

In order to evaluate the Hearing Panel's findings and sanctions against Newport, we review the Defaulting Respondents' backgrounds and reproduce relevant excerpts from the Hearing Officer's default decision related to the factual background of the Defaulting Respondents' customers who testified at the hearing.

a. Levy's Background and His Customers

Levy entered the securities industry in 1992. Prior to joining Newport in July 2008, Levy was associated with several FINRA members. He was registered with Newport both as a general securities representative and principal until August 2012. Levy has not been registered with any FINRA member since March 2015. FINRA barred Levy in September 2015 for reasons not related to the default proceeding.

i. NK

> NK owns a water conditioning business that has one part-time employee, apart from him. In 2010, the gross revenues for the business were $130,000 to $140,000, with net revenues of approximately 20% of the gross. NK has three years of college education, studying accounting and to become a minister. Prior to opening a Newport Coast account with Levy, based on a cold call, NK's investing experience was limited to a one-time $3,500 investment in one stock, on which he lost about $1,000. NK did not recall having any prior brokerage accounts and he did not have any retirement accounts, but he did purchase some stock in a non-public company owned by a friend and in a cartoon network. He also invested in silver through a broker while his Newport account was open.

Levy told NK that he could make a significant return if he trusted Levy. According to NK's new account documents, his annual income was $50,000, his net worth (excluding primary residence) was $500,000, and his liquid net worth, which NK added to the documents by hand, was $100,000. NK's liquid net worth consisted of an inheritance he had just received, and he used part of that money to fund his Newport Coast account. The new account documents listed NK's investment objective as Aggressive Growth and his risk tolerance as Speculation; NK testified his objective was simply to make money and that he told Levy he could take some risk, but not a lot. Initially NK invested just $1,700, which he quickly withdrew just to test whether he would be allowed to withdraw funds from his account. Once he succeeded, he invested additional funds totaling more than $60,000, but he also withdrew funds from the account on several occasions. NK testified he had very limited discussions with Levy about the investments in the account; Levy made the decisions.

NK invested approximately $64,000 in his account, but while the account was open, he withdrew approximately $25,000. His account was open from January 2010 through June 2012, but nearly all of the trading in the account took place from July 2010 through June 2012. During that active period, total purchases in the account were about $894,000 and total sales were approximately $860,000. For the active period, Enforcement calculated an annualized turnover rate of 16.15 and an annualized cost-to-equity percentage of 66.30%. Total costs were over $36,000 and losses were nearly $37,000.

ii. BNS

BNS is a psychiatrist. He invested with Levy following a cold call, making a small initial purchase for about $1,600. Levy told him there would be short-term trading in his account. BNS testified Levy also told him that both sides of his initial investment, buying or selling, would be without cost, "except for, I believe, a small brokerage fee." Later in 2010, BNS asked about cost, and he complained to Levy that the cost of one trade was exorbitant. The charges for that trade were reduced somewhat but BNS otherwise received no response to his inquiries about costs. At the time, most of BNS's investments were through his employer and he had a small IRA, so he wanted to be a bit more aggressive in his Newport Coast account, but he told Levy he would need the money later in the year so he wanted to keep the risk low. BNS's prior investing experience included a brokerage account that allowed him to do his own trading in 1999 and 2000. The value of that account started at $25,000, increased to about $100,000, and then decreased to about $25,000 again. In addition, some years earlier, he had invested $5,000 through a broker, but lost it all. He told Levy about that experience, saying it was traumatic, and Levy said it was unlikely to happen in his Newport account. On cross-examination, BNS admitted he had purchased two or three private placements about 15

years ago. He also testified he had traded his own account in 1999 and 2000, and believed he had NASDAQ Level 2 access when doing so.

The new account documents were already completed when BNS received them. They indicated that his annual income was $300,000, his net worth was $3 million, and his liquid net worth was $500,000. The stated net worth on the new account form of $3 million was high; it should have been $1 million, which was mostly in retirement accounts. But BNS signed the documents without changing that amount. The documents indicated that his investment objective was Aggressive Growth and his risk tolerance was Speculation, but in reviewing the documents BNS scratched out Speculation and checked "Aggressive" as his risk tolerance. He signed a margin agreement as a "just in case" option, but they did not plan to use it. He also signed the Short Term Trading Letter used by La Barbera, Levy, and Costanzo.

BNS testified he received and reviewed his account statements and confirmations until he took a trip to Brazil in August 2010. Some of the confirmations he reviewed included disclosures that he had been charged markups and markdowns, but BNS testified he does not recall that registering with him and he was not familiar with the concepts of markups and markdowns at that time; he only learned about markups and markdowns from FINRA when they contacted him during the investigation. BNS does not believe he discussed any of the trading in the account with Levy after he returned from his trip in September 2010, but Levy continued to trade the account actively. After his trip, BNS decided it was too stressful to follow his account, because he was obsessing on the trading, so he did not open any more statements until he gave them to his accountant at tax preparation time in 2011. He did not close his account at that time because his statements showed he had a profit in his account for 2010. He continued to avoid looking at the account statements and confirmations he received in 2011 until tax time in 2012, by which time his account had incurred substantial losses. BNS closed his account in April 2012.

BNS invested approximately $33,000 in his Newport account, which was open from January 2010 through April 2012. Purchases totaled more than $647,000, with total sales of more than $627,000. Enforcement calculated an annualized turnover rate of 14.42 and an annualized cost-to-equity percentage of 68.82%. Total costs were almost $31,000 and total losses were over $27,000.

iii. JS

JS was employed in stage craft (building stages and erecting sound systems) for more than 40 years before retiring in 2009, prior to opening his Newport Coast account, although he continued working on some small

jobs before fully retiring in 2010. Before opening his Newport Coast account through Levy after a cold call, he had never owned any individual stocks or bonds. Levy did not discuss his investment strategy or ask about JS's investment experience, risk tolerance, or objectives.

When JS received his new account documents, they indicated where he was to sign, so he signed and returned them. The documents stated that his income was $50,000, his net worth (excluding primary residence) was $1 million, and his liquid net worth was $50,000. They indicated his investment objective was Aggressive Growth, but he testified he does not know what that means, and they indicated his risk tolerance was Speculation, but he testified he is "not a speculator . . . not a gambler." His new account documents indicated that he was retired. The documents that JS signed included a "Customer Margin Account Agreement" and the Short Term Trading letter used by La Barbera, Levy, and Costanzo. JS testified he did not understand a margin account and did not know why Levy would want to put him on margin. Although the "Account Information Form" in JS's new account documents did not list any prior investing experience, the documents also included a "Customer Option Agreement" that indicated JS had 20 years of experience investing in options, with a usual size trade of "15," and that he had 30 years of experience investing in stocks and bonds, with a usual size trade per year of "30." In fact, JS did not have any such experience. The Customer Option Agreement also indicated that the anticipated options transactions included covered calls, but JS testified he did not know what covered calls are.

Levy recommended all the purchases in JS's account. JS testified that sometimes Levy would call him about purchases in his account and sometimes he did not. There were short sales in his account, but JS testified he does not even know what a short sale is and Levy never explained to JS why he was doing short selling in JS's account. Levy never told JS that he was paying markups or markdowns on purchases in his account and JS did not know what markups or markdowns were, or what a riskless principal transaction was. In May 2012, he transferred his Newport account balance to a local broker at another FINRA member firm.

JS invested over $75,000 in his Newport account, which was open from March 2010 through May 2012. Purchases totaled over $1.345 million, with sales of nearly $1.32 million. Enforcement calculated an annualized turnover rate of 11.81 and an annualized cost-to-equity percentage of 50.7%. Total costs were nearly $58,000, with losses of almost $37,000.

b. Costanzo's Background and His Customers

Costanzo entered the securities industry in 1995 and was associated with numerous FINRA members prior to associating with Newport in August 2008 with his partners La Barbera and Levy. He was registered with Newport as a general securities representative until August 2012. After leaving Newport, Costanzo was associated with other FINRA members until March 2015. FINRA barred him in August 2015 for reasons not related to the default proceeding.

i. DS

DS has owned his own fuel oil distribution company since 1990; in 2011 the company had about six employees. DS opened a Newport Coast account in the name of his company in February 2011 after receiving a cold call from Costanzo. At that time, he had an account at another FINRA member firm, in which he had invested since he was young, with a value of about $100,000, invested primarily in mutual funds recommended by the [registered representative] for that account.

DS's Newport Coast new account documents indicate his annual income was $100,000, his net worth (not including primary residence) was $2 million, and his liquid net worth was $175,000. The documents indicate that he had 25 years of experience investing in equities, and they state that his investment objective was Aggressive Growth and his risk tolerance was Speculation. The new account documents also included a Customer Margin Account Agreement and the Short Term Trading Letter used by La Barbera, Levy, and Costanzo.

After opening his Newport Coast account, DS only glanced at his account statements and did not open them all; he opened confirmations just to see what he had bought and the price. He had no discussions with Costanzo about commissions or markups. Although he now understands he was paying markups, he did not discuss that with Costanzo at the time. There were short sales in his account, but he does not have a good understanding of what a short sale is. He closed the account in November 2011. On cross-examination, DS acknowledged that he had opened other accounts based on cold calls both before and after he opened his Newport Coast account; that he understood Costanzo was being paid somehow for the trades in his account; and that short-term trading and the use of margin in his account was acceptable to him if recommended by Newport Coast. DS testified that he depends on the broker to make recommendations about what to do and focuses his attention on his business.

DS invested more than $254,000 in his Newport account, although he also withdrew $150,000 while the account was open and received approximately $61,000 when he closed the account. During the period February 2011 through November 2011, purchases in DS's account totaled nearly $1.6 million, with sales of over $1.5 million. Taking into account

DS's withdrawal of $150,000 in April 2011, Enforcement calculated an annualized turnover rate of 27.41 and an annualized cost-to-equity percentage of 104.72%. Total costs were over $60,000, with losses of over $43,000.

ii. RS

RS owned a dental technician business, which he sold in 2010 for $1 million. The terms of the sale required that he stay on for at least three years full time, drawing a salary of about $120,000. He also owned the building in which the business was located and rented it to the business. Before he opened his Newport Coast account, RS's primary investing experience involved buying blue chip stocks, as well as gold bullion, to fund his retirement, but in 1999 he was forced to sell all his investments when his business was destroyed by a flood and he needed the funds to rebuild. He acknowledged that he had an account at another FINRA member firm while his Newport account was open, but he did not recall the value of that account and was not asked what his investments were in that account.

RS opened his Newport Coast account after a cold call from Costanzo. According to RS, Costanzo did not explain what investments he was recommending or his strategy, but said it was supported by Newport Coast. RS's new account documents indicated that his annual income was $100,000, his net worth (excluding primary residence) was $1 million and his liquid net worth was $100,000. The documents list Aggressive Growth as his objective and Speculation as his risk tolerance, but RS testified that was not his actual objective or risk tolerance. Rather, he was looking to invest on a long-term basis for his retirement. RS's new account documents also included a Customer Margin Account Agreement and he signed the Short Term Trading Letter used by La Barbera, Levy and Costanzo. RS testified that he and Costanzo never discussed what Costanzo's charges would be, and that Costanzo made all the purchase and sale decisions in the account. RS had never used margin in the past and was not aware that margin was being used in his account. He recalls speaking to Costanzo once or twice, but after that Costanzo did not contact him about trades in the account.

RS invested over $15,000 in his Newport account, which was open from March 2011 through February 2012. Purchases totaled over $210,000, with sales of nearly $200,000. Enforcement calculated an annualized turnover rate of 23.18 and an annualized cost-to-equity percentage of 110.38%. Total costs were over $10,000, with losses of approximately $14,600.

iii. AB

AB is a retired engineer. In the 1980s and 1990s he obtained an insurance license as well as Series 6 and Series 63 securities licenses for a side business, but that business did not work out for him so he did not use those licenses. He and his wife later learned about FOREX currency trading by joining a club and then became clients of a Canadian company that provided training and technical assistance, initially investing $5,000 to $10,000. They are still doing FOREX trading. AB testified that at the time his Newport Coast account was open, he had probably four or five mutual funds, which he selected, with about $50,000 invested. He and his wife also invested in some pre-IPO private placements, but apart from the private placements he had no experience investing in individual stocks before opening his Newport Coast account. He also had a net investment of about $400,000 in real estate and about $25,000 to $30,000 invested in silver when he opened his Newport Coast account in 2011.

AB opened his account in response to a series of cold calls from Costanzo in which Costanzo urged him to make a small investment in a particular stock. AB's new account documents indicate that his income was $125,000, his net worth was $500,000 and his liquid net worth was $40,000. The documents listed his objective as Aggressive Growth and his risk tolerance as Speculation. AB's new account documents included a Customer Margin Account Agreement and he also signed the Short Term Trading Letter used by La Barbera, Levy, and Costanzo. AB testified that his objective with his Newport Coast account was to find a short-term opportunity to make a little money—short term being less than a year—and that he viewed the investment as riskier than normal. He acknowledged that the objective and risk tolerance shown on his new account form were accurate for the $2,500 he initially agreed to invest.

After AB's initial investment, Costanzo called with another great opportunity—a company that had almost completed FDA studies —and he invested an additional $10,000. Costanzo called again urging him to buy more of the same company and he invested another $15,000. AB thinks he took a signature loan from his credit union to obtain that money. After a while, the stock Costanzo had recommended was not doing well, but Costanzo called again and persuaded him to buy more of the stock on margin.

When the company continued to not do well, Costanzo recommended selling that stock and moving the money to a different stock and AB agreed, but told Costanzo to get rid of the margin in his account because he did not want to pay margin interest. AB testified that Costanzo did not talk to him about other purchases and sales in his account in November 2011. When AB realized transactions he had not authorized were occurring, he tried to call Costanzo without success, so he called

Newport's general number and spoke to someone who told AB that he would look into the matter and get back to him. AB did get a return call and spoke to the person, whose name he does not recall, on several occasions. AB's primary concern was the continued use of margin in his account. At some point, seeing his account value dropping, AB called Newport and asked to have trading in the account frozen, and then closed the account. Costanzo did not explain riskless principal trading and AB does not know what that is; similarly, Costanzo did not discuss markups or markdowns. He did not understand short sales when he received confirmations indicating they had been made in his account.

AB invested approximately $28,000 in his Newport Coast account, which was open from January 2011 through March 2012. Purchases totaled over $600,000, with sales of nearly $590,000. Enforcement calculated an annualized turnover rate of 24.66 and an annualized cost-to-equity percentage of 100.02%. Total costs were over $24,000, with losses of nearly $20,000.

iv. MZ

MZ is an 81-year-old retired teacher. In 2010, when he opened his Newport Coast account, his income was $1,100 per month in social security and a pension of $1,700 per month. At that time, he had a small account with another FINRA member firm worth about $2,000 to $3,000, which he opened after taking an investing course at that firm. But he never picked stocks in any of his accounts himself; they were always recommendations from the [registered representative].

While MZ's testimony was not clear, it appears that MZ may have done business with Costanzo when he was associated with another FINRA member firm prior to associating with Newport Coast. In any event, MZ opened his Newport Coast account in January 2010. He received pre-completed new account documents, but corrected a number of items in the documents before returning them to Newport Coast. As corrected by MZ, the documents indicated that his income was $35,000, his net worth (excluding primary residence) was $500,000, and his liquid net worth was $25,000. The documents, as corrected by MZ, also indicated that his primary source of wealth was "Retirement Funds" and that the source of funds to fund his Newport Coast account was also "Retirement Funds." The pre-completed documents listed his objective as Aggressive Growth and his risk tolerance as Speculation, but MZ changed his risk tolerance to "Medium" before signing the documents. MZ also signed a Customer Margin Account Agreement and the Short Term Trading Letter used by La Barbera, Levy, and Costanzo. MZ funded his Newport account with cash and with stock transferred from his account at another FINRA member firm. MZ testified that Costanzo made the investment decisions in his

account. Costanzo never discussed charges with him and MZ does not know the meaning of markups or markdowns or riskless principal trades.

MZ invested approximately $21,500 in his Newport Coast account, including the value of the stock he transferred into the account, which was open from January 2010 through August 2011. Purchases totaled almost $437,000, with sales of over $427,000. Enforcement calculated an annualized turnover rate of 26.9 and an annualized cost-to-equity percentage of 120.71%. Total costs were over $19,000, with losses of over $19,000.

c. Bartelt's Background and His Customers

Bartelt entered the securities industry in 1989 and was associated with numerous FINRA members prior to joining Newport. He was registered with Newport as a general securities representative and principal and an investment company products and variable contracts limited representative from May 2010 through August 2014. He has not been associated with a FINRA member since he left Newport.

i. MG

MG is an 87-year-old widow who retired in 1990. When she was employed, she was an executive assistant. Her late husband, who was a purchasing agent, met Bartelt at a securities class, and he and Bartelt were the only two members of the class who subsequently obtained securities licenses. Her husband only worked in the securities business for a couple of months before returning to his work as a purchasing agent. MG's husband took care of their investments before he was diagnosed with Alzheimer's disease in about 2007; he died in 2009. Bartelt and MG's husband were very close friends and spoke every morning. MG and her husband moved their investments to Bartelt before her husband died and she continued with Bartelt after that. When MG's husband died, she received $100,000 in life insurance, and after giving $10,000 to each of her daughters, she invested the remaining $80,000 through Bartelt. She had no experience with investments apart from listening to her husband and Bartelt discuss them.

MG had three Newport Coast accounts: an individual account, an IRA, and a trust account. The new account documents for all three accounts list her annual income as $65,000 to $124,999 and her net worth as $250,000 to $499,999. The documents for her individual and IRA accounts listed her objective as "long term growth with greater risk—Aggressive Growth (trade volatile securities that have wide change in price)," while the documents for her trust account listed her objectives, inconsistently, as both "long term growth with safety (long term capital appreciation with relative safety of principal)" and as "short term growth with high risk (appreciation with acceptance of high risk)." In fact, MG testified she

wanted "growth but minimal risk." MG testified that Bartelt made all the investment decisions in all three accounts.

MG's individual account was opened in June 2010 with a transfer of approximately $22,000 from Bartelt's prior firm. During the period from June 2010 through December 2012, when the account was actively traded, purchases totaled more than $436,000 and sales totaled more than $445,000. For this period, Enforcement calculated an annualized turnover rate of 22.74 and an annualized cost-to-equity percentage of 52.96%. Total costs were over $10,000 and losses totaled over $22,000, virtually the entire value of the account.

MG's Newport Coast IRA was also opened in June 2010 with a transfer of approximately $60,000. For the active trading period from June 2010 through November 2012, purchases and sales each totaled approximately $3 million. Enforcement calculated an annualized turnover rate for the active period of 27.60 and an annualized cost-to-equity percentage of 57.42%. Total costs were more than $63,000 and total losses were nearly $45,000.

During the same period, in her trust account, which was opened with a transfer of approximately $46,000, total purchases were approximately $2.9 million and total sales were approximately $3 million. For the active period, Enforcement calculated an annualized turnover rate of 31.01 and an annualized cost-to-equity percentage of 67.26%. Total costs were more than $63,000 and total losses were almost $42,000.

ii. LW

LW is MG's daughter. She is 57, has a college degree in accounting, and worked as a bookkeeper before retiring in 1999 to care for her daughter, who is ill. She had some money in an IRA with another FINRA member firm that she transferred to Bartelt before he joined Newport Coast. The value of the securities that LW transferred into her Newport Coast IRA was approximately $6,000, plus a non-marketable Real Estate Investment Trust investment worth about $4,000. She had no experience in personally managing or selecting her investments before investing through Bartelt.

After Bartelt moved to Newport Coast, LW signed her Newport Coast IRA new account documents without reading them closely because she trusted Bartelt. According to the documents, her income was $65,000 to $124,999 and her net worth was $125,000 to $249,999. Those amounts were correct only if the income figure applied to her husband's income—she was retired—and if the net worth amount included the value of the house she and her husband owned. The new account documents listed her objective as "long term growth with greater risk—Aggressive Growth (trade volatile securities that have wide change in price)," but in fact she

wanted long-term growth with stability. Bartelt made all the trading decisions in her IRA account. He did not discuss the trades with her and she did not review her IRA statements or confirmations when she received them. In 2012, she realized that Bartelt was making a lot of trades in her account because of the number of confirmations she was receiving, and she asked him to stop trading her account. Bartelt continued to trade in her account and because she does not like confrontations she did not challenge him.

LW's Newport Coast IRA account was actively traded from June 2010 through January 2013. During that period, purchases were nearly $357,000 and sales were more than $368,000. For this period, Enforcement calculated an annualized turnover rate of 18.93 and an annualized cost-to-equity percentage of 60.86%. Total costs were more than $11,500 and total losses were approximately $8,000.

iii. LAC

LAC is a software engineer. He met Bartelt at a restaurant where Bartelt's sister worked and they became casual, friendly acquaintances. LAC invested with Bartelt before Bartelt moved to Newport Coast and continued to invest with him there.

LAC had both an IRA and an individual account at Newport Coast. LAC's Newport Coast new account documents indicated his income was $125,000 to $249,999 and his net worth was $500,000 to $999,999. Neither of those figures was accurate. The documents also indicated that he had over 10 years of experience investing in stocks, averaging 10 purchases a year, and over 10 years of experience investing in bonds, averaging two purchases a year. In fact, his only investing experience prior to Bartelt was purchasing some stock of an employer, at an employee discount, between 1987 and 1990, and investing in retirement funds offered in his 401k plan. The documents for both accounts listed his objective as "long term growth with greater risk—Aggressive Growth (trade volatile securities that have wide change in price)," but he testified he wanted long-term growth with some aggressiveness, but not wide changes in price. The new account documents for LAC's individual account also included the word "yes" under "Margins Approved," but there was no evidence that LAC signed a separate margin agreement and he testified he did not recall Bartelt discussing margin with him. LAC does not believe he spoke to Bartelt after opening his Newport Coast accounts and he did not discuss the trades in his accounts with Bartelt. LAC testified he did not realize the extent of the losses in his accounts until FINRA staff contacted him.

LAC transferred $42,000 from another account to fund his Newport Coast IRA. During the active period from June 2010 through May 2013,

> purchases totaled over $2 million and sales also totaled over $2 million. Enforcement calculated an annualized turnover rate of 28.48 and an annualized cost-to-equity percentage of 60.35%. Total costs were almost $46,000, with total losses of nearly $40,000.
>
> LAC transferred approximately $8,000 in June 2010 to fund his individual account at Newport Coast. Bartelt did not trade the account until May 2011, by which time the value of the transferred investments had increased to more than $11,000. From May 2011 through December 2011, purchases totaled over $200,000 and sales also totaled over $200,000. For that period, Enforcement calculated an annualized turnover rate of 72.22 and an annualized cost-to-equity percentage of 200.49%. Total costs were approximately $5,700 and total losses were over $10,000.

B. Discussion

We affirm the Hearing Panel's findings that Leone, La Barbera, and Newport excessively traded and churned customers' accounts. NASD Rule 2310(a) provides, "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." FINRA Rule 2111(a) similarly provides that:

> A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained . . . to ascertain the customer's investment profile . . . [which] includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

NASD IM-2310-2(a)(1) explained that, "[i]mplicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of [FINRA's r]ules, with particular emphasis on the requirement to deal fairly with the public."

"Excessive trading may be thought of as quantitative unsuitability," and engaging in an appropriate level of trading in a customer's account is part of the general suitability obligation placed on registered representatives and member firms. *John M. Reynolds*, 50 S.E.C. 805, 806 (1991); *see Dep't of Enforcement v. Davidofsky*, Complaint No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *27 (FINRA NAC Apr. 26, 2013). In determining whether trading is quantitatively suitable, we focus on "the number of transactions within a given timeframe . . . in light of the customer's" investment objectives and financial situation. *Dep't of Enforcement v. Medeck*, Complaint No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *32 (FINRA NAC

July 30, 2009); *see also Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *47 (May 27, 2011) ("Customer investment objectives and financial situation are the benchmarks for evaluating whether the level of trading in any account is appropriate."), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

Excessive trading occurs when a registered representative has control over the trading in an account and the level of trading in that account is inconsistent with the customer's objectives and financial situation. *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *27. Churning is a form of excessive trading done with scienter and is fraudulent in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rule 2120, and FINRA Rule 2020.[35] *See Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *27, 34. "Churning is a shorthand expression for a type of fraudulent conduct in a broker-customer relationship where the broker overtrades a relying customer's account to generate inflated sales commissions." *Calabro*, 2015 SEC LEXIS 2175, at *3 (internal quotation marks omitted) ("Churning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests." (internal quotation marks omitted)).

We determine that the evidence establishes that Leone, La Barbera, and Newport engaged in excessive trading with scienter, in violation of NASD and FINRA rules and in violation of the federal antifraud provisions. Central to our findings that the respondents excessively traded and churned customer accounts is the evidentiary issue of the Hearing Panel's adverse credibility findings in response to hearing Leone's and La Barbera's testimony when compared with their customers' "highly credible" testimony as well as the credible testimony of the customers of the Defaulting Respondents.[36] The Hearing Panel made extensive credibility findings and gave specific, cogent reasons for its disbelief of Leone and La Barbera. Neither answered questions directly nor accepted any responsibility for trading the customers' accounts in a way that resulted in exorbitant costs to customers. In comparison, the customers nearly all accepted some personal responsibility for trusting their Newport representative, their failure to review closely their Newport new account documentation, and their failure to monitor their Newport accounts.

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[35] The federal courts and the Commission recognize churning as a manipulative and deceptive device within the meaning of Section 10(b) and Rule 10b-5 thereunder. *See Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983); *Carras v. Burns*, 516 F.2d 251, 258 (4th Cir. 1975); *Michael T. Studer*, 57 S.E.C. 1011, 1020-23 (2004). That same conduct also violates FINRA's antifraud rules (FINRA Rule 2020 and NASD Rule 2120) and just and equitable principles of trade (FINRA Rule 2010 and NASD Rule 2110). *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *25 (Sept. 28, 2017); *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *26 n.27.

[36] While the Defaulting Respondents did not testify at the hearing, the Hearing Panel reviewed designated portions of their investigative testimony that was admitted into evidence. The Hearing Panel determined that none of this testimony contradicted or was inconsistent with the customers' hearing testimony or the documentary evidence reflecting the trading in the customers' accounts of the Defaulting Respondents. We find no error in this determination.

The Hearing Panel also expressly credited the customers' testimony regarding their financial circumstances and investing experience when their testimony conflicted with the information contained in their Newport new account documents and credited the customers who testified that they did not realize they had authorized the use of margin in their accounts and had not intended to do so. The Hearing Panel determined that the testimony of each customer witness was generally internally consistent and consistent with relevant documentary evidence. The Hearing Panel observed that the testimony of Leone's customers was particularly consistent in reflecting that the Newport new account documents exaggerated their income, net worth, liquid net worth, and investment experience. The Hearing Panel concluded that Leone deliberately exaggerated those levels in order to justify how he intended to trade in those customers' accounts—a determination which is supported fully by the record. Further, the testimony of all customers of the same Newport representative was generally consistent. *See, e.g.*, *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *16 (Sept. 30, 2016) (affirming credibility determinations of witnesses who testified similarly regarding respondent's representations). In addition, the Hearing Panel credited the testimony of customers who stated that they had not read and understood the Active Trading Authorization letters used by Newport and the Short Term Trading Letter used by La Barbera, Levy, and Costanzo to purportedly obtain the customers' acquiescence to the trading in their accounts in the manner in which they did.

In finding that Leone and La Barbera were not credible witnesses, the Hearing Panel also observed that Leone and La Barbera offered inconsistent testimony concerning the interactions with their customers. Notably, the Hearing Panel observed that Leone initially was unable to recall specific interactions with the customers, given the passage of time, but then proceeded to recount detailed and self-serving aspects of his interactions with the customers. In addition, Leone's testimony regarding the manner in which he purportedly obtained the customers' prior approval for trades in their accounts changed repeatedly during the course of his testimony.

With respect to La Barbera, the Hearing Panel gave no weight to his claims that he had fully disclosed his compensation to the customers, finding that his explanations were inconsistent and implausible. La Barbera claimed that his normal practice was to tell the customers that he worked on a mark-up and mark-down basis and that the customers "received the confirmations that stated very clearly what their percentage of mark-up was and the commissions on the transactions." In fact, however, the Newport trade confirmations for riskless principal trades did not disclose the percentage of mark-up or clearly disclose the mark-up or mark-down charges in any manner. The Hearing Panel also observed that his purported justifications for using riskless principal trades with mark-ups and mark-downs rather than commissions, supposedly for the benefit of his customers, were nonsensical. La Barbera testified that anyone in the securities industry would understand that using mark-ups and mark-downs benefit a customer's accounting. La Barbera, however, could not explain that purported benefit in any coherent manner and the Hearing Panel rejected his rationale "as inconsistent, nonsensical, and virtually incomprehensible."[37]

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[37] The documentary evidence reflects that when La Barbera charged a mark-up or a mark-down, the charges to customers were higher than when he charged a commission.

The initial fact-finder's credibility determinations are entitled to considerable deference. *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *12 n.45 (Mar. 31, 2016) (explaining that credibility determinations "based on hearing the witness's testimony and observing demeanor . . . are entitled to considerable deference"), *aff'd sub nom. Harris v. SEC*, No. 16-1739, 2017 U.S. App. LEXIS 21318 (2d Cir. Oct. 25, 2017). The substantial evidence required to overcome those findings is not present in this case.[38] The testimony and other evidence presented by the customers concerning Leone's, La Barbera's, and the Defaulting Respondents' handling of their accounts was similar and consistent on several important points and supports the Hearing Panel's determination to credit their version of events. *See Laurie Jones Canady*, 54 S.E.C. 65, 79 (1999); *see also Alvin W. Gebhart, Jr.*, 58 S.E.C. 1133, 1145 n.18 (2006) ("[W]here, as here, there are similarities among the investors' testimony regarding the salespersons' behavior, the reliability of that testimony is strengthened."), *aff'd in part*, 255 F. App'x 254 (9th Cir. 2007). Accordingly, we will not disturb the Hearing Panel's credibility findings. It is against this backdrop that we make the following findings of liability.

1. De Facto Control

The requisite control is established when a broker has formal discretionary authority over an account or, alternatively, de facto control. *Cody*, 2011 SEC LEXIS 1862, at *41; *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *28. It is undisputed that none of the registered representatives in this case exercised formal discretionary authority over any of the customer accounts at issue. Further, Newport prohibited discretionary accounts. The Hearing Panel found instead that Leone, La Barbera, and Newport, acting through these registered representatives and the Defaulting Respondents, exercised de facto control over the customers' accounts. We concur.

De facto control "may be established when a customer relies on the representative such that the representative controls the volume and frequency of transactions." *Calabro*, 2015 SEC LEXIS 2175, at *18 (internal quotation marks omitted). A finding of de facto control is further supported by a customer's routinely following a representative's recommendations. *Id.* To that end, de facto control exists when representatives' "consultations with [customers] on investment choices were merely a formality because the customers did not have sufficient understanding to make an independent evaluation of the broker's recommendations." *Cody*, 2011 SEC LEXIS 1862, at *42-43 (internal quotation marks omitted). In addition, a representative exercises de facto control if the customers "were not consulted, nor typically even made aware of, the

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[38] La Barbera argues in favor of reversing the Hearing Panel's credibility findings because, in his view, the Hearing Panel "disregarded" his "relevant and creditable [sic] testimony" while his three testifying customers DB, CA, and RG "either committed perjury on the stand . . . [or] while signing the initial new account documents." La Barbera's rationale for reversing the Hearing Panel's findings is that they are inconsistent with his testimony. The Hearing Panel found the testimony of DB, CA, and RG to be similar in describing La Barbera's behavior and his handling of their accounts as well as consistent with relevant documents. La Barbera does not meet the burden required for us to overturn the Hearing Panel's credibility determinations. *See Dane S. Faber*, 57 S.E.C. 297, 307 (2004).

particular trades executed in their account until well after the fact." *Id.* at *41. Witness credibility is central to determining de facto control. *See Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1070 (2d Cir. 1977) (explaining that "the determination of whether [a broker] exercised control over the account involved a question of fact, which turned largely upon the court's assessment of the witnesses' credibility").

a. Leone Exercised De Facto Control

The facts establish that Leone controlled the accounts of the eight customers (DG, RR, JB, CP, PH, LC, MJ, BS), all of whom testified and the Hearing Panel found to be credible. The customers testified that Leone chose the stocks he traded; controlled the timing, volume, and frequency of the trading; and executed most trades without their prior authorization after the initial account opening trades.

While the Hearing Panel fully credited the testimony of Leone's customers, it directly rejected Leone's testimony that he spoke with the customers before each trade in their accounts. Leone's testimony was inconsistent on this point and unconvincing when he was questioned about his contacts with the customers. The Hearing Panel observed that Leone at one point claimed that he called his customers early in the day to discuss their trading strategy. Leone stated that he was establishing a "game plan" for trading during the day by identifying the companies he was following and how many shares and at what price range he would buy or sell. Leone acknowledged, however, that he would choose the timing of the trade. Leone in later testimony contended that he spoke to each customer at the beginning of the day "telling them exactly what we are going to do," including "buying it at a certain price and once we see a good enough profit . . . I would intend to sell that stock." Leone testified that when the stock reached the pre-established purchase price, he would buy it for all the customers with whom he had spoken. When confronted with evidence that reflected that on numerous occasions he made multiple purchases of the same stock in a customer's account within a short period at different prices, Leone again changed his testimony. He asserted instead that he actually obtained authority from the customers to buy within a defined price range. He also initially claimed that during his morning conversations with the customers they agreed on a specific price at which Leone would sell the stock. When further questioned, however, Leone claimed that the conversations included a range of selling prices. When Leone was asked what he would do if the stock decreased in value, he claimed that he and the customer during their morning call would have agreed on a sale price if that occurred. Leone, however, could not explain why none of his customers recalled the purported daily telephone calls that he described, and he contended that the customers were lying. Leone ultimately stated that he obtained time and price discretion from his customers, but he acknowledged he did not indicate that he had such discretion on the trade tickets, as required by FINRA rules, and Newport moreover prohibited discretionary accounts.

Leone also arranged for the eight accounts to be approved for trading on margin and day-trading. The customers uniformly testified that they were averse to such methods and that Leone had not discussed these methods ahead of employing them in their accounts. All of these facts demonstrate Leone's de facto control.

Leone argues that he did not control the customers' accounts because the customers were "sophisticated individuals and had the ability to determine their own best interest."[39] His argument addresses only one factor in assessing de facto control, the customer's sophistication, while disregarding the others. He largely relies on his self-serving testimony, which the Hearing Panel found not credible, and on information from new account documents that the customers' testimony contradicted and that the Hearing Panel expressly credited. *See Calabro*, 2015 SEC LEXIS 2175, at *26-27 & n.32 (rejecting assertion that customer was sophisticated when statements in account documents related to investing experience were incorrect, customer was not an active participant in the trading, and did not suggest or reject any trades). His argument furthermore addresses only five of the eight customers (and ignores DG, RR, and CP altogether). Notably, the facts he relies upon as to those five do not support the argument that he did not control their accounts.[40] Rather, the evidence in the record here shows that Leone chose all the

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[39] Leone relies on several cases to support his argument that he did not have control over the eight customers' accounts. These cases are inapposite to the facts presented here. In *Leib v. Merrill Lynch*, 461 F. Supp. 951, 956 (E.D. Mich. 1978), the customer had "professional experience in managing the financial affairs of others"; had previously had a brokerage account over which he exercised full control; kept tabs on the account at issue "on a daily basis [and] often on an hourly basis"; personally approved every transaction after "thoroughly" discussing it with the broker; and "kept himself informed on each transaction after it had occurred." The customer in *Follansbee v. Davis, Skaggs & Co.*, 681 F.2d 673, 674-78 (9th Cir. 1982), was "far from an untutored novice." Together with his broker, the customer devised an active, short-term trading strategy, he pushed for investments against his broker's recommendation, and took "many positive steps . . . to insure that his account was actively traded." *Id.* at 674-78.

[40] Leone specifically contends that certain facts reflect that these five customers were sophisticated investors. We reject Leone's contentions. That JB bought and sold classic cars and boats does not negate the fact that he had essentially no prior experience investing in securities. *See Cody*, 2011 SEC LEXIS 1862, at *45 (rejecting assertion that customers "were sufficiently sophisticated to control their own accounts," because customers "had little if any experience evaluating individual bonds or short-term bond trading, and relied heavily on Cody's recommendations"). Moreover, the fact that JB was amenable to Leone's doing for him the kind of trading he was doing for customer RR, however risky, does not attest to JB's sophistication. Rather, JB's lack of investing sophistication placed him in a position of relying on Leone for advice. That MJ had invested in real property does not negate the fact that he had little prior experience in securities investing. *See id.* That LC and his wife were members of an investment club many years earlier also does not evidence sophistication. *See id.* That PH understands debits and credits does not negate the fact that Leone engaged in trading in her account without discussing the trades with her and that she had no idea what he was doing. *See, e.g.*, *Al Rizek*, 54 S.E.C. 261, 270 (1999) ("Although . . . customers may have been successful businessmen and most of them had some degree of higher education, they were totally lacking in the degree of investor sophistication necessary to understand Rizek's strategy and unable to make any sort of independent evaluation of that strategy. . . . The customers placed their reliance on Rizek's supposed expertise, and almost invariably followed his recommendations."), *aff'd*, 215 F.3d 157 (1st Cir. 2000). Further, PH's receipt of trade confirmations and account statements does not

[Footnote continued on next page]

securities that he traded in the eight customers' accounts, that he initiated all the transactions, and that he controlled the volume and frequency of the trading. Leone's eight customers also testified that he regularly executed trades in their accounts without obtaining their prior authorization. We conclude that Leone exercised de facto control over the eight customers' accounts.

b. La Barbera Exercised De Facto Control

The facts establish that La Barbera controlled the accounts of his three customers (DB, CA, RG), all of whom testified and the Hearing Panel found to be credible.[41] The trading in these customers' accounts was all done on La Barbera's initiative. These customers' testimony reflects that La Barbera chose the stocks he traded and that he controlled the timing, volume, and frequency of the trading. In addition, La Barbera did not obtain CA's prior authorization before executing all of the trades.

To the extent that La Barbera obtained the customers' authorization before making certain trades, he nonetheless exercised control over the accounts because the customers routinely relied upon him and followed his recommendations. *See Calabro*, 2015 SEC LEXIS 2175, at *21 & n.23 (finding de facto control when customer routinely followed broker's recommendations, deferred to broker with respect to the strategy for trading the account, including "selecting securities[] and determining when and in what quantities to trade them[,]" and customer did "not object to them because of his lack of knowledge and expertise"). Moreover, DB, CA, and RG were not experienced or knowledgeable investors who had a sufficient understanding to independently evaluate La Barbera's recommendations. *See id.*; *see also Cody*, 2011 SEC LEXIS 1862, at *43 (finding that respondent "maintained *de facto* control because the Customers did not independently evaluate [the broker's] recommendations but rather acquiesced in his trades"); *Joseph J. Barbato*, 53 S.E.C. 1259, 1277 (1999) (finding de facto

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[cont'd]

evidence her control of the account. *See Cody*, 2011 SEC LEXIS 1862, at *46 (rejecting claims that customers' receipt of post-trade notice through trade confirmations and statements amounts to control over accounts). Similarly, that BS possessed some financial sophistication does not negate the fact that he was surprised when he received his Newport account statements and confirmations showing the tempo and quantity of Leone's trading, and that Leone was engaging in trading on margin. *See Rizek*, 54 S.E.C. at 270; *see also Cody*, 2011 SEC LEXIS 1862, at *46. None of Leone's assertions supports that these customers were savvy investors.

[41] The Hearing Panel found that La Barbera also controlled DR's account. But because DR did not testify at the hearing, the Hearing Panel did not consider La Barbera's trading in DR's account when concluding that he engaged in excessive trading and churning and when assessing sanctions for these violations. We too do not rely on the trading in DR's account for determining La Barbera's culpability for the excessive trading and churning allegations.

control over customer's account when the customer "testified that he placed his trust and confidence in [the broker] and allowed him to decide what to buy or sell in the account").

Like Leone, La Barbera argues that the customers' sophistication undermines a finding of de facto control. To that end, La Barbera contends that there is no control if customers had the "intellectual capacity" to evaluate a broker's recommendations. La Barbera argues that the customers' business successes reflect that they "had the ability to evaluate financial matters and exercise independent judgement." As already discussed, the Commission has rejected this argument in other cases. A customer's success as a business person does not equate to the "degree of investor sophistication necessary" to evaluate independently a broker's recommendations. *See Calabro*, 2015 SEC LEXIS 2175, at *124.

In an apparent effort to show that his customers evaluated financial matters and exercised independent judgment, La Barbera argues that DB "copy-catted some of [his] recommendations including self-directed purchases at TD Ameritrade where [DB] bought and hold [sic] Savient and other stocks after La Barbera recommended they be sold at Newport and he took substantial losses on those positons [sic] in his self-directed TD Ameritrade account." The evidence shows, however, that DB did not buy Savient as La Barbera contends. DB's TD Ameritrade account statements reflect two transactions in a security that La Barbera had bought for DB at Newport—a purchase of VXX on April 26, 2012, and the sale of that position approximately two weeks later. The record does not reveal DB's reasoning for purchasing VXX in his TD Ameritrade account. Nonetheless, these transactions do not evidence that DB was a sophisticated investor.

With respect to customer CA, La Barbera contends that CA "researched the information La Barbera gave him before he made investments" and that CA "tracked other stocks recommended by La Barbera that he did not purchase on La Barbera's recommendation." La Barbera's contentions do not align with CA's credible testimony. Rather, multiple factors illustrate La Barbera's de facto control. CA testified that he researched only two of La Barbera's recommendations: Take Two, La Barbera's first recommendation before CA opened his Newport account and began investing with him, and Savient, when, as CA described, "it was dwindling down." CA further testified that he did not reject a single one of La Barbera's recommendations. And as the Hearing Panel observed, none of the registered representatives at issue in this case either in his hearing testimony or investigative testimony (in the case of the Defaulting Respondents) claimed that the customers initiated any of the trading in their accounts. The evidence also shows that CA was not attuned to what was occurring in his Newport account for several months while he was preoccupied with his wife's grave medical condition and the downturn in his business. CA thus was unable to "keep up with the activity in the account." *See id.* at *85. CA's involvement in La Barbera's trading "can accurately be characterized as the passive acquiescences of an uninformed dependent." *See id.* (internal quotation marks omitted).

The evidence shows that La Barbera exercised de facto control over DB's, CA's, and RG's accounts.

2. Excessive Trading Activity

The evidence also shows that Leone, La Barbera, and Newport engaged in excessive trading activity that was inconsistent with customers' financial circumstances and investment objectives. As the Commission has explained, the "assessment of the level of trading . . . does not rest on any magical per annum percentage, however calculated." *Gerald E. Donnelly*, 52 S.E.C. 600, 603 (1996) (internal quotation marks omitted). Nonetheless, when determining whether trading was excessive, an adjudicator may examine factors including turnover rate, the cost-to-equity ratio, and the use of "in-and-out" trading[42] during the relevant period. *See Calabro*, 2015 SEC LEXIS 2175, at *32-37; *see also* FINRA Rule 2111 Supplementary Material .05(c) (setting forth factors relevant to determining quantitative suitability). "While there is no definitive turnover rate or cost-to-equity ratio that establishes excessive trading," the Commission has held that "a turnover rate of 6 or a cost-to-equity ratio in excess of 20% generally indicates that excessive trading has occurred." *Calabro*, 2015 SEC LEXIS 2175, at *32. The Commission, however, has found "excessive trading where the annual turnover ratio was 4 or less, and in accounts with cost-to-equity ratios less than 20%." *Id.* (internal quotation marks and footnote omitted). The number and frequency of trades, a customer's age and retirement status, and the existence of unauthorized trades are other relevant factors in determining the existence of excessive trading. *See id.* at *34; *Cody*, 2011 SEC LEXIS 1862, at *47; *Jack H. Stein*, 56 S.E.C. 108, 118 (2003); *Clyde J. Bruff*, 53 S.E.C. 880, 883 (1998), *aff'd*, No. 98-71512, 1999 U.S. App. LEXIS 27405 (9th Cir. Oct. 25, 1999).

a. Leone Excessively Traded Eight Customers' Accounts

We find that Leone's level of trading in eight of his customers' (DG, RR, JB, CP, PH, LC, MJ, BS) accounts was grossly inconsistent with the customers' objectives and financial circumstances. The record reflects that the highlighted customers generally sought to invest with a minimal amount of risk and had limited prior investment experience. None of Leone's customers sought to invest in high-risk investments, to speculate, to use margin, or to engage in the quantity and pace of Leone's trading in their accounts. For example, LC who is retired and a veteran with a disability, with a monthly income of $3,000, testified that he "never . . . had enough money to accept high risk." LC also had no interest trading on margin. Nonetheless, Newport approved LC's account to use margin. In December 2010 alone, Leone conducted $3.3 million in transactions in LC's account and accrued a margin balance of $150,000. LC concluded that Leone was trading his account in a manner solely to generate commissions after he realized Leone's pattern of purchasing a single stock in multiple, near simultaneous transactions, and charging him commissions as high as $5,000 on a single trade. When LC attempted to contact Leone and Newport to discuss this ongoing pattern of trading, neither returned his calls.

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[42] "In-and-out trading" is "the sale of all or part of the securities in an account and reinvestment of the sales proceeds in other securities, followed by the sale of the newly acquired securities." *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *9 n.10.

For the period each of Leone's eight customers had accounts open at Newport, the annualized cost-to-equity ratios ranged from 96 to 280 percent. The annualized turnover rates ranged from 85 to 151. These astronomical levels far exceed the presumptive guideposts for a finding of excessive trading. *See, e.g.*, *Harry Gliksman*, 54 S.E.C. 471, 477 (1999) (holding that a turnover "rate in excess of 6 is generally presumed to reflect excessive trading"), *aff'd*, 24 F. App'x 702 (9th Cir. 2001); *Daniel Richard Howard*, 55 S.E.C. 1096, 1100 (2002) ("[A] cost-to-equity ratio in excess of 20% generally indicates that excessive trading has occurred."), *aff'd*, 77 F. App'x 2 (1st Cir. 2003). The record also reflects "another hallmark of excessive trading" in that the eight customers' accounts reflect substantial levels of in-and-out trading. *See Howard*, 55 S.E.C. at 1100-01. Leone initiated an extraordinary number of trades in the same securities occurring with extraordinary frequency.

Leone, relying on the customers' account opening forms, contends that his trading was not excessive in light of the customers' investment objectives. The customers, however, credibly testified that their investment experience, financial circumstances, investment objectives, and risk tolerances were mischaracterized or exaggerated or both. Indeed, the Hearing Panel expressly credited "the customers' testimony regarding their financial circumstances and investing experience where their testimony conflicted with the information contained within their new account documents, as well as the testimony of customers who stated that they did not realize they had authorized the use of margin in their accounts and had not intended to do so." Moreover, the Hearing Panel, after crediting the customers' testimony—and discrediting Leone's—determined that Leone "deliberately exaggerated" the customers' information "in an effort to justify the type of trading he planned to do." As the Commission has directed, "[e]ven if we were to assume that the customers authorized [Leone] to manage their accounts aggressively, they did not authorize [him] to deplete those accounts through commissions, markups and margin charges. There is a difference between aggressive investing and excessive trading." *Michael David Sweeney*, 50 S.E.C. 761, 765 (1991). Thus, trading is excessive when "a trading strategy results in costs so high as to make the generation of any profit unlikely." *Bruff*, 53 S.E.C. at 885.

The record amply demonstrates that Leone excessively traded eight customers' (DG, RR, JB, CP, PH, LC, MJ, BS) accounts in violation of NASD Rule 2310, NASD IM-2310-2, NASD Rule 2110, and FINRA Rule 2010.

b. <u>La Barbera Excessively Traded Three Customers' Accounts</u>

Applying the relevant factors, we also find that La Barbera excessively traded the accounts of three customers (DB, CA, and RG). The level of La Barbera's trading was inconsistent with the highlighted customers' investment goals and exceeded reasonably established turnover rates and cost-to-equity ratios. The investment objectives of La Barbera's customers was growth of their investment. While the customers were willing to accept some level of risk, none had any stated investment objective that would support the extraordinarily high level of trading that La Barbera carried out in these customers' accounts.

Customer DB was 64 years old and had little hands-on investing experience. DB had another brokerage account, and he always followed his broker's recommendations by investing conservatively. DB testified that his Newport new account documentation significantly

overstated his income, net worth, and investing experience and inaccurately listed his risk tolerance as aggressive growth and speculation. He testified to a moderate risk tolerance with an annual income of $40,000 and liquid net worth of $600,000. DB credibly testified that he did not believe he completed the account documents when he signed them and that La Barbera told him that he would "fill it out." DB also signed the Short Term Trading Letter provided by La Barbera purporting to approve of active and short-term trading in his account. The letter, however, did not contain specific information about a customer's risk tolerance or disclose the level of trading that La Barbera would soon be doing or quantify the costs that a customer would be charged on the trades or mention mark-ups and mark-down charges. DB's signature on the Short Term Trading Letter is not convincing evidence that DB was an aggressive, speculative investor. DB simply signed the letter at La Barbera's request. The Commission has found excessive trading in an account notwithstanding the customer's signature on documentation indicating speculation as a risk tolerance. *See Studer*, 57 S.E.C. at 1015 n.10 & 1020-21 (finding that account was churned when "check-mark indications on the account application" indicated that the customer "was interested in speculation" but was contradicted by the customer's age and investment history among other factors). DB deposited approximately $63,300 in his Newport account. With those funds, La Barbera made 60 trades totaling approximately $1.4 million in purchases and $1.3 million in sales during a ten-month period. DB paid costs exceeding $49,000 on these trades.

Customer CA managed a family business and his investment experience was limited to a retirement account invested in mutual funds. When CA received the Newport new account documentation, it was already marked with "Aggressive Growth" and "Speculation" as his risk tolerance and objective. CA, however, had told La Barbera when opening his account that he was looking for "growth and to make money" and had not discussed these other parameters checked on his account documents. CA's Newport documentation also included a signed margin agreement that CA has no recollection of signing. La Barbera began trading on margin after CA refused to invest more money with La Barbera. Using CA's $57,000 investment, La Barbera made 59 trades over a 17-month period, totaling approximately $721,000 in purchases and $667,000 in sales. CA paid more than $29,000 in total costs for La Barbera's trading.

Customer RG is a veterinarian and previously had invested in mutual funds in a retirement account and had made a $500 individual stock purchase in the 1980s. The Newport new account documents show that RG's income was approximately $85,000, his net worth (excluding primary residence) was $800,000, and his liquid net worth was $75,000. RG testified that he did not carefully review the form before he signed it and returned it to La Barbera. In his testimony, RG does not correct or dispute these numbers. The documents also listed his investment objective as "Aggressive Growth," his risk tolerance as "Speculation," and that he had 25 years of experience investing in equities. RG did not tell La Barbera or anyone else at Newport these benchmarks. Rather, RG only told La Barbera the investments that he had at the time (i.e., mutual funds held in a retirement account).

Using RG's $16,851 investment, La Barbera made 20 trades over an eight-month period totaling more than $173,000 in purchases and sales of approximately $140,000. RG was also unaware that La Barbera was trading on margin until he received an account statement showing an interest charge. RG had never before traded on margin, and he did not speak to anyone at Newport about using margin in his account. Rather, RG had told La Barbera he had no more

money to invest, and later he realized that La Barbera was continuing to make purchases on margin in order to continue trading his account. RG paid total costs over $7,900.

The annualized cost-to-equity ratios and turnover rates for La Barbera's trading in these three customers' accounts further establishes his excessive trading. The cost-to-equity ratios ranged from 67 to 142 percent. The annualized turnover rates ranged from 16.69 to 39.98. La Barbera's frequent trading far exceeded the guideposts that the Commission has recognized as indicative of excessive trading. *See Howard*, 55 S.E.C. at 1100; *Gliksman*, 54 S.E.C. at 477. We determine that La Barbera excessively traded the accounts of three customers (DB, CA, and RG) in violation of NASD Rule 2310, NASD IM-2310-2, and FINRA Rule 2010.

3. Scienter

"Churning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests." *Donald A. Roche*, 53 S.E.C. 16, 22 (1997) (internal quotation marks omitted). Scienter is required in order to find that excessive trading constitutes churning. *See Studer*, 57 S.E.C. at 1021. Scienter is "a mental state embracing [an] intent to deceive, manipulate, or defraud, and is established either by evidence of intent to defraud or by evidence of willful and reckless disregard of the customer's interests." *Calabro*, 2015 SEC LEXIS 2175, at *55 (internal citations and quotation marks omitted). Proof of churning, however, "does not require proof of a specific or invidious intent to defraud." *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 494 F.2d 168, 171 n.2 (10th Cir. 1974). Instead, scienter "may be inferred from the amount of commissions charged by the registered representative." *Calabro*, 2015 SEC LEXIS 2175, at *55-56 (internal quotation marks omitted).

a. Leone Churned Eight Customers' Accounts

We find that Leone acted with scienter when he excessively traded the eight highlighted customers' (DG, RR, JB, CP, PH, LC, MJ, BS) accounts. The exceptionally high trading volume, the in-and-out trading, the exorbitant turnover rates, and the sky-high returns that Leone's trading would have needed to generate for the eight customers to break even evidence Leone's scienter. All eight customers had to earn more than 100 percent per year to simply break even. And for several of these customers, their annual break-even point was more than 150 percent. For example, DG had to earn more than 166 percent per year, LC had to earn nearly 174 percent, and MJ had to earn in excess of 280 percent.

The amount of commissions that Leone generated from excessively trading these eight customers' accounts demonstrates that he acted with scienter. Newport had no commission schedule and Leone was permitted to set his own commissions so long as the amount did not exceed five percent. Leone did not tell customers what he was charging them unless they asked. When they asked, Leone was not truthful. For example, RR understood from Leone that he was charging him commissions of $75-100 per trade. In reality, Leone charged RR commissions as high as $1,000 per trade. When LC asked Leone about commission charges, Leone told him only that nonprofitable trades would be commission free and did not disclose that LC would be charged as much as $5,000 for a single trade despite the fact that his account was losing money.

The record shows that the customers at the center of this case accounted for the majority of Leone's commissions during the relevant period. Several examples are detailed below.

- From December 2008 through May 2009, Leone earned 25 percent to more than 50 percent of his monthly commissions from DG. From February 2009 through June 2009, Leone effected 112 transactions in a single stock with a weighted average holding period of 1.65 days, and for which DG was charged over $11,000. Over the life of his account, DG paid more than $76,000 in costs because of Leone's trading.
- From August 2009 through March 2010, Leone earned 27 percent to more than 50 percent of his monthly commissions from RR. From September 2009 through June 2010, Leone effected 108 transactions in a single security with a weighted average holding period of 2.85 days, and for which RR paid costs of more than $10,500. RR paid more than $98,000 in total costs while Leone was trading in his account.
- JB accounted for 27 percent to more than 58 percent of Leone's monthly commissions from April 2010 through September 2010. From March 2010 through September 2010, Leone effected 75 transactions in a single stock with a weighted average holding period of 3.95 days, and for which JB paid over $9,000 in total costs. Over the course of Leone's trading, JB paid more than $49,000 in total costs.
- Similar patterns appear with regard to the commissions and trading in the accounts of LC and BS.
    - LC accounted for 39 percent to more than 48 percent of Leone's monthly commissions from December 2010 to April 2011. In LC's account from October 2010 through April 2011, Leone effected 204 transactions in a single stock with a weighted average holding period of 5.92 days, and for which LC paid costs of more than $39,000. LC paid more than $67,000 in total costs because of Leone's trading.
    - From May 2011 to through July 2011, BS accounted for 28 percent to more than 59 percent of Leone's monthly commissions. In BS's account from April 2011 to June 2011, Leone effected 59 transactions in a single stock with a weighted average holding period of 2.71 days, and for which BS paid costs of more than $6,500. BS paid more than $13,000 in total costs.

In addition, we agree with the Hearing Panel that Leone deliberately exaggerated and mischaracterized the customers' investing experience, financial circumstances, investment objectives, and risk tolerances in an effort to justify how he intended to trade in the customers' accounts. Leone also traded using margin without disclosing the costs involved and despite the customers not asking to open a margin account or understanding that they had done so after signing account-opening forms. The amount of trading in relation to the size of the accounts along with the amount of commissions and other costs when compared to the value of these accounts is staggering. Instead of managing the customers' accounts in a manner consistent with their true financial profiles and risk tolerances, Leone traded in a way that benefitted himself. Moreover, Leone's inconsistent and incredible testimony at the hearing provides additional evidence of his fraudulent intent.

All of these factors demonstrate that Leone must have known that he was acting, at the very least, in reckless disregard of his customers' interests. The record amply establishes that Leone churned the accounts of DG, RR, JB, CP, PH, LC, MJ, and BS, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, NASD Rules 2120 and 2110 (for conduct through December 14, 2008), and FINRA Rules 2020 and 2010 (for conduct after December 14, 2008).

b. La Barbera Churned Three Customers' Accounts

We determine that La Barbera also acted with scienter with respect to his excessive trading in DB's, CA's, and RG's accounts. La Barbera must have known that he was acting in reckless disregard of his customers' interests. The customers all credibly testified to La Barbera charging fees, including mark-ups and mark-downs, that none understood that they were paying at the time. RG testified that he followed La Barbera's recommendations because he put his trust and faith in La Barbera, who said he had been in the business for 20 years. La Barbera told RG that Newport would not charge anything for his first transaction. Thereafter, however, La Barbera started charging RG mark-ups, which RG was unaware he was paying, and La Barbera did not discuss the charges or explain mark-ups or mark-downs to RG. La Barbera was unable to articulate a plausible explanation for how he determined whether to charge a mark-up or commission for a trade, or how he determined the amount of the charge. Further, as the Hearing Panel found when determining that La Barbera was not a credible witness, his "purported justifications for using riskless principal trades with markups and markdowns rather than commissions, supposedly for the benefit of his customers, were nonsensical, and his claims that he had fully disclosed his compensation to the customers were inconsistent and implausible." La Barbera has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility findings. *See Dep't of Enforcement v. Butler*, Complaint No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *17-18 (FINRA NAC Sept. 25, 2015), *aff'd*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989 (June 2, 2016).

La Barbera also traded using margin without disclosing the costs involved. RG testified that he had no idea that La Barbera was trading on margin until he later saw an interest charge on an account statement. La Barbera used margin in order to continue to trade RG's and CA's accounts when they refused to invest more money with him, which added to these customers' costs. "Margin accounts result in margin interest charges on the amounts borrowed that add to the amount a security must appreciate to show a profit." *Dep't of Enforcement v. Brookstone Sec., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *55 (FINRA NAC Apr. 16, 2015). As the Commission has explained, "[t]rading on margin also increases the risk of loss to a customer" if the securities purchased on margin depreciate significantly. *Luis Miguel Cespedes*, Exchange Act Release No. 59404, 2009 SEC LEXIS 368, at *26 (Feb. 13, 2009).

La Barbera's trading was in reckless disregard of DB's, CA's, and RG's true investment objectives as evidenced by La Barbera's high volume of trades relative to the size of the accounts and the commissions and other charges.

- In DB's $63,000 account, La Barbera made approximately $1.4 million in total purchases and $1.3 million in total sales over the course of approximately ten months. For this period, the annualized cost-to-equity ratio in DB's account was

142.07 percent; the annualized turnover rate was 39.98. DB paid total costs of $49,712.13, of which $43,685 consisted of undisclosed mark-ups and mark-downs. La Barbera traded DB's account so actively in October 2011 that this activity accounted for more than 30 percent of La Barbera's total production for the month.

- CA invested approximately $57,000 with La Barbera. During the 17-month period, La Barbera executed 59 trades, totaling approximately $721,000 in purchases and approximately $667,000 in sales. The annualized turnover rate during this period was 16.69 and the annualized cost-to-equity ratio was 67.23 percent. Total costs were $29,268.90.
- In RG's account, during the period from January 2011 through August 2011, La Barbera made total purchases of more than $173,000 and total sales of approximately $140,000 in an account in which RG had deposited $16,851. During that period, La Barbera charged mark-ups of $5,496 and commissions of $830. The annualized cost-to-equity ratio during that time was 74.35 percent and the annualized turnover rate was 18.02 percent.

Given the costs associated with La Barbera's trading, it was "extremely unlikely that [these customers] would be able to break even, much less earn any profit." *See Roche*, 53 S.E.C. at 22.

We find that La Barbera's excessive trading of DB's, CA's, and RG's accounts was fraudulent in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.

4. The Defaulting Respondents Excessively Traded and Churned the Accounts of 10 Customers

We review the Hearing Officer's findings that the Defaulting Respondents excessively traded and churned 10 customers' accounts because the allegations against Newport stem in part from the acts of the Defaulting Respondents. A preponderance of the evidence supports the excessive trading and churning findings against the Defaulting Respondents, and Newport does not contest them.

The Hearing Officer first determined that the Defaulting Respondents controlled the accounts of their 10 highlighted customers. Like Leone and La Barbera, none of the Defaulting Respondents exercised formal discretionary authority over any of the customers' accounts. They nonetheless exercised de facto control over the accounts because the customers relied totally on the Defaulting Respondents when trading in their Newport accounts. The customers' credible testimony supports that these respondents controlled the volume and frequency of transactions in the customers' accounts. The customers consistently followed the Defaulting Respondents' recommendations. *See Calabro*, 2015 SEC LEXIS 2175, at *21 & n.23. All of the customers credibly testified that their representative (either Levy, Costanzo, or Bartelt) selected and purchased each of the securities in their accounts, decided when to purchase and sell the securities, and determined the amount to invest in each security. *See id.*; *Barbato*, 53 S.E.C. at 1277. Bartelt's customers also testified that he bought and sold the securities in their accounts without first speaking with them. None of the Defaulting Respondents in his investigative testimony claimed that any of his customers initiated any of the trading in their accounts.

The Hearing Officer found some of Levy's and Costanzo's trading was unauthorized by two of their customers. Levy's customer BNS credibly testified that from September 2010 on, Levy traded BNS's account on his own without obtaining BNS's approval.[43] Based on BNS's past investing experience, he was the most knowledgeable investor of the 10, but Levy exercised de facto control over BNS's account through his unauthorized trading. *See Sandra K. Simpson*, 55 S.E.C. 766, 796 (2002) (explaining that de facto control exists when a customer is incapable of controlling the account because of unauthorized trading); *Olde Discount Corp.*, 53 S.E.C. 803, 832 (1998) ("unauthorized trading presents clear evidence of control"). In addition, the Hearing Officer credited AB's testimony that the majority of the trading that Costanzo undertook in his account was without AB's prior approval; therefore, Costanzo exercised de facto control over AB's account. *See Simpson*, 55 S.E.C. at 796. Even if the remaining customers were aware of some of the trading in their accounts, they did not have sufficient understanding to make an independent evaluation of the Defaulting Respondents' recommendations, as these customers were inexperienced investors. The Defaulting Respondents controlled the accounts of their 10 customers.

In addition, the Hearing Officer determined that the trading activity in all 10 of the Defaulting Respondents' customer accounts was excessive and inconsistent with the customers' financial circumstances and investment objectives. The Defaulting Respondents' trading was in excess of the benchmarks established by Commission precedent and indicative of excessive trading. *See Howard*, 55 S.E.C. at 1100; *Gliksman*, 54 S.E.C. at 477. For Levy's three customers (NK, BNS, and JS), the annualized turnover rates ranged from 11.81 to 16.15 and the annualized cost-to-equity ratios ranged from 50.7 to 68.82 percent. For Costanzo's four customers (DS, RS, AB, and MZ), the annualized turnover rates ranged from 23.18 to 27.41 and the annualized cost-to-equity ratios ranged from 100.02 to 120.71 percent. For the six accounts belonging to Bartelt's three customers (MG, LW, and LAC), the annualized turnover rates ranged from 18.93 to 72.22 and the annualized cost-to-equity ratios ranged from 52.96 to 200.49 percent.

In reviewing the financial circumstances and investment objectives of the Defaulting Respondents' customers, the Hearing Officer found that with the exception of customer BNS, these customers were unsophisticated, inexperienced investors who had no prior investment experience with actively traded accounts.[44] These customers also were either retired or approaching retirement. For example, Levy's customer, JS, was retired with a modest income, never before had owned any individual stocks or bonds, had no experience using margin or short sales, and testified that he was "not a speculator." Nonetheless, JS's Newport account authorized the use of margin and included an options agreement. And Levy utilized margin to fund some of

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[43] BNS's Newport account was open from January 2010 through April 2012.

[44] The Hearing Officer considered that some of the customers disavowed at the hearing the signed Newport new account documents stating financial means, investment experience, and high-risk investment objectives and risk tolerances. The Hearing Panel who heard this testimony found the customers credible witnesses. *See Scholander*, 2016 SEC LEXIS 1209, at *12 n.45 (applying "considerable deference" to credibility determinations).

the trading in JS's account and engaged in short selling. With JS's $75,000 investment, Levy made over $1.34 million in purchases and $1.32 million in sales over the course of 26 months. JS paid over $57,800 in costs for this trading.

But even for those customers who invested money they were prepared to lose or understood would be invested in speculative securities, none understood the manner in which the Defaulting Respondents would be trading their accounts or the astronomical costs that they would incur as a result. None of the customers had any stated investment objective that would support the extraordinarily high level of trading that the Defaulting Respondents carried out in these customers' accounts—trading that benefitted only these respondents and Newport. As the Hearing Officer found, in some of the customers' accounts there was little or no net loss on the trades themselves, but the customers all lost money stemming from the significant costs the Defaulting Respondents charged them in the form of commissions, mark-ups, mark-downs, and other fees. The Hearing Officer rightly concluded that "[n]o customers, regardless of their financial circumstances and investment objectives, would make a rational decision to invest on such a basis because they would know they would be highly unlikely to profit from the trading, and that the trading would primarily benefit the" representative.

The Hearing Officer also determined that the Defaulting Respondents acted in reckless disregard of their customers' interests and therefore excessively traded the 10 customers' accounts with the scienter required to manifest churning. The cost-to-equity ratios and turnover rates for all the customers were exorbitant. The evidence reflects that these respondents traded their customers' accounts with the primary purpose of generating commissions, mark-ups, and mark-downs for their own benefit. To that end, Bartelt, for example, engaged in substantial in-and-out trading in the accounts of each of his three customers. These respondents also used margin in order to perpetuate the trading. The financial benefits to these respondents from the trading subsumed any investment returns.

We find no error in the Hearing Officer's conclusion that the Defaulting Respondents each excessively traded and churned their highlighted customers' accounts.[45] Accordingly, Levy, Costanzo, and Bartelt violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120, 2310 and IM-2310-2 (for conduct during the period September 2008 through July 8, 2012), and 2110 (for conduct through December 14, 2008), and FINRA Rules 2020, 2111 (for conduct after July 8, 2012), and 2010 (for conduct after December 14, 2008).

5. Newport Is Liable for the Excessive Trading and Churning of Its Representatives

The Hearing Panel found that Newport also was accountable for Leone's, La Barbera's, and the Defaulting Respondents' excessive trading and churning, and as a result, violated the high standards of commercial honor and just and equitable principles of trade required of FINRA

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[45] Specifically, Levy excessively traded and churned the accounts of NK, BNS, and JS; Costanzo excessively traded and churned the accounts of DS, RS, AB, and MZ; and Bartelt excessively traded and churned the accounts of MG, LW, and LAC.

members. Newport does not contest these findings. "It is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts." *SIG Specialists, Inc.*, 58 S.E.C. 519, 536 (2005); *see, e.g.*, *Prime Investors, Inc.*, 53 S.E.C. 1, 5-6 (1997) (holding firm responsible for misconduct of its employee). We affirm the Hearing Panel's decision to hold Newport directly responsible for these violations. None of the trading done by the five representatives was hidden from the firm in any way.

We agree with the Hearing Panel's findings that Newport gave Leone, La Barbera, and the Defaulting Respondents actual authority to solicit the highlighted customers in this case, which the firm ratified by establishing new accounts for them. Newport then gave these five representatives actual authority to solicit securities transactions from the customers and empowered these representatives to determine the amount of commissions, mark-ups, or mark-downs to charge for the transactions. For example, the firm was aware that Levy and Costanzo were in a partnership with La Barbera and conducted their business in the same manner with their individual customers. Each of the partners recommended the same securities during the same periods and each traded on a riskless principal basis, charging large mark-ups or mark-downs on opening positions and smaller commissions on closing positions. The firm also was aware that La Barbera, Levy, and Costanzo were each using the same Short Term Trading Letter, which these three representatives sent to customers with their Newport new account documentation.

As discussed in detail in Part VI of this decision related to Newport's failure to supervise, Newport's management, including the firm's president, chief operations officer ("COO"), and chief compliance officer ("CCO"), was familiar with the rapid and aggressive trading done by Leone, La Barbera, Levy, and Costanzo and did nothing to stop them because they were large producers for the firm. The customers of these representatives appeared repeatedly on the firm's exception reports reflecting the high volume of trading, commission charges, or both. Moreover, Newport ratified the quantitatively unsuitable trading engaged in by the five representatives and the attendant costs charged to the customers by entering those trades and charges in the firm's books and records. Notably, Newport was the direct beneficiary of the excessive trading by receiving all commissions, mark-ups, mark-downs, and other charges that the customers incurred. Newport then elected to pay out a portion of these fees to the five representatives based on their individual agreements with the firm.

In addition, we find that Newport, through the knowledge of the firm's management and ratification of the excessive trading, was primarily liable for and recklessly engaged in the churning. *See, e.g.*, *Ahmed*, 2017 SEC LEXIS 3078, at *50-51 (finding firm primarily liable for fraud when four of the firm's employees were selling securities using material misrepresentations and omissions and did so with the firm's knowledge) (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994)); *cf. SEC v. Sells*, No. C 11-4941 CW, 2012 U.S. Dist. LEXIS 112450, at *24 (N.D. Cal. Aug. 10, 2012) (imputing firm officer's knowledge to the firm in a civil fraud case); *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *59 (Dec. 10, 2009) (affirming disciplinary action against a firm for the manipulation of a security sold to public investors by the firm's co-chief executive and head trader). The trading activity and costs to the customers were unreasonable in light of the customers' investment objectives and financial situations that they evidence at least recklessness involving an extreme departure from the standards of ordinary

care. *See, e.g.*, *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1368 (7th Cir. 1983) (determining that "volume of transactions, considered in light of the nature and objectives of the account, was so excessive as to indicate a purpose on the part of the broker to derive a profit for himself at the expense of his customer" and holding brokerage firm accountable for the conduct of its broker). Under the facts of this case, we determine that Newport shares liability with the five representatives for all of the violative trading. We therefore affirm the Hearing Panel's findings that Newport engaged in excessive trading in violation of NASD Rules 2310 and 2110, NASD IM-2310-2, and FINRA Rules 2111 and 2010, and that Newport engaged in churning in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010.

IV. La Barbera and Newport Recommended Qualitatively Unsuitable Investments

A. Facts

Enforcement alleged that La Barbera made unsuitable recommendations related to the purchases of exchange-traded products in the accounts of customers DR and DB. Enforcement's qualitative unsuitability charge against Newport related to these purchases as well as the purchases of exchange-traded products by two of Costanzo's customers, AB and MZ, and one of Levy's customers, NK. Some of the purchases were of leveraged or inverse exchange-traded funds ("ETFs") and others were of the iPath S&P 500 VIX Short Term Futures Exchange-Traded Notes ("VXX").

1. Recommended Purchases of ETFs

From March 2009 through August 2010, La Barbera recommended to customer DR approximately 26 purchases of the following leveraged or inverse ETFs: (1) Direxion Daily Financial Bull 3X Shares (FAS); (2) Direxion Daily Energy Bull 3X Shares (ERX); (3) Direxion Daily Small Cap Bear 3X Shares (TZA); (4) Direxion Daily Financial Bear 3X Shares (FAZ); (5) ProShares UltraShort Financials (SKF); (6) ProShares UltraShort Real Estate (SRS); and (7) ProShares Ultra DJ-UBS Crude Oil (UCO). From March 2010 through September 2010, Costanzo recommended four ETF purchases in MZ's account in TZA, ERX, and UCO.

The complexity and riskiness of these products are reflected in the disclosures contained in the ETFs' registration statements. For example, the TZA prospectus states:

> The Fund seeks daily investment results, before fees and expenses, of 300% of the inverse (or opposite) of the price performance of the Russell 2000(R) Index ("Index"). ***The Fund seeks daily leveraged investment results and does not seek to achieve its stated investment objective over a period of time greater than one day.*** The Fund is different and much riskier than most exchange-traded funds.
>
> **The Fund is designed to be utilized only by knowledgeable investors who understand the potential consequences of seeking daily leveraged investment results, understand the**

> **risks associated with shorting and the use of leverage, and are willing to monitor their portfolios frequently. The Fund is not intended to be used by, and is not appropriate for, investors who do not intend to actively monitor and manage their portfolios.**

The other ETFs that La Barbera and Costanzo recommended contained similar disclosures regarding the risks of investing in these products and holding them longer than one day. As the disclosures make clear, all of these ETFs at issue in this case were high-risk investments designed to be traded over a single day and were intended to be used by highly sophisticated investors.

2. Recommended Purchases of VXX

La Barbera and his partners Costanzo and Levy recommended purchases of VXX, a complex futures-index-linked exchange-traded note, to three customers. Costanzo in June 2010 recommended one purchase of VXX to customer MZ and one purchase of VXX to customer AB in February 2012. La Barbera, between December 2011 and February 2012, recommended three purchases of VXX to customer DB. And Levy, in February 2012, recommended one purchase of VXX to customer NK.

The VXX prospectus explained:

> Each series of ETNs are medium-term notes that are uncollateralized debt securities and are linked to the performance of an underlying Index that is designed to provide investors with exposure to one or more maturities of futures contracts on the VIX Index, which reflect implied volatility of the S&P 500(R) Index at various points along the volatility forward curve. The VIX Index is calculated based on the prices of put and call options on the S&P 500(R) Index.

The prospectus also explained that the VXX was "linked to the performance of the S&P 500 VIX Short-Term Futures TM Index TR that is calculated based on the strategy of continuously owning a rolling portfolio of one-month and two-month VIX futures to target a constant weighted average futures maturity of 1 month." The prospectus listed numerous investment risks and indicated that VXX might be an appropriate investment for an investor who was "willing to accept the risk of fluctuations in volatility in general and in the prices of futures contracts on the VIX Index in particular." The prospectus further explained that "[t]he value of your ETNs will be linked to the value of the underlying Index, and your ability to benefit from any rise or fall in the level of the VIX Index is limited. . . . These futures will not necessarily track the performance of the VIX Index." The prospectus disclosed that "VIX futures have frequently exhibited very

high contango[46] in the past, resulting in a significant cost to 'roll' the futures. The existence of contango in the futures markets could result in negative 'roll yields,' which could adversely affect the value of the Index underlying your ETNs and, accordingly, decrease the payment you receive at maturity or upon redemption."

Without question, VXX is a highly complex product that is intended for highly sophisticated investors with specialized investment needs. As Newport's former CCO, SW, testified, the VXX "is so complex in nature that it is really hard to determine the underlying positions and whether leverage was actually used to imitate the VIX, which is . . . an options volatility index."

B. Discussion

The Hearing Panel found that that La Barbera and Newport, acting through La Barbera, Costanzo, and Levy, failed to possess a reasonable basis for believing that the ETFs and VXX recommended for and purchased by five retail customers were suitable, in violation of NASD Rules 2310 and 2110 and FINRA Rule 2010. We affirm the Hearing Panel's findings.

In determining whether a recommended transaction is qualitatively suitable under NASD Rule 2310, a broker is required to possess an "'adequate and reasonable basis' for any recommendation he makes." *See F.J. Kaufman & Co.*, 50 S.E.C. 164, 168 (1989) (quoting *Hanly v. SEC*, 415 F.2d 589, 597 (2d Cir. 1969)). As we have explained, a broker must conduct a two-step analysis under NASD Rule 2310. "First, a broker must conduct a reasonable investigation and conclude that" his recommendation could be suitable for at least some customers by his understanding of the potential risks and rewards inherent in that recommendation. *See Dep't of Enforcement v. Luo*, Complaint No. 2011026346206, 2017 FINRA Discip. LEXIS 4, at *27-28 (FINRA NAC Jan. 13, 2017). This analysis relates to a particular recommendation, rather than to a particular customer. *Kaufman*, 50 S.E.C. at 168. "Second, the broker must assess whether an investment recommendation is suitable for the specific customer to whom it is made, and to tailor recommendations to a customer's financial profile and investment objectives." *Luo*, 2017 FINRA Discip. LEXIS 4, at *28. "A broker's recommendations must be consistent with his customer's best interests, and he or she must abstain from making recommendations that are inconsistent with the customer's financial situation." *Faber*, 57 S.E.C. at 310. Even when a customer "affirmatively seeks to engage in highly speculative or aggressive trading, a representative is under a duty to refrain from making recommendations that are incompatible with the customer's financial profile." *Dep't of Enforcement v. O'Hare*, Complaint No. C9B030045, 2005 NASD Discip. LEXIS 39, at *12 (NASD NAC Apr. 21, 2005). A broker must also disclose the risks associated with a recommended security to a customer, but "[m]ere disclosure of risks is not enough. A [broker]

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46 "Contango" represents the ordinary pattern in the futures market, "typically, the further in the future the delivery date, the greater the purchase price of the futures contract," because far-off prices reflect additional costs for "storage, insurance, financing, and other expenses the producer incurs as the commodity awaits delivery." *In re Crude Oil Commodity Futures Litig.*, 913 F. Supp. 2d 41, 48 (S.D.N.Y. 2012).

must be satisfied that the customer fully understands the risks involved and is . . . able . . . to take those risks." *James B. Chase*, 56 S.E.C. 149, 159 (2003) (internal quotation marks omitted).

There is no evidence that La Barbera, Costanzo, or Levy performed a reasonable basis suitability analysis of the ETFs or the VXX that they were recommending to retail investors. FINRA specifically reminded its members in a June 2009 Regulatory Notice about suitability parameters of leveraged and inverse ETFs:

> While such products may be useful in some sophisticated trading strategies, they are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis. . . . Therefore, inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.

FINRA Regulatory Notice 09-31, at 1 (June 2009). The Notice further explained that the first step in a suitability analysis would be to determine whether the particular ETF was suitable for at least some customers, which "requires firms and associated persons to fully understand the products and transactions they recommend." *Id.* at 3. In August 2009, FINRA and the Commission issued a joint investor alert again explaining the "[e]xtra [r]isks" of leveraged and inverse ETFs for buy-and-hold investors. *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors*, http://www.finra.org/investors/alerts/leveraged-and-inverse-etfs-specialized-products-extra-risks-buy-and-hold-investors. This investor alert highlighted that a customer should "work with someone who understands your investment objectives and tolerance for risk. Your investment professional should understand these complex products, be able to explain whether or how they fit with your objectives and be willing to monitor your investment." *Id.* The investor alert also warned of the potentially negative consequences of holding these products for longer than one day. "[B]ecause leveraged and inverse ETFs reset each day, their performance can quickly diverge from the performance of the underlying index or benchmark. In other words, it is possible that you could suffer significant losses even if the long-term performance of the index showed a gain." *Id.* The record in this case reveals that La Barbera, Costanzo, and Levy failed their customers when recommending these complex products to them.

As the Hearing Panel observed, when La Barbera testified at the hearing, he exhibited no understanding of the ETFs that he traded in DR's account. La Barbera described his strategy and rationale for recommending ETFs to customers as, "It was an overall volatile market, coming off one of the largest volatile markets in all of time. So these products were being used and being traded during this period of time." He explained that, "obviously it was to see some sort of appreciation at the time based on the specific indices that these were related to and events going on in those indices." When asked why they were suitable specifically for DR, La Barbera stated, "[s]hort-term trading, the products were discussed with [DR], approved the products [sic] and we purchased the products and we sold the products." La Barbera elaborated that these ETFs "met' DR's "objectives . . . for short-term trading, speculation, and aggressive growth." La Barbera, however, could not recall the specifics of his recommendations to DR "other than during that period of time it was heavily recommended, not only by myself but throughout the industry."

The evidence does not support that La Barbera conducted a reasonable investigation of the ETFs before recommending them.[47] La Barbera's lack of understanding related to these products for retail investors like DR also is reflected in the length of time the investments were held in DR's account. La Barbera admitted that he was recommending leveraged and inverse ETFs during a "volatile market." Nonetheless, these ETFs purchased by La Barbera in DR's account often were held for longer than one day thereby presenting substantial risk and were unsuitable for a retail investor like DR. *See FINRA Regulatory Notice 09-31.*

La Barbera also did not conduct a reasonable investigation of VXX before recommending it. When asked how he would explain the VXX to customers, La Barbara could not recall what he would have told them. And there is no indication from La Barbera's testimony, or any other evidence, that he performed the required suitability analysis of this product.

We also find that La Barbera's specific recommendations of VXX to customer DB were unsuitable. The product was designed primarily for institutional or highly sophisticated investors. DB was near retirement, had limited income, and little investing experience. He had a moderate risk tolerance and did not seek high-risk investments. When asked to explain why VXX was a suitable investment for DB when the investment represented 70 percent of his account equity at the time of purchase, La Barbera explained, "[b]ased on the speculative nature the way the account was set up, his objectives in the account for short-term trading, this was a suitable recommendation for [DB]." The evidence supports that DB was *not* such an investor and VXX was plainly not an appropriate investment for him. The Commission has "previously held that risky investments are unsuitable recommendations for investors with relatively modest wealth and limited investment experience." *See Cespedes*, 2009 SEC LEXIS 368, at *23.

DB credibly testified that La Barbera failed to explain the risks of investing in VXX and the risks of holding VXX in his account. The three VXX purchases that La Barbera recommended all were held for lengthy periods, with the last purchase in February 2012 held for more than five months through La Barbera's departure from Newport in July 2012.

In addition, La Barbera's decision to concentrate DB's account in VXX was not suitable. *See Faber*, 57 S.E.C. at 311 ("We have repeatedly found that high concentration of investments in one or a limited number of speculative securities is not suitable for investors seeking limited risk."); *Stephen Thorlief Rangen*, 52 S.E.C. 1304, 1308 (1997) ("[B]y concentrating so much of their equity in particular securities, Rangen increased the risk of loss for these individuals beyond what is consistent with the objective of safe, non-speculating investing."). As FINRA has cautioned, "[f]or many investors who are at or nearing retirement, there can be a temptation to reach for yield to maximize retirement income without the appreciation of the concomitant risk." *FINRA Regulatory Notice 07-43*, 2007 FINRA LEXIS 42, at *6 (Sept. 2007). FINRA members and their associated persons thus "*are required* to . . . recommend only those products

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[47] La Barbera testified that he "believed" that he would have explained to DR the risks of holding a leveraged or inverse ETF longer than one day, but he did not recall what he explained with any certainty. La Barbera stated that he also "believed" DR would have received a "follow up prospectus from the issuer as well" after the trade.

that are suitable in light of the customer's financial goals and needs." *Id.* at *7 (emphasis added). La Barbera failed to do so here.

We also review Costanzo's and Levy's recommended purchases of exchange-traded products in holding Newport accountable for the unsuitable recommendations of its three representatives. As the Hearing Officer found in the default decision, Costanzo's and Levy's recommended purchases of the exchange-traded products were unsuitable for their customers. Costanzo admitted as much in his investigative testimony. Costanzo admitted that his sales of VXX were unsuitable, that Costanzo did not understand these products when he recommended them, and that they were not appropriate for retail customers. In addition, Costanzo's customer MZ, who was an 81-year-old retired schoolteacher with an income of approximately $2,800 per month from social security and a pension, testified that Costanzo never explained the risks and features of any of the ETFs or VXX that he bought and sold in MZ's account. Despite the risks of holding the ETFs for longer than one day, MZ's account frequently held the ETFs for several weeks. The recommended purchases of VXX in AB's (Costanzo customer) and NK's (Levy customer) accounts were similarly unsuitable in that the VXX positions were held for long periods and the risks were not explained to the customers. Costanzo's customer AB, who was a retired engineer, testified that neither Costanzo nor anyone from Newport informed him of the risks of VXX. Levy's customer NK testified similarly that Levy did not discuss the risks of VXX and that NK "knew very little about it." These investments were not suitable for these retail investors. *See, e.g.*, *Cody*, 2011 SEC LEXIS 1862, at *37 ("Cody recommended that Mr. Bates make substantial investments in these bonds, which were rated speculative and highly speculative, even though he knew that Mr. Bates was retired, needed to preserve principal, requested low-risk investments, and needed immediate income for monthly withdrawals to cover living expenses."); *Larry Ira Klein*, 52 S.E.C. 1030, 1037 (1996) (finding that the degree of risk associated with the debt securities that a broker recommended made them inappropriate for retired customers whose overriding need was for safety to principal).

The evidence also does not support that Newport conducted a reasonable investigation into the ETFs or VXX that La Barbera, Costanzo, and Levy were recommending to their retail customers, and we hold the firm responsible for this misconduct. *See Brookstone*, 2015 FINRA Discip. LEXIS 3, at *66-67 (holding firm responsible for unsuitable recommendations of its employees when "Brookstone's chief compliance officer, reviewed . . . recommendations and advised the firm's registered representatives about the CMOs available for their customers' accounts"). The firm's CCO, SW, testified that the firm placed no restrictions on its representatives' sale of leveraged and inverse ETFs until April 18, 2011, when SW circulated a compliance memo prohibiting the trading. Even then, sales of these ETFs and the VXX continued. Newport, which was aware that these sales were occurring, directed its representatives to educate themselves on these products, including through the issuers. KK, the firm's COO, who testified at the hearing never claimed that the firm undertook the required suitability analysis of these ETFs or the VXX that the firm knew its representatives were selling.

In holding the firm accountable, we note that SW played a central role in the sales of these complex products. *Cf. Prime Investors*, 53 S.E.C. at 11 ("We . . . reject Prime's claim that it had no involvement with the investment program. This assertion is belied by the record, which establishes Prime's central role (through its offices and personnel) in promoting the program."); *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *67. In May 2011, SW required representatives

selling leveraged and inverse ETFs and structured products to come to him for approval of these transactions. He stated that he generated new suitability parameters that had to be met in order for a purchase to even be considered. These included selling to "accredited investors only" and limiting the concentration of structured products to no more than 10 percent of a customer's investment portfolio. Despite these purported limitations, Newport permitted the sales that occurred in this case after this date, including concentrating 70 percent of DB's account equity in VXX, and selling to investors who were not accredited. SW admitted that some representatives were permitted to sell VXX until "at least February 2012." SW testified to the complexity of the VXX, stating in part that it "is so complex in nature that it is really hard to determine the underlying positions" and admitted that his lack of understanding of the product likely impaired his ability to make appropriate suitability decisions about it.

We conclude that La Barbera and Newport made qualitatively unsuitable investment recommendations in violation of NASD Rules 2310 and 2110 and FINRA Rule 2010.

V. Leone Provided Inaccurate Account Values to Customer JB

Enforcement alleged, and the Hearing Panel found, that Leone on five separate occasions conveyed false account values to his customer, JB, in violation of FINRA Rule 2010. We agree and affirm these findings.

JB did not have on-line access to his Newport account and frequently emailed Leone for updates on his account's value. Leone does not dispute that he repeatedly overstated the value of JB's account in five emails to him. On May 13, 2010, JB asked Leone to email his account balance "as of today." Leone instead emailed that the balance on April 30 was approximately "50k." The actual value of JB's account on April 30 was $44,777.97. On June 1, 2010, JB emailed Leone asking to let him "know where my account stands as of today." Leone responded that JB's account "today is worth $47k," when in reality the account value was $45,773.83. On November 16, 2010, JB again asked Leone in an email about his account's value. Leone replied "about 35k." The actual value of JB's account on that day was $33,480.57. On February 4, 2011, when JB asked for his account's balance, Leone replied, "15k aprox [sic] it has been rough going I will do everything to get you back, don't give up now thanks." JB's actual account value was $9,476.03. Finally, on April 6, 2011, when JB asked Leone what his account value was "as of today," Leone told him "same as last month aprox [sic] 6k." The actual value was $2,917.72.

As we previously have explained, a representative "misrepresent[ing] the true state of a customer's account is the antithesis of a registered representative's [duty to uphold] high standards of commercial honor," and constitutes a violation of just and equitable principles of trade under FINRA Rule 2010. *Dep't of Enforcement v. Cody*, Complaint No. 2005003188901, 2010 FINRA Discip. LEXIS 8, at *51 (FINRA NAC May 10, 2010) (internal quotation marks omitted), *aff'd*, 2011 SEC LEXIS 1862. Despite having access to the true value of JB's account, Leone overstated JB's account value by thousands of dollars on five days spanning nearly a year. The email that Leone sent to JB on May 13, 2010, overstated the account by more than $5,200. The following month, Leone overstated JB's account value by more than $1,200. In November 2010, February 2011, and April 2011, Leone overstated JB's account value by more than $1,500, $5,500, and $3,000, respectively.

Leone argues that he had no intent to mislead JB by providing these incorrect values. As the Hearing Panel found, however, Leone's misstatements, even though by small dollar amounts, were not an isolated occurrence, and Leone provided no explanation at the hearing of his repeated actions in this regard. Leone's repeated instances of exaggerating the value of JB's account contravenes just and equitable principles of trade. *Cody*, 2011 SEC LEXIS 1862, at *56 (holding that "inaccurate and misleading account summaries and/or reports fail to satisfy these principles" (internal quotation marks omitted)). Accordingly, we affirm the Hearing Panel's finding that Leone provided JB with inaccurate account values, in violation of FINRA Rule 2010.

VI. Newport Failed to Supervise Reasonably the Trading by Leone, La Barbera, Costanzo, and Levy

Enforcement alleged, and the Hearing Panel found, that Newport failed to supervise reasonably Leone's and La Barbera's trading as well as the trading of Levy and Costanzo, in violation of NASD Rules 3010 and 2110 and FINRA Rule 2010.[48] We affirm these findings.

A. Facts

Enforcement contends that Newport ignored multiple red flags indicating that Leone, La Barbera, Costanzo, and Levy were excessively trading and churning certain customers' accounts. These red flags consisted of:

- the volume of trading in the accounts;
- the concentration of the accounts in single securities and the use of high levels of margin;
- in-and-out trading in the accounts;
- a pattern of breaking transactions into multiple orders executed within minutes, with multiple commissions and activity fees charged to customers;
- the total commissions charged on individual accounts relative to total account value;
- cost-to-equity ratios in excess of 100 percent;
- turnover rates over 100;
- certain customers' accounts repeatedly appearing on exception reports;
- sizable losses in certain customers' accounts; and

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[48] Enforcement alleged that Newport also failed to supervise reasonably Bartelt. The Hearing Panel determined that Enforcement offered "very little evidence" regarding the firm's supervision of Bartelt and rested its findings of supervisory violations on the firm's conduct related to its supervision of Leone, La Barbera, Levy, and Costanzo. Enforcement did not cross appeal, and we decline to review this determination.

- the use of riskless principal and agency trading in the same account, with the high-cost trades executed on a riskless principal basis and lower-cost trades executed on an agency basis.

The record reflects that these red flags were present, many of which we discussed above in relation to our prior findings. None of the trades or fees charged to customers was hidden from the firm, but instead were reflected in Newport's own records. Indeed, the evidence in this case demonstrates that Newport's management, supervisors, and compliance officers were aware of the unsuitable trading and churning, but took no action to stop or reduce the trading.

1. Supervisory Structure and Responsibilities

The Hearing Panel heard testimony regarding the firm's supervision from Leone's supervisor, Arena, who was the firm's Long Island branch manager; KK, the firm's COO who had supervisory responsibilities; and SW, who served as the firm's CCO during much of the relevant period (January 2011 to March 2013). KK and SW reported directly to the firm's CEO, KM, and worked from the firm's home office in Irvine.[49] SW had no prior experience working in compliance prior to his employment at Newport.[50]

Arena supervised 10 representatives, including Leone who worked from his home, which was located in another state when some of Leone's misconduct occurred in this case. Arena had no prior supervisory experience and Newport gave him no supervisory training. KK was Arena's designated supervisor. Arena's compensation included overrides on Leone's business and the business of the other representatives whom he supervised. Arena stated that despite Newport's written supervisory procedures ("WSPs") assigning him the responsibility of reviewing monthly customer account statements for suitability, he did not do it. No one at Newport directed him to review the statements nor made any determination as to whether he was doing it. Arena also did not attempt to verify any of the customers' information collected by the representatives, including that collected by Leone, on the new account forms. With the exception of overseeing BS's account in June 2011, Arena never contacted any of Leone's customers regarding the activity in their accounts or restricted any activity in these accounts. At best, Arena occasionally instructed Leone to reduce commissions on certain trades without reducing the overall level of trading in the customers' accounts. Arena further was aware of and permitted Leone's concentration of customer accounts in a few stock positions. Newport provided Arena with daily reports showing the trading by his representatives for the prior day, but these reports did not allow him to review any patterns of trading over a period, and Newport did not provide any cumulative reports that would have reflected the trading patterns that existed in this case.

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[49] KK previously reported to DS, who was the firm's CEO before KM.

[50] KM hired SW in January 2011 to replace DS, who was the firm's CCO at the time. DS was demoted and left the firm soon thereafter.

The record also contains evidence regarding Luckey's supervision of La Barbera, Levy, and Costanzo. Luckey did not testify at the hearing, but he provided an on-the-record interview with FINRA staff that was entered into evidence. SW also provided testimony regarding Luckey's supervision. Luckey's focus at the firm was not supervising these representatives, but acting as the head of the firm's trading desk. Newport did not assign a branch manager to La Barbera, Levy, or Costanzo despite these representatives being located on the east coast while Luckey worked in California. Luckey executed the trades for La Barbera, Levy, and Costanzo, and had the ability stop any trade. Luckey received daily trade blotters and commission reports for La Barbera's, Costanzo's, and Levy's trading activity, which showed mark-ups or commissions over three percent. Luckey reviewed these reports only to ensure that no trades charged mark-ups or commissions in excess of five percent; he did no cumulative analysis to consider the costs of the trades in any account over time. He also never prepared any cost-to-equity or turnover analysis. Luckey never discussed with any of La Barbera's, Costanzo's, or Levy's customers the trading in their accounts. And he could recall no instance in which someone from the firm's compliance department discussed with him contacting one of these customers to discuss the trading activity in a customer's account.

2. Newport Officers Were Aware of the Trading

Newport's CCO, SW, testified to Newport's knowledge of Leone's, La Barbera's, Costanzo's, and Levy's trading.[51] SW knew from prior experience that La Barbera, Costanzo, and Levy's business model was difficult to manage. SW testified that the supervisory structure at Newport "was less than adequate and [an] independent broker/dealer in many different states is exposed in a supervisor [sic] capacity and is a flawed business model in this day and age."

SW also admitted that he knew Leone was excessively trading customers' accounts. SW, however, never directed Arena to stop Leone from excessively trading his customers' accounts or to instruct the trading desk to stop taking his orders, and had no knowledge that any other member of the firm's management did so either. Leone was a large producer for the firm, and SW testified that he was powerless to terminate him.

SW further testified that he was aware when he was CCO that Leone, La Barbera, Levy, and Costanzo were concentrating their customers' accounts in single securities, and using margin in some of these accounts, but the firm took no action to stop these practices. SW also was aware of La Barbera, Levy, and Costanzo charging mark-ups on purchase transactions and commissions on sales, and discussed these transactions with KK. In order for a representative to engage in riskless principal transactions, the firm had to approve it. SW acknowledged that because of the way in which mark-ups and mark-downs appeared on the firm's trade

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[51] Prior to joining Newport, SW was familiar with La Barbera, Costanzo, and Levy and their trading style because they all were associated with Brookstreet Securities Corp., a defunct firm as of 2007. SW was Brookstreet's head of trading. Newport's CEO, KM, also worked with SW at Brookstreet and hired him at Newport as its CCO. When Newport hired SW, he had no prior compliance responsibilities other than occasionally reviewing exception reports.

confirmations, an "unsophisticated customer, not aware of the difference between [riskless principal and agency trades] would be paying more for that transaction and not know[] it."

SW also explained that he did not order the firm's compliance department to review and investigate various customer accounts of these representatives even after the representatives were placed on heightened supervision in May 2012 in response to FINRA's investigation because,

> it goes along the lines that there weren't any secrets about what was taking place with these RRs, that KM [Newport's then-CEO] was fully cognizant of what was going on, and I don't know what it would have accomplished other than to paper some files, but I don't think it would have resulted in any changes.

SW testified that Newport had received numerous customer complaints about La Barbera, Costanzo, and Levy and that he informed the firm's CEO, KM, about them. In addition, SW stated that he had no ability to limit the trading of these representatives based on the fact that KM "ruled with an iron fist" and that "there wasn't anything that was said or done without her approval." SW thus believed he had no ability to limit these representatives' trading nor could he terminate them from the firm because of its CEO, KM.

Newport's COO, KK, was also well-versed in the active trading style of Leone, La Barbera, Levy, and Costanzo.[52] KK testified that these four, along with Bartelt, were "some of the most active traders in the entire firm." KK explained that the firm "knew" with respect to La Barbera, Levy, and Costanzo that these representatives "do one thing, they do short-term trading and high risk stocks." When asked at the hearing if that meant "aggressive growth and speculation," KK agreed.

Despite this knowledge, KK, who approved all new account documentation for the firm, could not describe for the Hearing Panel any financial circumstances that would have led him to reject a new account for active trading and the use of margin. KK described his suitability analysis when approving customer accounts. He testified that he considered a customer's investment objective, risk tolerance, investing experience, the size of the account, and the customer's age. Nonetheless, KK readily approved the new account documents that Leone, La Barbera, Levy, and Costanzo submitted without carefully considering the salient factors. For example, KK approved a new account for Levy customer JS, which included a margin agreement, despite the new account documents indicating that JS was retired, and 65 years old with an income of $50,000 and liquid net worth of $50,000. In the end, Levy excessively traded and churned JS's account.

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[52] KK was associated with Brookstreet at the same time as KM, SW, La Barbera, Costanzo, and Levy.

3. Customer Accounts Appeared Repeatedly on Exception Reports

Newport, through exception reports it received from its clearing firms, possessed ample evidence of the excessive trading engaged in by Leone, La Barbera, Levy, and Costanzo. Newport used two different clearing firms, Wedbush Securities Inc. and Penson Financial Services. Newport provided its representatives with the discretion to choose which clearing firm to use for their customers. While both clearing firms made a variety of monthly exception reports available to Newport, the clearing firms provided different data in the exception reports and used different parameters to identify exceptions. The Wedbush exception reports provided the most meaningful information, including the number of trades, amount of commissions and loss of equity, turnover rates and commission-to-equity percentages on a monthly basis as well as the prior three and 12 months. Customer accounts appeared on the reports when trading occurred outside of the defined criteria, such as a number of trades. The accounts of Leone's, La Barbera's, Levy's, and Costanzo's customers appeared repeatedly on monthly exception reports.[53]

La Barbera's, Levy's, and Costanzo's customers specifically were reflected on Wedbush active account exception reports numerous times. Nonetheless, Newport did not stop or reduce the trading in these accounts. La Barbera's customer, CA, appeared on the reports nine times between September 2010 and September 2011. La Barbera's customer, DB, appeared on consecutive reports from November 2011 through March 2012. From March 2009 through August 2011, La Barbera's customer, DR, also appeared on Wedbush exception reports 13 times. And La Barbera's customer, RG, appeared on three reports between May and August 2011.[54]

Leone cleared his customers' accounts through Penson. The Penson exception reports reflected the majority of Leone's customers at issue here resulting from the high volume of

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[53] Newport's CEO, KM, circulated the monthly exception reports only to compliance staff located at the firm's Irvine office, including SW and KK. Newport did not circulate the reports to immediate supervisors like Arena on a regular basis.

[54] The evidence is similar for Levy's and Costanzo's customers.

Levy's customers:

- JS appeared on the reports 17 times from April 2010 through December 2011;
- NK appeared on the reports 13 times from July 2010 through February 2012; and
- BNS appeared on the reports nine times from September 2010 through October 2011.

Costanzo's customers:

- MZ appeared on the reports eight times from April 2010 through May 2011;
- DS appeared on the reports nine times from March 2011 through January 2012;
- AB appeared on the reports seven times from May 2011 through February 2012; and
- RS appeared on the reports four consecutive times from May through August 2011.

trading, commission charges, or both. For example, in April 2009, a Penson exception report showed 97 trades in customer DG's account that month alone, which generated more than $5,000 in commissions. That report also reflected 191 trades in the account year-to-date, which generated more than $15,000 in commissions. The following month's report reflected 42 trades executed in May 2009 in DG's account, and 233 trades in the account year-to-date, which generated more than $18,000 in commissions. The exception report for August 2009 reflected 109 trades in RR's account and 41 trades in DG's account that month. The December 2009 exception report showed 78 trades in RR's account for the month, which generated more than $6,000 in commissions, and 619 trades for the year, which generated more than $61,000 in commissions. Several of Leone's other customers also appeared repeatedly on myriad other exception reports reflecting similar trading activity and commissions.[55] Nonetheless, Newport did not stop or reduce the trading in these accounts.

4. Newport's Insufficient Action in Response to the Exception Reports

KK reviewed all of the exception reports generated by Newport's clearing firms until early 2011.[56] KK testified that Newport ignored many of the parameters identified in the Wedbush exception reports, such as turnover rates and commission-to-equity percentages, because the Penson reports did not include them. Newport's WSPs did not require any action if an account appeared on an exception report unless certain thresholds were met. Newport's WSPs directed that for accounts appearing on Penson reports: "Review Report for accounts with frequent trading (15 or more) for suitability, (20 or more) send active trading letter and (over 30) for activity letter." SW and KK explained that pursuant to these WSPs, Newport would review account documents for suitability if an account had 15 or more trades in one month. If an account had 20 or more trades in one month, a member of Newport's compliance staff would send a negative-option letter known as a "happiness letter," suggesting that the customer contact the registered representative or the firm if the customer was unhappy with the trading in the account.

In December 2010, DS, Newport's prior CEO and CCO, sent a "happiness letter," to Leone's customer, LC. The "happiness letter" indicated that LC's account had been selected as part of an effort "to provide better service to you on an ongoing basis" and "due to the size

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55 For example, a March 2010 exception report for JB reflected 52 trades in JB's account and more than $4,600 in commissions for the month. By September 2010, the exception reports reflected 296 trades for the year, which generated more than $28,500 in commissions. A 2010 report for LC reflected 55 trades and $19,182 in commissions for the month of November and 140 trades and $20,328 in commissions for December. A December 2010 report for MJ showed 33 trades and $4,275 in commissions for the month. A January 2010 report for PH reflected 36 trades and $2,225 in commissions. An April 2011 report for BS reflected 61 trades and $6,125 in commissions. By June 2011, the report reflected 159 trades for the year and $13,732 in commissions.

56 Another Newport compliance person, Supervisor R, reviewed exception reports after KK until late 2011. Supervisor R was Bartelt's supervisor at Newport.

position(s) in your portfolio." It encouraged LC to "visit with" Leone, "to be open and frank in expressing your investment objectives," and advised that "[u]nless notified by you, we assume you are satisfied with the way your investment portfolio has been handled." In November 2010, the month prior to Newport sending this letter to LC, Leone had made 55 trades in LC's account, charging more than $19,000 in commissions, and in December 2010, Leone made 140 trades, charging more than $20,000 in commissions. Newport did nothing further to stem Leone's trading of LC's account.

If an account clearing through Penson had 30 or more trades in the month, Newport's WSPs directed the firm to send the customer an Active Trading Authorization form requiring a signature from the customer in order to confirm the customer's investment objectives and risk tolerance. The form stated in relevant part: "We want to be sure that you understand that short-term trading of stocks ("active trading") of your account exponentially increases the commission charges to you without necessarily increasing your investment returns." The form requested a customer's signature to identify as "a sophisticated investor with substantial personal experience in trading stocks," and to verify the customer's "primary investment objectives" by circling them on the form. When directed by KK or SW, a Newport registered representative assigned to the account would send the form to the customer directly. KK or SW instructed Leone to send Active Trading Authorization forms to three of his eight customers at issue here (DG, BS, and RR) after Leone had already excessively traded these accounts. These forms did not inform the customers of the exorbitant costs that they were paying for Leone's trading, suggest that the trading in the accounts may have been excessive, or otherwise indicate any concerns about the suitability of the trading in the accounts.

Newport also took no action to stop or reduce Leone's trading even when it expressly knew he was excessively trading a specific customer's account. In March 2011, KK sent Arena and Leone an email stating that BS's account had been "excessively [t]raded." Rather than restricting Leone's trading, KK directed Arena and Leone to have BS execute an Active Trading Authorization form "for Speculation and High Risk." In May 2011, BS returned a signed form, but he circled investment objectives "growth" and "capital appreciation," not "speculation" or "high risk." Nevertheless, Leone continued to excessively trade in BS's account until BS instructed Newport to stop all trading in his account in June 2011.

Moreover, there is additional evidence in this case that Newport ignored a customer's refusal to authorize the active trading. DG returned his Active Trading Authorization form to Leone by placing an "X" through the approval line because he disagreed with his stated objective in the letter as "high risk." He credibly testified that he was not a "high-risk person." Regardless, Leone continued the trading in DG's account unabated until DG closed the account in April 2010.[57]

Newport's WSPs provided different parameters for accounts appearing on Wedbush exception reports. Those WSPs directed: "Accounts with frequent trading (20 or more), over 10

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[57] As we noted previously, the copy of this form that Newport provided to Enforcement during this investigation appears to have been altered by obscuring DG's "X."

trades with $5,000 in commission or loss of 25% equity, will be reviewed." Neither the WSPs for Penson nor Wedbush set forth guidance as to the standards to be applied when reviewing the suitability of trading. KK testified that when he performed these suitability reviews, he considered a customer's age, investing experience, investment objectives, risk tolerance, and size of the account. The evidence, however, does not reflect that KK, or anyone at Newport, placed limitations on trading in any of the customers' accounts at issue in this case, despite these accounts appearing on numerous exception reports.

B. Discussion

NASD Rule 3010 requires that a member firm "establish and maintain" a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." "Assuring proper supervision is a critical component of broker-dealer operations." *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *27 (June 29, 2007). "The standard of 'reasonable' supervision is determined based on the particular circumstances of each case." *John A. Chepak*, 54 S.E.C. 502, 513 n.27 (2000). "The duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation." *Studer*, 57 S.E.C. at 1023-24. "Final responsibility for proper supervision of a member's business rests with the member." *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *104; *see Dep't of Enforcement v. CapWest Sec., Inc.*, Complaint No. 2007010158001, 2013 FINRA Discip. LEXIS 4, at *28 (FINRA NAC Feb. 25, 2013), *aff'd*, Exchange Act Release No. 71340, 2014 SEC LEXIS 205 (Jan. 17, 2014).

For more than three years, Newport failed to supervise reasonably brokers Leone, La Barbera, Levy, and Costanzo. Newport took no action to place limits on—or to stop—the excessive trading and churning of the accounts of their 18 customers at issue. The high trade activity and commissions and mark-ups or mark-downs incurred in the customers' accounts were known to Newport, but the firm took no action to stop the misconduct. In addition, KK readily approved the customers' new account documentation that permitted these representatives to use margin to support their trading irrespective of whether such trading was suitable for these customers.

The firm was well aware of the excessive trading and churning in Leone's customer accounts, with annualized turnover rates as high as 151 and cost-to-equity ratios as high as 280 percent, yet the firm never restricted the trading in these accounts even after they appeared on exception reports repeatedly. Testimony given by SW, KK, and Arena confirmed the absence of any effective supervision over Leone's trading. The evidence also shows that Newport failed to supervise La Barbera, Levy, and Costanzo. The firm approved of their use of mark-ups and mark-downs and was aware of the high turnover rates and cost-to-equity ratios in their customers' accounts, which appeared repeatedly in monthly exception reports. Yet Newport deliberately took no action to stop their trading.

SW testified that, despite his awareness of the many red flags and after speaking with KK and the firm's CEO, KM, about these representatives, he was precluded from terminating their association with the firm or limiting their trading. KM, "who ruled with an iron fist," would not

allow it because Leone, La Barbera, Levy, and Costanzo were significant financial producers for the firm.

We agree with the Hearing Panel's assessment of the evidence and its conclusion that Newport impermissibly disregarded numerous, troubling red flags. The Commission has found a failure to supervise in other excessive trading and churning cases when the firm or supervisor failed to take appropriate action after becoming aware of potential excessive trading. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *90 (July 2, 2013) (finding that a supervisor's "review of the daily tickets and activity report for the account should have alerted Birkelbach to the excessive trading, including several in-and-out trades, but he failed to take any steps to investigate and allowed Murphy to churn" the customer's account), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *Michael E. Tennenbaum*, 47 S.E.C. 703, 711 (1982) (finding a failure to supervise when supervisor had "specific warnings that [representative] might be engaging in excessive trading" but "failed to take or recommend any action to investigate [his] activities" and "never sought to place any meaningful restraints on [representative]"). The evidence here establishes that Newport's "unreasonable inaction" in the face of red flags indicative of excessive trading and churning nullified the firm's supervision of Leone, La Barbera, Levy, and Costanzo. *See, e.g.*, *Robert E. Strong*, Exchange Act Release No. 57426, 2008 SEC LEXIS 467, at *29 (Mar. 4, 2008) ("[T]he evidence establishes that Strong's unreasonable inaction effectively nullified the supervisory system related to the Firm's compliance with Rule 2711."). The costs of which were catastrophic for the 18 customers of the representatives that Newport failed to supervise. *See Dep't of Enforcement v. Pellegrino*, Complaint No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *71 (FINRA NAC Jan. 4, 2008) (finding that insufficient supervisory actions "failed to directly address the problems that were causing voluminous amounts of unsuitable recommendations and misleading sales presentations"), *aff'd*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008).

We affirm the Hearing Panel's findings that Newport violated NASD Rules 3010 and 2110 and FINRA Rule 2010 by failing to supervise Leone, La Barbera, Levy, and Costanzo.

VII. Leone's Procedural Argument

Relying on the Commission's decision in *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000), Leone argues that this case against him should be dismissed based on Enforcement's unfair delay in filing the complaint. We have considered Leone's claim, and we reject it.

The Exchange Act requires that SRO rules "provide a fair procedure for the disciplining of members and persons associated with members[.]" 15 U.S.C. § 78o-3(b)(8). In *Hayden*, the Commission for the first time dismissed an SRO disciplinary action on fairness grounds because of the age of the case. The Commission identified four different time periods in reviewing whether the SRO proceeding at issue was fair: (1) the time between the first alleged occurrence of misconduct and the date that the SRO filed the complaint (thirteen years and nine months); (2) the time between the last alleged occurrence of misconduct and the date that the SRO filed the complaint (six years and seven months); (3) the time between the date that the SRO received notice of the alleged misconduct and the date that the SRO filed the complaint (five years); and (4) the time between the date that the SRO commenced its investigation and the date that the

SRO filed the complaint (three years and six months). *Hayden*, 54 S.E.C. at 653-54. The Commission dismissed the action because "the delay in the underlying proceedings was inherently unfair," despite not finding that "Hayden's ability to mount an adequate defense was impaired by the Exchange's delay." *Id.* at 654.

The Commission confirmed its holding that an extreme delay in bringing an action can result in dismissal based on fairness grounds in a subsequent case, *William D. Hirsh*, 54 S.E.C. 1068 (2000). The Commission, in *Hirsh*, emphasized that no statute of limitations applies to SRO proceedings and focused on the period between the time when the SRO received notice of the misconduct and the time when it filed its complaint. *Id.* at 1077.

In *Mark H. Love*, the NAC explained that "in addition to the four time-periods referenced in *Hayden* and *Hirsh*, adjudicators should consider traditional equitable principles in determining whether a particular proceeding is fair under the circumstances," as there are no bright-line rules for determining whether a proceeding lacks fairness based on delay alone. Complaint No. C3A010009, 2003 NASD Discip. LEXIS 17, at *13 (NASD NAC May 19, 2003), *aff'd*, 57 S.E.C. 315 (2004). The Commission, in affirming the NAC's decision, stated that fairness of the proceeding is determined based "on the entirety of the record" and looks to whether the respondent has shown that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him." *Love*, 57 S.E.C. at 324-25.

In this case, the record does not show that the alleged delay resulted in unfairness to Leone. The misconduct at issue occurred between September 2008 and May 2013, with Leone's misconduct occurring between December 2008 and December 2011. FINRA's Member Regulation staff initiated its review of the trading at Newport's Long Island branch offices in mid-2011 and, in January 2012, referred the matter to Enforcement for further investigation. Two FINRA examiners testified regarding their investigation and their review and analysis of the extensive trading data in this case. Several on-the-record interviews were conducted in 2013, including interviews of Costanzo, Levy, Bartelt, Luckey, and Leone. FINRA issued Wells notices to La Barbera, Costanzo, and Levy in January 2014. In July 2014, Enforcement filed its nine-cause complaint against the eight respondents: Newport, Leone, La Barbera, Levy, Costanzo, Bartelt, Arena, and Luckey.

We find that the time periods in this case are significantly shorter than in *Hayden*. Here, the time between the first alleged occurrence of Leone's misconduct and the last occurrence of his misconduct and the date that FINRA filed the complaint was approximately five years and six months and two years and six months, respectively. Approximately three years elapsed between the date when FINRA commenced its investigation and filed the complaint.

Leone argues that he was prejudiced because his memory was "impaired" as a result of the passage of time. As the Hearing Panel observed in rejecting Leone's testimony as not credible, Leone "initially professed an inability to recall specific contacts with customers, given the passage of time, but then proceeded to 'recall' self-serving aspects of his interactions with the customers." This suggests that Leone's memory was not faded, but selective. *See Dep't of Enforcement v. Rooney*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *94-95 (FINRA NAC July 23, 2015); *cf. Michael J. Marrie*, 56 S.E.C. 760, 798 (2003) (rejecting

claim of prejudice based on witnesses' poor memory where they "had no difficulty recalling exculpatory facts").

To that same end, Leone argues that he was prejudiced by the customers' lack of "specific recollection of events." We disagree. The Hearing Panel addressed the customers' recollection when finding that the customers overall were credible witnesses. The Hearing Panel "discounted the accuracy of some details of certain customers' testimony because of the uncertainty of the customers' recollections regarding those details considering the passage of time since the events occurred." The Hearing Panel found that the customers' testimony was "generally internally consistent and consistent with the relevant documentary evidence; and the testimony of all customers of the same [representative] was generally consistent." Moreover, the findings of violations against Leone are supported by ample documentary evidence including voluminous trading records and the testimony of Newport's management who was aware that he was excessively trading customer accounts.

Leone additionally claims that Enforcement's alleged delay rendered him "unable to obtain phone records which would have corroborated [his] testimony that his practice was to speak to his clients before every transaction." The record undercuts Leone's claim. The record reflects that, at FINRA's request, Leone attempted to obtain phone records from service providers in October 2011, but was unsuccessful for reasons unrelated to Enforcement's alleged delay.[58]

We determine that Leone has not shown that Enforcement's alleged delay in filing the complaint in this matter made the proceedings unfair and reject Leone's assertion that fairness requires dismissal of the action.

VIII. Sanctions

The Hearing Panel determined that the violations in this case were closely interrelated and imposed a single set of sanctions upon each respondent by barring Leone and La Barbera and expelling Newport. We agree that in cases such as this one when "multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate." *Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005), *aff'd*, 58 S.E.C. 873 (2005). The Hearing Panel also imposed a unitary fine on each respondent, but without linking the fine

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[58] Leone submitted a signed request form dated October 15, 2011, to Charter Communications for call logs from August 1, 2010, to September 30, 2011. The form states that Charter "does not fulfill requests where information is older than 1 year," and that Charter DOES NOT keep or have records for every incoming or outgoing call made or received by our telephone subscribers." Leone also requested from Verizon a log of outgoing calls from his phone number for the billing period between January 2010 and July 2010. In an email response dated October 17, 2011, a Verizon representative stated that "no itemization is available" because of Leone's unlimited calling plan.

amounts to the ranges set forth in the individual Sanction Guidelines ("Guidelines").[59] We agree with the Hearing Panel regarding the unitary bars and expulsion, but we follow the individual Guidelines' recommended fine amounts to assist in our determination of the total fine for each respondent.[60]

The Hearing Panel also ordered the respondents to pay restitution to the affected customers. The Hearing Panel's order to pay fines is subject to set-off by amounts that the respondents are able to demonstrate they paid to customers in restitution. We disagree with offsetting the fines and order the respondents to pay restitution to customers independently from the amounts we order that they pay as fines.

A. Newport's and Leone's History of Past Misconduct

Before we apply the violation-specific Guidelines, we begin with a review of the relevant disciplinary histories of Newport and Leone. *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. E8A2005014902, 2008 FINRA Discip. LEXIS 47, at *28-29 (FINRA NAC Dec. 10, 2008) (applying disciplinary history as an aggravating factor when determining appropriate sanctions), *aff'd*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796 (Aug. 14, 2009). The Guidelines instruct us to "always consider a respondent's relevant disciplinary history in determining sanctions," and impose more severe sanctions on recidivists in order to deter and prevent future misconduct.[61] Newport argues that it has "no disciplinary history similar to the events at issue." Newport is incorrect. As described in detail below, the firm's relevant disciplinary history includes past misconduct similar to that at issue here when the firm was sanctioned on other occasions for supervisory failures. Newport's and Leone's disciplinary histories evidence a disregard for fundamental regulatory requirements and provide further evidence that serious sanctions are necessary to confront the risks posed to the investing public by these two respondents. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *48 (June 14, 2013) ("FINRA properly considered these matters in assessing sanctions because they evidence a disregard for regulatory requirements and are further evidence that he poses a risk to the investing public absent a bar."); *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *24 (Sept. 10, 2010) (considering respondent's disciplinary history and finding that it was further evidence that he poses a risk to the investing public should he re-enter the securities industry), *aff'd*, 436 F. App'x 31 (2d Cir. 2011).

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59 The Hearing Panel fined Leone $400,000; La Barbera $125,000; and Newport $1 million.

60 A fine, in addition to a bar or expulsion, is appropriate in cases like this one involving egregious sales practice violations with widespread, significant, and identifiable customer harm. *See FINRA Sanction Guidelines* 10 (2017), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

61 *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations [hereinafter General Principles], No. 2), 7 (Principal Considerations in Determining Sanctions [hereinafter Principal Considerations], No. 1).

On March 7, 2007, Newport, when it was known as Grant Bettingen, settled NASD disciplinary charges when it signed a Letter of Acceptance, Waiver, and Consent ("AWC"). NASD censured the firm and fined it $10,500 for violating Exchange Act Rules 15c2-4 and 15c3-1 and NASD Rule 2110. The firm consented to findings that it participated in private placement offerings of stock for which the private placement memoranda provided that the offerings were contingent upon receiving subscription agreements for a certain amount. The firm failed to transmit investor funds to an unaffiliated bank to hold in escrow until the contingency was met. The firm also engaged in a securities business while failing to maintain required minimum net capital.

On March 6, 2009, Grant Bettingen settled disciplinary charges with the Commission. The Commission censured the firm and ordered that the firm disgorge to $97,135.51 for an alleged failure to supervise a representative within the meaning of Exchange Act Section 15(b)(4)(E).

Newport agreed to settle FINRA disciplinary charges when the firm executed an AWC on May 22, 2012. In that matter, Newport consented to findings that the firm failed to establish and implement policies and procedures that could reasonably be expected to detect and cause the reporting of suspicious transactions and that the firm's anti-money laundering systems, procedures, and internal controls were inadequate, in violation of FINRA Rules 3310 and 2010. For this misconduct, Newport was censured, fined $100,000, and required to revise its policies and procedures to monitor for suspicious transactions to achieve compliance with FINRA Rule 3310.

On March 12, 2013, FINRA issued an AWC in which Newport agreed to a censure and $10,000 fine for violating NASD Rule 3010 and FINRA Rule 2010 for failing to enforce its written supervisory procedures.

On April 9, 2015, FINRA issued an AWC that censured the firm and fined it $7,500. The firm consented to findings that it submitted execution or combined order and execution reports that contained inaccurate, incomplete, or improperly formatted data.

On September 9, 2015, Newport and KK agreed to an order accepting an offer of settlement with FINRA in a disciplinary matter. Under the terms of the settlement, Newport was censured and fined $35,000, with $5,000 of this amount joint and several with KK. The settlement was based on findings that the firm failed to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations, and rules and by failing to enforce the firm's WSPs with respect to a former registered representative and his business activities.

In May 2017, FINRA initiated expedited proceedings under FINRA Rule 9552 against Leone in a different matter for his failure to provide requested information pursuant to FINRA Rule 8210. FINRA suspended Leone on May 30, 2017, for his failure to comply with the information request and subsequently barred him on August 7, 2017, for his continued failure to respond.

The sanctions previously imposed on Newport and Leone in these other disciplinary matters serve, in part, to frame our assessment of sanctions for their misconduct before us now. *See Dep't of Enforcement v. Fox Fin. Mgmt. Corp.*, Complaint No. 2012030724101, 2017 FINRA Discip. LEXIS 3, at *21-22 (FINRA NAC Jan. 6, 2017).

B. Relevant Guidelines

We set forth below the relevant Guidelines that we have consulted when formulating sanctions in this matter.

1. Excessive Trading and Churning Violations

The Guidelines for excessive trading and churning recommend a fine of $5,000 to $110,000, and suspension in any or all capacities for one month to two years.[62] They further recommend a longer suspension or a bar when aggravating factors predominate and a bar of an individual for reckless or intentional misconduct, including churning.[63] The Guidelines recommend suspending a firm from a limited set of activities or functions for up to three months.[64] When aggravating factors predominate, the Guidelines recommend a longer suspension of a firm or expulsion.[65]

2. Conveying False Account Values to a Customer

Because there are no specific Guidelines for conveying false account values to a customer, we rely on the Guidelines for misrepresentations or omissions of material fact, which are the most analogous, to assist in our formulation of sanctions.[66] For negligent misconduct, the Guidelines recommend a fine of $2,500 to $73,000 and a suspension in any or all capacities for 31 calendar days to two years.[67] In cases involving intentional or reckless misconduct, the Guidelines recommend a fine of $10,000 to $146,000 and strongly considering a bar unless mitigating factors predominate.[68]

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62 *Guidelines*, at 78.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at 1.

67 *Id.* at 89.

68 *Id.*

3. Unsuitable Recommendations

The Guidelines for making unsuitable recommendations recommend a fine of $2,500 to $110,000.[69] They further recommend a suspension in any or all capacities for a period of 10 business days to two years for an individual respondent or, when aggravating factors predominate, a bar.[70] The Guidelines direct us to consider suspending a firm with respect to a limited set of activities for up to 90 days, or in egregious cases, a suspension of any or all activities for longer than 90 days or an expulsion.[71]

4. Failure to Supervise

For a failure to supervise, the Guidelines recommend that adjudicators consider imposing fines of $5,000 to $73,000.[72] Additionally, they recommend individual supervisory suspensions for up to 30 business days.[73] In egregious cases, they recommend suspending the firm with respect to any or all activities or functions for up to 30 business days and suspending the responsible individual in any or all capacities for up to two years or a bar.[74] The Guidelines also direct us to consider violation-specific considerations, including whether a respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny; the nature, extent, size, and character of underlying misconduct; and the quality and degree of the firm's supervisory procedures and controls.[75]

Adjudicators are also directed to consider the Guidelines for systemic supervisory failures "when a supervisory failure is significant and is widespread or occurs over an extended period of time."[76] These Guidelines recommend fining a firm $10,000 to $292,000.[77] When aggravating factors predominate, an adjudicator is directed to consider a higher fine and suspending the firm with respect to any or all relevant activities or functions for 10 business days

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69 *Id.* at 95.

70 *Id.*

71 *Id.*

72 *Id.* at 104.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 105.

77 *Id.*

to two years or consider expelling the firm.[78] Depending on the circumstances, we may also impose undertakings, order the firm to revise its supervisory systems and procedures, or order the firm to engage an independent consultant to recommend changes to the firm's supervisory systems and procedures.[79] The Guidelines also set forth eight violation-specific considerations that are relevant to determining appropriate sanctions for a systemic supervisory failure.[80]

C. Sanctions by Respondent

In assessing sanctions for the respondents' violations, we consider the foregoing violation-specific Guidelines that are relevant to each respondent's misconduct in addition to the Principal Considerations in Determining Sanctions and General Principles that apply to all violations of FINRA rules.

1. Leone

We bar Leone and fine him $185,000 for excessively trading and churning eight customer accounts and conveying false account values to one customer. Aggravating factors predominate Leone's misconduct. Over the course of three years, Leone engaged in numerous violative acts and a pattern of misconduct.[81] During that time, he effected hundreds of trades in the accounts of eight customers, which resulted in substantial costs to these customers that rapidly depleted the customers' accounts.[82] For example, in the account belonging to retired veteran LC, Leone traded one stock more than 200 times and made over $1.7 million in trades in one month alone. Leone's trading in that month caused the value of LC's account to drop in value from $128,000 to $50,000. As the record amply reflects, Leone regularly engaged in in-and-out trading that

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78 *Id.* at 106.

79 *Id.*

80 These considerations are: (1) whether the deficiencies allowed the violative conduct to occur or escape detection; (2) whether the firm failed to timely correct or address deficiencies once identified or failed to respond reasonably to "red flag" warnings; (3) whether the firm appropriately allocated its resources to prevent or detect the supervisory failure; (4) the number and type of customers affected by the deficiencies; (5) the number and dollar value of the transactions not adequately supervised as a result of the deficiencies; (6) the nature, extent, size, character, and complexity of the activities or functions not adequately supervised; (7) the extent to which the deficiencies affected market integrity, market transparency, the accuracy of regulatory reports, or the dissemination of trade or other regulatory information; and (8) the quality of controls or procedures available to the supervisors and the degree to which the supervisors implemented them.

81 *See id.* at 7 (Principal Considerations Nos. 8 & 9).

82 *See id.* at 7-8 (Principal Considerations Nos. 8, 9, 11, 17).

generated excessive turnover and cost-to-equity ratios. Without question, Leone acted at least recklessly.[83]

Leone also has accepted no responsibility for his misconduct and, instead, he has blamed his customers, claiming incredibly that they wanted him to trade their accounts in the active manner in which he did.[84] *See Sweeney*, 50 S.E.C. at 765 ("Even if we were to assume that the customers authorized [Leone] to manage their accounts aggressively, they did not authorize [him] to deplete those accounts through commissions, markups and margin charges. There is a difference between aggressive investing and excessive trading."). Seven of the eight customers were not sophisticated investors (only BS reasonably could be described as an experienced investor), and all eight customers relied on Leone to trade in their best interest.[85] Leone, however, deliberately abused their trust. He disregarded the customers' financial circumstances in order to engage in rapid trading with a high degree of risk designed to enrich himself.[86] Leone's excessive trading and churning were egregious and without mitigation.

Leone also misrepresented to customer JB the value of his Newport account on five occasions during the time when he was also excessively trading JB's account. Leone's action in this regard provides additional support for stringent sanctions worthy of protecting investors. Leone moreover has a disciplinary history that reflects his reckless disregard for regulatory requirements, which weighs in favor of robust sanctions in this case.[87] Leone represents a "clear danger to the investing public." *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *54 (Dec. 7, 2010); *see also Gerald J. Kesner*, Complaint No. 2005001729501, 2010 FINRA Discip. LEXIS 2, at *52 (FINRA NAC Feb. 26, 2010) ("To ensure that Kesner causes no similar harm to the investing public in the future . . . we bar Kesner from associating with any member firm in any capacity."). Accordingly, we impose sanctions at the upper level of the Guidelines: a bar and $185,000 fine ($150,000 for excessive trading and churning, and $35,000 for conveying false account values to a customer). *See Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *40 (barring respondent for excessively trading and churning one customer's account and concluding that "serious sanctions are needed to protect the investing public" when conduct "demonstrated a gross indifference" to the customer's interests).

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83 *See id.* at 8 (Principal Considerations No. 13).

84 *See id.* at 7 (Principal Considerations No. 2).

85 *See Guidelines*, at 8 (Principal Considerations No. 18).

86 *See id.* at 8 (Principal Considerations No. 16).

87 *See id.* at 2-3 (General Principles No. 2), 7 (Principal Considerations No. 1).

2. La Barbera

We bar La Barbera and fine him $125,000 for excessively trading and churning three customers' (DB, CA, and RG) accounts and for making qualitatively unsuitable recommendations to two customers (DB and DR). Aggravating factors predominate La Barbera's misconduct.

La Barbera repeatedly excessively traded and churned his three customers' accounts over an extended period.[88] This was not an isolated occurrence, but instead La Barbera's actions demonstrate numerous acts of misconduct[89] and that La Barbera acted at least recklessly.[90] La Barbera did not consider the costs of his trading and sought only to enrich himself.[91] As the evidence against La Barbera establishes, the turnover rates and cost-to-equity percentages exceed the established benchmarks and demonstrate the egregiousness of La Barbera's misconduct. For example, during a 10-month period in 2011 when La Barbera made approximately $1.4 million in total purchases and $1.3 million in total sales in DB's account, DB's account would have had to appreciate by over 142 percent to cover the mark-ups and other costs from this trading.

We find it extremely troubling that La Barbera has not accepted any responsibility for his misconduct and casts blame on others for his own failures.[92] *See Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *98-99 (FINRA NAC Dec. 20, 2007) ("Epstein's failure to accept responsibility for his own actions and his continued blame of others for the circumstances that have occurred are aggravating factors that we have considered in reaching our conclusion that a bar is an appropriate sanction in this case."), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Dep't of Enforcement v. Roethlisberger*, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *12 (NASD NAC Dec. 15, 2003) (finding that a representative's attempts to blame his firm for allowing him to violate securities laws demonstrate representative's unwillingness to accept responsibility for his conduct). He blames Newport for

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88 *See Guidelines*, at 7 (Principal Considerations No. 9).

89 La Barbera suggests that his trading in this manner was not a pattern when the case against him involves trading in "just three (3) of [his] 300 actively traded customer accounts." We reject his claim that is devoid of evidentiary support. Moreover, in a case like this that involves excessive trading *and* churning, the Guidelines recommend consideration of a bar irrespective of the number of customers involved. *See id.* at 78. Excessively trading and churning just one customer's account is serious misconduct warranting the most severe sanctions. *See Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *40.

90 *See Guidelines*, at 7-8 (Principal Considerations Nos. 8 & 13).

91 *See id.* at 7-8 (Principal Considerations Nos. 11, 16, & 17).

92 *See id.* at 7 (Principal Considerations No. 2).

his failures to comply with the securities laws and FINRA rules by not alerting him to any "cost/equity and turnover concerns" or by making him "an access person for purposes" of reports showing this data. We reject his argument; La Barbera is independently responsible for his own misconduct. *See John Montelbano*, 56 S.E.C. 76, 92 (2003); *Dep't of Enforcement v. Conway*, Complaint No. E102003025201, 2010 FINRA Discip. LEXIS 27, at *50-51 (FINRA NAC Oct. 26, 2010) ("Neither a claimed ignorance of the securities laws, nor an attempt to shift responsibility for a failure to comply with the securities laws to inadequate training or incompetent supervision, will serve to lessen the sanction imposed."), *aff'd*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527 (Nov. 7, 2013); *see also Dep't of Enforcement v. Audifferen*, Complaint No. C10030095, 2007 FINRA Discip. LEXIS 5, at *32 (FINRA NAC Oct. 18, 2007) ("Audifferen's attempts to assign responsibility for his own shortcomings to his firm's operations department illustrate his refusal to accept responsibility for his own misdeeds."), *aff'd*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740 (July 25, 2008). La Barbera at every turn ignored his unequivocal suitability obligations to his customers to whom he also assigns blame.

La Barbera attempts to excuse his actions by blaming the customers and painting them as sophisticates who sought to trade in an aggressive and risky manner. La Barbera argues that the customers signed the Short Term Trading Letter, which he contends evidences his effort "to be transparent on the issue of speculation, turnover and expense of trading." But as we found, the evidence does not support La Barbera's characterization of these customers who had little hands-on investing experience and a more moderate risk tolerance.[93] Moreover, the Short Term Trading Letter did not quantify the amount of costs the customers might incur from short-term trading or disclose that they might be charged mark-ups or mark-downs on trades. Nonetheless, La Barbera depleted his customers' accounts through the costs of his excessive trading, including mark-ups, mark-downs on short sales, and using margin in order to continue his trading when the customers refused to invest more money with him.[94] The customers did not authorize La

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[93] *See Guidelines*, at 8 (Principal Considerations No. 18). For example, RG testified that he received the new account documents with the majority of information already completed and he did not tell La Barbera or anyone else at Newport that "Aggressive Growth" and "Speculation" were his objectives. Likewise, DB testified to a moderate risk tolerance and denied telling La Barbera that he wanted to speculate despite his new account forms indicating "Aggressive Growth" and "Speculation."

[94] La Barbera contends that two of the customers "opted to let the strategy continue using margin rather than new money." We reject La Barbera's misleading characterization and give it no mitigative weight. The weight of the evidence shows that La Barbera used margin as a means to continue to churn RG's account when he refused to invest more money with him. RG testified that he did not speak with anyone at Newport about using margin in his account. And RG was unaware that La Barbera was using margin to continue to trade in his account until he received an account statement after-the-fact showing a margin interest charge. It appears from CA's testimony that La Barbera did discuss using margin after CA refused to invest more money. CA, however, was not focused on his Newport account due to personal problems and was unaware of

[Footnote continued on next page]

Barbera to deplete their accounts in this manner. In fact, the evidence shows that the customers had little to no understanding of mark-ups or mark-downs and were unaware that they were paying them.[95] Rather, La Barbera disingenuously represented to them that he only made commissions when the customers made money in an effort to conceal the actual costs they were paying in the form of mark-ups and mark-downs. La Barbera abused the trust of these customers who relied on him to trade in their best interest. *See Cody*, 2011 SEC LEXIS 1862, at *80 ("The Customers entrusted Cody with considerable discretion over their retirement savings and, based on Cody's assurances, believed that he was acting in their interest."); *Dep't of Enforcement v. Kelly*, Complaint No. E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *31 (FINRA NAC Dec. 16, 2008) ("GM was not a sophisticated investor, and because of his limited investment experience, he relied heavily on Kelly."). As customer RG testified, he placed his trust in La Barbera who had more than 20 years of investing experience and therefore faithfully followed his recommendations.

La Barbera also "breached an important duty that is fundamental to the relationship between" a registered representative and his customers when he recommended unsuitable exchange-traded products for the accounts of two retail customers. *See Brookstone*, 2015 FINRA Discip. LEXIS 3, at *128; *see also Stephen W. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *47 (FINRA NAC Dec. 28, 2011) ("Wilson's unsuitable recommendations were in serious breach of his duty to his customers."). La Barbera had no understanding of the potential risks inherent in his recommendations of these products and made his recommendations without any apparent concern for his customers. *See Wilson*, 2011 FINRA Discip. LEXIS *47. For example, La Barbera recommended that customer DB, who was a financially inexperienced customer in his 60s, concentrate 70 percent of his Newport portfolio in one speculative security, VXX. This concentration created a substantial risk that DB could lose virtually all of his account balance. La Barbera's lack of understanding of these products for retail investors also is reflected in the length of time the ETFs were held in customer DR's account. La Barbera's unsuitable recommendations were at least reckless.[96] *See, e.g.*, *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *131-32 ("Because Turbeville and Kline compounded the risks of their trading by concentrating the customers' accounts in inverse floaters and, for some customers, by using margin to support greater levels of trading, we conclude that they exhibited an intentional or reckless disregard of their suitability obligations.");

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the charges he was incurring at the time as a result of La Barbera's excessive trading and use of margin.

[95] For example, DB credibly testified that he believed that La Barbera was waiving trading fees as he tried to recoup trading losses and that La Barbera never told him what he was charging. RG similarly testified that he was unware that he was paying mark-ups and that La Barbera did not discuss these charges with him or explain them.

[96] *See Guidelines*, at 8 (Principal Considerations No. 13).

Dep't of Enforcement v. Siegel, Complaint No. C05020055, 2007 NASD Discip. LEXIS 20, at *48 (NASD NAC May 11, 2007) ("And while Siegel may have believed that World ET was a good company, he either failed to read the World securities subscription materials or saw how obviously inadequate such investments were for any customer and recommended the investment anyway."), *aff'd*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008), *aff'd in part*, 592 F.3d 147 (D.C. Cir. 2010). La Barbera's qualitatively unsuitable trading also directly resulted in injury to his customers and his monetary gain.[97]

La Barbera's "failure to appreciate the requirements of the securities business and the gravity of his misconduct and the harm it caused warrants significant sanctions." *See Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *48 (FINRA NAC Dec. 29, 2015), *aff'd*, 2016 SEC LEXIS 3769. Because the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants," barring La Barbera is necessary to prevent him from again inflicting harm upon customers as he did in this case. *See Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995). For La Barbera's egregious misconduct, we impose sanctions at the upper level of the Guidelines: a bar and $125,000 fine ($100,000 for excessive trading and churning, and $25,000 for unsuitable recommendations).[98]

3. Newport

We expel Newport for excessive trading, churning, qualitatively unsuitable trading, and failing to supervise. We have considered the Guidelines and find that Newport's misconduct is reflective of myriad aggravating factors without mitigation and therefore sufficiently egregious

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[97] *See Guidelines*, at 7-8 (Principal Considerations Nos. 11 & 16).

[98] As set forth in Part VIII.D, we also order Newport, Leone, and La Barbera to pay restitution to their customers. At oral argument, La Barbera's counsel argued that restitution and disgorgement are punitive under the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Kokesh* has no relevance to this appeal. In *Kokesh*, the Supreme Court considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts. *Id.* at 1639. Section 2462 establishes a five-year limitations period for a government "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." *Id.* The Court held that the federal statute of limitations applies to Commission disgorgement actions, on the ground that disgorgement is a "'penalty' within the meaning of [28 U.S.C.] § 2462." *Id.* at 1643. We find that *Kokesh* does not apply for several reasons. First, FINRA's restitution order is not governed by § 2462. *Kokesh* leaves intact Section 15A of the Exchange Act, which mandates FINRA to have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings, which includes orders of restitution. *See Ahmed*, 2017 SEC LEXIS 3078, at *89. Second, courts have ruled that § 2462 does not apply to SRO-imposed sanctions. *See Krull v. SEC*, 248 F.3d 907, 914 & n.9 (9th Cir. 2001). Moreover, FINRA is not ordering disgorgement in this case.

to expel the firm from FINRA membership. Newport's disciplinary history serves as an additional aggravating factor that further supports expelling the firm.[99] *See Ahmed*, 2017 SEC LEXIS 3078, at *83-84. We also fine Newport $403,000 for the totality of its misconduct.

The Principal Considerations relevant to all sanction determinations along with the Principal Considerations specific to the failure to supervise and systemic supervisory failure Guidelines further aggravate Newport's misconduct. We consider it highly aggravating that Newport abused the trust and confidence of its customers by engaging in a systematic pattern of misconduct that extended for more than four years.[100] Newport was complicit in the excessive trading and churning of 21 customers' accounts.[101] For the most part these were unsophisticated customers, some of whom were at or near retirement age, and the firm permitted the frequent concentration of customer accounts in a single security and the use of margin to leverage the accounts of many of these customers.[102] Devastating injuries to the customers resulted from Newport's misconduct, while the firm benefited financially from this trading.[103] Leone, for example, engaged in frequent in-and-out trading and had a practice of breaking transactions into multiple orders executed within minutes of each other thereby charging multiple commissions and firm activity fees for the trades. The firm was well aware of the excessive trading and churning in Leone's customer accounts, with annualized turnover rates as high as 151 and cost-to-equity ratios as high as 280 percent, yet the firm never restricted Leone's trading in these accounts even after they appeared on exception reports repeatedly.[104] The firm permitted La Barbera, Levy, and Costanzo to use riskless principal and agency trading in the same account, with high-cost trades executed on a riskless principal basis when these representatives charged the customers a mark-up or mark-down. As we discussed, Newport's trade confirmations for riskless principal trades did not show the total dollar amount of the mark-up or mark-down on the trade; thus inexperienced investors could not easily discern the costs of the trades.

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99 *See Guidelines*, at 7 (Principal Considerations No. 1).

100 *See Guidelines*, at 7 (Principal Considerations Nos. 8 & 9), 104, 105.

101 Newport is directly responsible for the excessive trading and churning of 21 customers' accounts. Because Enforcement presented insufficient evidence of the supervision of Bartelt, Newport failed to supervise only Leone, La Barbera, Levy, and Costanzo, which affected 18 of these customers.

102 *See id.* at 8 (Principal Considerations No. 18), 104, 105.

103 *See id.* at 7-8 (Principal Considerations No. 11 & 16).

104 *See id.* at 104, 105.

None of this conduct was unknown to the firm, and the firm allowed the violative conduct to occur.[105] The firm acted at least recklessly.[106]

Newport manifestly disregarded its supervisory responsibilities and ignored compelling red flags.[107] "Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and [FINRA] rules." *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *35 (Sept. 16, 2011). The firm never critically questioned the high trade activity, commissions, and mark-ups in the customers' accounts, despite the amount of total commissions or mark-ups charged relative to the total account value and the accounts' many appearances on exception reports. Newport readily approved customers' new account documentation that permitted these representatives to use margin to support their trading without probing whether such trading was suitable for customers. The firm also permitted La Barbera, Levy, and Costanzo to make unsuitable recommendations of exchange-traded products to unsuspecting retail customers. Newport, despite its awareness of the many red flags, did not limit the trading of any of these representatives because they were significant financial producers for the firm.

Newport has admitted that its "underlying conduct was egregious" and that the Guidelines "would permit expulsion of the firm." Nonetheless Newport argues that expulsion is impermissibly punitive. Expulsion of a firm such as this one is precisely the consequence necessary to protect the investing public and well-within FINRA's discretion under the Guidelines. Newport ignored over and over for years the glaring red flags that enabled Leone, La Barbera, and the Defaulting Respondents to engage in securities fraud by churning vulnerable customers' accounts that enriched the firm and these individual respondents and caused real and substantial injury to the affected customers.

Although Newport is no longer in business,[108] a number of Newport representatives have subsequently associated with another member firm, Firm 2. Thus, Enforcement argues in favor of expulsion because it would trigger the tape recording of conversations at Firm 2. Newport, in response, contends that the expulsion is an "undue burden on competition" because Firm 2 would be required to tape "all of its calls or fire half the Newport brokers and staff that it hired."

FINRA Rule 3170 is known as the "Taping Rule." The collateral application of the Taping Rule is not relevant to a determination of sanctions. This rule requires a firm to establish, enforce, and maintain special written procedures supervising the telemarketing activities of all of its registered persons, including the tape recording of conversations, if the firm has hired more than a specified percentage of registered persons from firms that meet the rule's definition of

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105 *See id.*

106 *See id.* at 8 (Principal Considerations No. 13).

107 *See id.* at 104, 105.

108 Newport filed a Form BDW on August 3, 2016.

"disciplined firm." Newport argues that the registered persons who associated with Firm 2 pose "no danger" because "they were not engaging in illegal activity at all." Newport misunderstands the purpose of the Taping Rule. In its approval order, the Commission emphasized that the rule is intended to enhance supervision at the new firm. "The monitoring of registered persons' telephone conversations will help to provide additional supervision of individuals who formerly worked at a disciplined firm where they were inadequately trained and supervised." *Order Granting Approval of Proposed Rule Change*, Exchange Act Release No. 39883, 1998 SEC LEXIS 713, at *23 (Apr. 17, 1998). The Commission later stressed that "[t]he taping of customer conversations, a commonly utilized practice within the securities industry, is designed to enhance customer protection." *Joseph Dillon & Co.*, 54 S.E.C. 960, 964 (2000). Indeed, the required "monitoring of registered persons' telephone conversations" serves "the important goals of protecting investors and the public interest." *Whitehall Wellington Invs., Inc.*, 55 S.E.C. 205, 209 n.7 (2001).

Newport argues that if Firm 2 fires its former Newport brokers, the customers of these brokers will have "no one to service their accounts." These customers, however, may continue to access the services of Firm 2 irrespective of whether the Taping Rule applies. *See Dillon*, 54 S.E.C. at 964 ("Dillon identifies no manner in which such a practice compromises a customer's ability to access services offered by the Firm, and we are unware of any."). In determining that the application of the Taping Rule was not a sanction, denial of membership, denial or limitation of access to services, or a bar, the Commission emphasized that employees of the firm subject to the Taping Rule "remain free to associate with other firms." *Id.* at 965. And here FINRA would not be requiring the taping of conversations by Firm 2 as a result of disciplinary proceedings and findings of violations against Firm 2. *See id.* at 964.

We reject Newport's argument that expelling the firm imposes an undue burden on competition. *See, e.g.*, *Wedbush Sec. Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *60 n.88 (Aug. 12, 2016) (finding that "neither the imposition of the suspension on Wedbush nor any other action of FINRA in this matter imposed an unnecessary or inappropriate burden on competition"), *appeal docketed*, No. 16-73284 (9th Cir. Oct. 10, 2016); *cf. Exchange Servs., Inc. v. SEC*, 797 F.2d 188, 191 (4th Cir. 1986) (stating that "any burden on competition created by the overly comprehensive exam is outweighed by the necessity for the public interest protection"). As we have found, Newport marginalized the supervision of its representatives when it ignored glaring red flags of unsuitable trading and churning and was complicit in the misconduct.

Newport argues that "substantial mitigating factors" weigh against expelling the firm. The record, however, reflects no evidence of mitigation in this case.

Newport contends that it substantially assisted FINRA in its investigation and took no steps to obstruct it. Newport's compliance with the information and document requests merely satisfies the firm's obligations under FINRA rules and does not amount to "substantial assistance" within the meaning of the Guidelines. *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *40-41 (Jan. 9, 2015) ("Associated persons do not provide substantial assistance by simply fulfilling their obligations to provide FINRA information pursuant to an investigation."), *aff'd*, 641 F. App'x 27 (2d Cir. 2016); *Phillipe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 & n.22 (Nov. 8, 2006)

(explaining that respondent's cooperation in the investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance).

We also consider Newport's claim that it accepts responsibility for its misconduct. While we acknowledge that Newport's counsel at oral argument represented that the firm is no longer contesting liability, any fines, or the order of restitution, Newport's post-hearing admission of liability and acquiescence to certain sanctions is not mitigative. Acceptance of responsibility is mitigating "when it occurs prior to detection and intervention by . . . a regulator." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *28 (Feb. 20, 2014) (internal quotation marks omitted); *Guidelines*, at 7.

Similarly, Newport argues that it took corrective action by hiring a new compliance officer and adding surveillance software and exception reports. The firm cites no supporting evidence that these measures were implemented prior to FINRA's investigation and therefore warrant no mitigative value.[109] Further, the firm had surveillance tools at its disposal to detect the violative trading done by these representatives and either did not use them or ignored the glaringly obvious red flags signaled by them.

We reject Newport's argument that it is mitigating that it "tried very hard to settle this disciplinary proceeding, and made very substantial offers that included restitution and a substantial fine." Settlement negotiations generally are not relevant to disciplinary proceedings. *See Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 n.9 (FINRA NAC Mar. 7, 2008); *see, e.g.*, FINRA Rule 9216(a)(4) (stating that a rejected Acceptance Waiver and Consent "may not be introduced into evidence in connection with the determination of the issues set forth in any complaint"); FINRA Rule 9270(h) (stating that rejected offers and proposed orders of acceptance do not constitute a part of the record "in any proceeding against the [r]espondent making the offer"); FINRA Rule 9270(j) (stating that rejected offers of settlement "may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint"). Regardless, the NAC "has an independent obligation to determine sanctions based on the evidence in the record, not on how far alleged settlement negotiations have proceeded prior to the issuance of the complaint." *Paratore*, 2008 FINRA Discip. LEXIS 1, at *13 n.9.

Newport claims that because it was in business for 30 years and employed "thousands of brokers," it should not be expelled "based on the imputed conduct of five brokers." Neither the

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[109] *See Guidelines*, at 7 (Principal Considerations No. 3). To that same end, Newport asserts that it terminated Leone, La Barbera, the Defaulting Respondents, Arena, Luckey, the firm's CCO, DS, and its CEO, KM. The evidence does not support Newport's assertion. The Central Registration Depository reflects that Leone, La Barbera, the Defaulting Respondents, Arena, Luckey, and DS all left Newport's employment voluntarily and that KM's position was "eliminated."

lengthy duration of a firm's operations nor the claimed employment of numerous brokers insulate the firm from meaningful sanctions resulting from its egregious misconduct in this case.

Newport claims that FINRA has singled it out and subjected it to "disproportionately harsh treatment" because it was a "smaller, independent firm." There is nothing in the record, however, to support Newport's argument that the firm was discriminated against in any way.[110] Rather, Newport's culpability rests on its active complicity in the misconduct as well as the high-reaching supervisory failures that permitted the abhorrent sales practice violations to recur for years and impact more than a score of its customers. We reject the firm's argument. *See N. Woodward Fin. Corp.*, 2008 FINRA Discip. LEXIS 47, at *21 (rejecting respondents' unfounded claim of "specific bias against small firms"); *cf. William J. Haberman*, 53 S.E.C. 1024, 1032 (1998) (rejecting applicant's claim of bias against small firms where he offered no evidence in support); *First Colorado Fin. Servs. Co.*, 53 S.E.C. 843, 852 (1998) (rejecting claim of "unfair treatment of small firms" where respondents identified no specific instances of bias and record contained no evidence of bias).

Relying on *CapWest Sec., Inc.*, 2013 FINRA Discip, LEXIS 4, at *30 n.24, Newport argues that because the firm was already out of business when the Hearing Panel ordered the expulsion, there is no remedial purpose in the order.[111] We disagree. Appropriate sanctions are dependent upon the specific facts and circumstances of each individual case, and the characteristics of Newport's misconduct are central to the remedial justification of the expulsion.[112] *See McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005); *Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *57 (FINRA NAC July 21, 2014), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015).

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[110] Newport argues that the Hearing Panel erred by not considering whether a sanction less onerous than expulsion would protect investors. FINRA, however, is not required to "choose the least onerous of the sanctions" or "state why a lesser sanction would be insufficient." *See PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009).

[111] Newport's representations about the status of the firm going forward were inconsistent throughout this appeal. In its opening appellate brief, Newport depicted itself as a going concern that "is presently poised to move forward in a positive fashion." In its reply brief and during oral argument, Newport represented that the firm was out of business with no plans to return.

[112] We have consulted with the Guidelines in "determining appropriate remedial sanctions" and to "provide direction . . . in imposing sanctions consistently and fairly." *Guidelines*, at 1. The Guidelines' recommended sanctions "reflect the seriousness of the misconduct," and are "tailored to address the misconduct involved in each particular case." The Guidelines relevant to Newport's misconduct (excessive trading, churning, unsuitable recommendations, systemic supervisory failures) support expelling the firm.

Unlike the violations sanctioned in *CapWest*, Newport's misconduct was egregious, without mitigation, and caused wide-spread harm to many unsophisticated and vulnerable customers, which directly resulted in financial gain to the firm. Newport's systemic supervisory failures are at the heart of the firm's rule violations. "Because proper supervision serves such an important role in protecting investors, egregious violations of supervisory rules often warrant the most severe sanctions." *Murphy*, 2013 SEC LEXIS 1933, at *112.[113] An expulsion serves the remedial purpose of protecting investors who may be harmed by similar misconduct in the future if the firm was eligible for membership and deterring other firms from engaging in similar misconduct. *See PAZ*, 566 F.3d at 1175-76 (upholding the "findings regarding the protective interests to be served" by firm's expulsion); *McCarthy* 406 F.3d at 189 ("Although 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.").[114]

Based on the foregoing aggravating factors, and lack of mitigation, we agree with the Hearing Panel that decisive action is necessary in order to protect the investing public from Newport's flagrant disregard of its regulatory responsibilities to its customers. *See McCarthy*, 406 F.3d at 188 ("[T]he purpose of expulsion or suspension from trading is to protect investors, not to penalize brokers."); *see also Mission*, 2010 SEC LEXIS 4053, at 53-54 ("Applicants' demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions. 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.'"); *Dist. Bus. Conduct Comm. v. Prime Investors, Inc.*, Complaint No. C04930065, 1995 NASD Discip. LEXIS 219, at *52 (NASD NBCC Sept. 11, 1995) ("We believe that these respondents have demonstrated a serious lack of understanding of federal securities laws, and that public investors may be harmed by similar misconduct in the future if . . . the firm [is not] expelled."), *aff'd*, 53 S.E.C. at 1. Accordingly, we expel Newport and fine it $403,000 ($220,000 for excessive trading and churning, $110,000 for unsuitable recommendations, and $73,000 for failure to supervise).

D. Orders of Restitution

We also determine that restitution is an appropriate remedy in this case. Restitution may be appropriate when an "identifiable person" otherwise would unjustly suffer "quantifiable loss

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[113] We note that expelling a firm that previously had its FINRA membership cancelled is not without precedent. *See, e.g.*, *Fox Fin. Mgmt.*, 2017 FINRA Discip. LEXIS 3, at *1-2, 31-32.

[114] Newport is incorrect that we are precluded from considering general deterrence as a part of the overall rationale for the expulsion because the Hearing Panel made no express finding on the issue. Our review of Hearing Panel decisions is de novo, and accordingly, we may "affirm, modify, reverse, increase, or reduce any sanction." FINRA Rule 9348. We consider the deterrent effect that a sanction may have on future conduct of the offending respondent and others as part of our overall sanctions analysis. *See McCarthy*, 406 F.3d at 190.

proximately caused by a respondent's misconduct."[115] Although the Commission and courts have not adopted a single approach to proximate causation, we agree with the Hearing Panel's determination that the losses suffered by the highlighted customers in the form of the full amount of the costs imposed on the customers were the foreseeable, direct, and proximate result of Newport and its five representatives excessively trading the customers' accounts.[116] *See Dep't of Enforcement v. McGee*, Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *79 (FINRA NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *appeal docketed*, No. 17-1240 (2d Cir. Apr. 26, 2017).

Leone argues that restitution is unwarranted because the customers did not object to the trades and, therefore, "ratified all of the activity in their accounts." Leone is incorrect both factually and legally. The record shows that several of Leone's customers attempted to contact him to complain about the level of trading in and fees charged to their accounts, but he evaded or ignored them. Further, the Commission rejected a similar argument that customers who received monthly statements and other notices reflecting unauthorized trades, but did not complain, ratified the trades. *Calabro*, 2015 SEC LEXIS 2175, at *24-25 & n.28.

We order Leone and La Barbera to pay restitution, jointly and severally, with Newport, to their customers in the amounts set forth in Addendum A to this decision plus prejudgment interest.[117] *Cf. SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996) (permitting joint and several liability for securities violations). We further order that Leone, La Barbera, and Newport make full restitution to their customers before paying the fines. We also affirm the Hearing Panel's order requiring Newport, jointly and severally with the Defaulting Respondents, to pay restitution to the 10 customers of the Defaulting Respondents in the amounts set forth in Addendum A.

E. Imposition of Joint and Several Hearing Costs

The Hearing Panel ordered Newport, Leone, and La Barbera jointly and severally liable for $40,353.38 in hearing costs, which represents the cost of the hearing transcript and a $750 administrative fee. La Barbera argues against holding him jointly and severally liable for these costs. His argument is centered on the Hearing Officer's denial of a motion to sever the claims

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115 *Guidelines*, at 4 (General Principles No. 5).

116 We, like the Hearing Panel, do not order restitution to customers BS and DR who each settled claims against his Newport representative and the firm.

117 Prejudgment interest shall be paid at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *Guidelines*, at 11; *see McGee*, 2016 FINRA Discip. LEXIS 33 at *80. Prejudgment interest will begin to accrue as of May 31, 2013, which is the end of the relevant time period in this case, until paid in full. Where customers cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed property, or abandoned property fund for the states of the customers' last known residences.

against La Barbera, Levy, and Costanzo from those against the other respondents charged in the complaint. We concur with the Hearing Panel that a joint and several assessment of the costs in this case is fair and appropriate.

FINRA Rule 8330 provides that members and associated persons "disciplined pursuant to [FINRA] Rule 8310 shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances." As the NAC previously has explained, the rule's "fair and appropriate language provides FINRA adjudicators with broad discretion to impose costs in disciplinary proceedings." *Dep't of Enforcement v. Murray*, Complaint No. 2008016437801, 2013 FINRA Discip. LEXIS 33, at *7 (FINRA NAC Dec. 17, 2013) (internal quotation marks omitted); *see also Scholander*, 2016 SEC LEXIS 1209, at *44 n.68 (upholding FINRA's imposition of costs in disciplinary case against two respondents with each respondent ordered to pay half of the total costs); *John M. W. Crute*, 53 S.E.C. 1112, 1116 (1998) (upholding the imposition of costs under former Article IV, Section 2 of NASD's By-Laws), *aff'd*, 208 F.3d 1006 (5th Cir. 2000) (Table).

The Hearing Panel correctly found that La Barbera, along with Leone and Newport, violated FINRA's rules, and the Hearing Panel assessed an appropriate amount of hearing costs. None of the respondents prevailed in the disciplinary proceedings before the Hearing Panel, and thus, pursuant to FINRA Rule 8330, the respondents shall bear the costs. *See E. Magnus Oppenheim & Co.*, 58 S.E.C. 231, 243 (2005) ("NASD acted well within its discretion in assessing the costs following the decision.").

Moreover, in general, when there are multiple parties found liable for misconduct, responsibility for costs is imposed on them jointly and severally. *See Anderson v. Griffin*, 397 F.3d 515, 523 (7th Cir. 2005); *see also Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002) ("Joint and several liability for costs is the general rule unless equity otherwise dictates."). Joint and several liability expressly is permitted in cases involving violations of securities laws and FINRA rules. *See First Jersey*, 101 F.3d at 1476; *see, e.g.*, *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (affirming disgorgement order imposed jointly and severally against broker-dealer securities firm, its president, and its executive vice-president for violations of NASD rules when respondents "acted collectively in violating the association's rules and because of the close relationship among the three of them").

The Hearing Officer's denial of the severance motion does not provide a basis for departing from the general rule of imposing costs jointly and severally. FINRA Rule 9214(d) directs an adjudicator to consider three factors when determining whether to sever respondents from a disciplinary proceeding: (1) whether the same or similar evidence reasonably would be expected to be offered at each hearing; (2) whether severance would conserve time and resources of the parties; and (3) whether any unfair prejudice would be suffered if severance is denied. In denying severance, the Hearing Officer determined that all of the evidence of La Barbera's, Levy's, and Costanzo's excessive trading, churning, and qualitatively unsuitable trading would also have to be offered in a separate proceeding against Newport. Likewise, the moving respondents' activities formed the basis of the supervision allegations against Newport and the firm's supervisors. The Hearing Officer concluded that severance would have increased the time and resources the parties would have had to expend on the case. The Hearing Officer further determined that the moving respondents, including La Barbera, would not be unfairly prejudiced

if the Hearing Officer denied the request. Relying on Commission precedent, the Hearing Officer explained that, "the respondents in a multi-respondent case do not each have a right to a wholly independent trial in a proceeding that revolves entirely around him. Where common issues of fact and law are present, and where the decision maker is not a lay jury who might be prone to impute the wrongdoing of one respondent to another, then it is not prejudicial to hear the claims together in a single hearing." *See Richard C. Spangler Inc.*, 46 S.E.C. 238, 252 n.62 (1976). The record reflects that the Hearing Officer properly adjudged each respondent based on the evidence pertaining to that respondent. *See Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *69-70 (Feb. 20, 2007). We find no abuse of discretion in the Hearing Officer's ruling denying severance. *See Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *54 (FINRA NAC Feb. 24, 2011), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012).

La Barbera also argues that the denial of severance "forced" him to appear pro se during the hearing and that the Hearing Panel "failed to consider reasonable alternatives" such as directing Enforcement to put on its case against him before Leone or Newport.[118] Enforcement offered in opposing the motion to sever to discuss with the respondents and the Hearing Officer "the sequencing of witness testimony" to enable the respondents to avoid having to be present on all hearing days. Enforcement during a prehearing conference conveyed to La Barbera the expected order of witnesses and on which days they were expected to testify. The record shows that the hearing proceeded in a direct and orderly fashion. For example, the first five days of the hearing generally were devoted to receiving evidence from Leone and his customers. Nine other hearing days generally were devoted to receiving La Barbera's testimony and that of his

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[118] It is unclear why La Barbera could not have hired counsel to attend the hearing on the days when evidence pertaining to him was presented. He ultimately hired counsel to represent him at oral argument before the NAC Subcommittee. Regardless, the NAC has rejected and laid to rest a similar argument of a pro se respondent who claimed that "he was unable to participate meaningfully" in a disciplinary hearing "because he was required to appear without counsel." *Dep't of Enforcement v. Tucker*, Complaint No. 2007009981201, 2011 FINRA Discip. LEXIS 66, at *23-24 (FINRA NAC Oct. 4, 2011), *aff'd*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496 (Nov. 9, 2012). Although FINRA "permit[s] the participation of counsel," "there is no constitutional or statutory right to counsel in [FINRA] disciplinary proceedings." *Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 559 (1995), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996). That right "does not come into play until the initiation of criminal proceedings." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984).

Our review of the record reveals that La Barbera received fair process as required by the Exchange Act. Exchange Act § 15A(b)(8) requires FINRA to provide a fair procedure for disciplining its members and associated persons. Section 15A(h)(1) sets forth how this is achieved: by filing specific charges, notifying a respondent of those charges, giving him a chance to defend himself, and by keeping a record of those proceedings. La Barbera was given appropriate opportunities to present evidence and arguments, to testify, and to cross-examine witnesses.

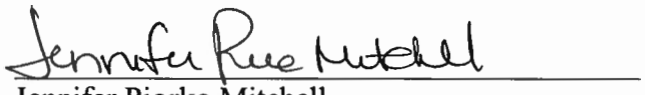
customers and the customers of his partners, Levy and Costanzo. The balance of the hearing focused largely on the supervision charges and receiving evidence related to Bartelt's misconduct.

We find no unfairness in the Hearing Panel's order to hold La Barbera jointly and severally liable for costs. *See, e.g.*, *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *153-54 (affirming Hearing Panel's order imposing hearing costs jointly and severally among four respondents).

IX. Conclusion

We affirm the Hearing Panel's findings that Newport, Leone, and La Barbera engaged in excessive trading and churned customers' accounts; Newport and La Barbera made unsuitable recommendations to customers; Leone provided inaccurate information to a customer by overstating the customer's account value; and Newport failed to supervise reasonably the activities of Leone, La Barbera, Levy, and Costanzo. Accordingly, and in summary for the foregoing violations, Newport is expelled and fined $403,000; Leone is barred and fined $185,000; and La Barbera is barred and fined $125,000. Newport shall pay to its customers, as set forth in Addendum A, restitution totaling $853,617.04. Leone shall pay to his customers, as set forth in Addendum A, jointly and severally with Newport, restitution totaling $325,853. La Barbera shall pay to his customers, as set forth in Addendum A, jointly and severally with Newport, restitution totaling $86,940.35. We further order that the respondents make full restitution to their customers before paying the fines. We affirm the Hearing Panel's order that Newport, Leone, and La Barbera pay, jointly and severally, hearing costs totaling $40,353.38, and we impose appeal costs, jointly and severally, of $1,680.42. The expulsion and bars are effective upon service of this decision.

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

ADDENDUM A
Costs Restitution Schedule

Customer	Costs
Leone Customers	
CP	$4,757.09
DG	$76,309.07
JB	$49,113.46
LC	$67,149.01
MJ	$16,159.76
PH	$14,340.25
RR	$98,024.36
Leone Customer Total	**$325,853.00**
La Barbera Customers	
DB	$49,712.13
CA	$29,268.90
RG	$7,959.32
La Barbera Customer Total	**$86,940.35**
Levy Customers	
NK	$36,854.48
BNS	$30,969.99
JS	$57,827.04
Levy Customer Total	**$125,651.51**

Costanzo Customers

RS	$10,078.23
DS	$60,591.81
AB	$24,542.39
MZ	$19,629.09
Costanzo Customer Total	**$114,841.52**

Bartelt Customers

MG Individual Account	$10,314.51
MG IRA Account	$63,116.13
MG Trust Account	$63,568.98
LW	$11,696.21
LAC Individual Account	$ 5,719.96
LAC IRA Account	$45,914.87
Bartelt Customer Total	**$200,330.66**

Newport Combined Total	**$853,617.04**