NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

October 8, 2019

By email to: pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 19-27: Retrospective Rule Review

Dear Ms. Mitchell:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA")[1] I am writing in response to the request for comment by the Financial Industry Regulatory Authority ("FINRA") on *Regulatory Notice 19-27: Retrospective Rule Review* (the "Review").[2] NASAA commends FINRA for its engagement and efforts on issues related to protections for senior investors – an area in which FINRA and NASAA have been able to collaborate successfully. The Review represents another effort by FINRA to assure that this community-based issue benefits from a holistic, community-based approach.

The Review is intended to assess existing FINRA rules, processes and tools implemented to protect senior investors and address suspected financial exploitation of vulnerable populations. As part of the Review, FINRA has posed several questions as a way of obtaining input from external and internal stakeholders. From the information collected, FINRA will consider whether additional steps should be taken to further enable FINRA and broker-dealers to increase protections for senior investors. As noted in the Review, protecting senior investors is a priority for FINRA as it is for NASAA's members, who interact with senior investors on a regular basis. NASAA recognizes the need for a holistic, fulsome approach to the protection of senior investors that includes providing tools for regulators as well as firms. The Review should result in affirmation of rules and processes that are effective and in the identification of additional opportunities to increase protection. NASAA supports the Review generally and offers the

[1] Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] *See* Regulatory Notice 19-27: Retrospective Rule Review, FINRA (August 9, 2019) *available at* https://www.finra.org/rules-guidance/notices/19-27.

comments below in response to specific questions posed in the Review to assure any approach balances protection of senior investors with their right to autonomy and dignity absent a legal finding of incapacity.

FINRA Rule 2165

1. ***Should Rule 2165's safe harbor be extended to apply to transactions in securities, in addition to disbursements of funds and securities? If so, how should changes in security prices be addressed (e.g. where a hold is terminated: (i) by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction; or (ii) upon a determination that there is not financial exploitation)? Are there other implications of extending the safe harbor to transactions?***

On September 29, 2015, NASAA released its proposed Model Act to Protect Seniors and Vulnerable Adults (the "NASAA Model Act") for public comment. After reviewing multiple comments as well as FINRA's proposed Regulatory Notice 15-37[3] and making appropriate modifications to the proposed model, NASAA members voted to adopt the NASAA Model Act on January 22, 2016. Since that time, 24 jurisdictions have enacted legislation or regulations based on the NASAA Model Act.

The NASAA Model Act, like the FINRA rule, provides for a delay in disbursement, rather than a delay in transactions. The relevant provision in the NASAA Model Act requires that the requested transaction be processed and the proceeds be held pending further investigation by the firm and appropriate state agencies. NASAA decided on a delay in disbursement rather than disbursements and transactions for several reasons. First, limiting the delay to disbursements respects the rights of clients, regardless of age, to direct the management of their funds absent some legal determination of incapacity. Second, a delay in the transaction could be deemed inconsistent with best execution requirements. Third, allowing a delay in transactions could result in greater loss or gain on the account depending upon market volatility at the time, increasing potential litigation and reputational risk for the firm.

NASAA believes it found the correct balance in adopting a provision that focuses on a delay in disbursements rather than a hold on transactions. FINRA should not extend the safe harbor to transactions without clear empirical data reflecting the extent to which firms have used holds on disbursements and the extent to which the delay in disbursement has resulted in clear and significant harm to customers. Additionally, no modification should be made absent clarification of the extent to which any hold on a transaction could violate the best execution rule.[4] Any safe harbor provided should assure that the right of a client to have autonomy over their account remains in place absent a determination of incapacity by a qualified professional.

[3] FINRA Regulatory Notice 15-37, Financial Exploitation of Seniors and Other Vulnerable Adults resulted in the adoption of FINRA Rule 2165 and 4512, which are the subject of the retrospective Review.

[4] *See* FINRA Rule 5310.

Once empirical data is collected and analyzed by FINRA, FINRA would be in a better position to ascertain whether the safe harbor should be extended. Should FINRA decide to extend the safe harbor to transactions in securities, NASAA believes the potential harm to customers should be identified particularly as it relates to changes in prices and any harm resulting from a hold on transactions should be addressed by FINRA in any subsequent rulemaking. (For example, FINRA might require firms to mitigate the harm if a transaction was held but no actual risk of financial exploitation was substantiated.)

2. ***Should Rule 2165's safe harbor be extended to apply where there is a reasonable belief that the customer has an impairment that renders the individual unable to protect his or her own interests (e.g., a cognitive impairment or diminished capacity), irrespective of whether there is evidence that the customer may be the victim of financial exploitation by a third party? What burdens would be placed on member firms and their registered persons if the safe harbor were extended in this way?***

NASAA does not believe it would be appropriate to extend the safe harbor under this instance. Preserving the respect, autonomy and dignity of an adult absent a legal finding of incapacity is at the core of adult protection principles (and recognized as a basic human right under the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948).[5] Absent a legal determination of incapacity through a formal proceeding or doctor's determination, a decision to delay a transaction or disbursement represents little more than the exercise of the agent's judgment over that of the customer and constitutes an exercise of discretion without authority. It is the role of the agent to know their customer and, if they see red flags, notify a trusted third-party contact of their concerns. But they should not be substituting their judgment simply because someone wants to make a bad decision and is older. Further, many apparent forms of cognitive impairment are short term issues possibly related to a treatable medical condition or personal situation causing short term stress for the customer. Firms are not equipped to address these issues and their customers would be best served if the firms get the matter into the hands of appropriate professionals, including a local adult protective services agency. The agent should evaluate the request based on typical financial principles and not the age of the customer when the request appears perfectly legitimate and does not involve signs of financial exploitation. (For example, if an 85-year-old customer who had never shown signs of cognitive impairment now appears a little confused and indicates they want to liquidate $10,000 in stock to make a donation to a church they are known to frequent, should the firm be able to stop that transaction based solely on these facts? Is the answer different if the client is 40 years old? Do investors have less say over their money the older they get?)

3. ***Should FINRA extend the temporary hold period in the rule or create a different mechanism to obtain an extension? If so, for how long? How frequently has your firm placed a temporary hold pursuant to Rule 2165 and what has been the duration of any holds? When a hold was placed, did the firm's internal review find support for the reasonable belief of financial exploitation that prompted placing the hold?***

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[5] *See* United Nations General Assembly Resolution 217A (1948), *available at* https://undocs.org/en/A/RES/217(III).

As noted, NASAA believes it would be important for FINRA to have empirical data from firms supporting the need for such an extension, including some idea of how often the hold has been used and the average hold period. The FINRA rule mirrors the NASAA Model Act which is designed to get the information into the hands of state regulatory and adult protective services agencies who can provide for the extension of the hold, as necessary. Comments received by NASAA during the public comment period before final adoption of the NASAA Model Act noted some of the harm that could come to customers when there are lengthy hold periods, such as inability to pay bills, bounced checks, and inability to obtain medical care. Indeed, one of the first things older adults do when their money gets tight is to start splitting prescribed medications or to stop taking prescribed medications altogether. Consumer advocates expressed clear concern to NASAA over any extended delay in disbursements of funds. The current 25-business day hold period recognizes the urgency of conducting investigations in this context and provides the added safety valve of going to a court to obtain an extension of that period. The requirement to go to a court to extend the time period provides the affected customer the opportunity to object and explain any unintended hardship they are experiencing during the period of delay – an important recognition of the need to protect all needs of the customer. NASAA believes that the total 25-business day period for delay represents the appropriate balance of protection and autonomy while limiting the possibility of unintended harm to the customer.

4. ***Has your firm identified any unintended consequences when placing or attempting to place a temporary hold on disbursement of funds or securities from an account under Rule 2165?***

NASAA encourages FINRA to obtain empirical data from firms related to the consequences of and extent to which firms have used a temporary hold on disbursement of funds before determining whether to make modifications. While anecdotal information may be informative, it would be insufficient to ascertain the true extent to which actual harm to the customer has occurred.

Rule 4512

5. ***To gain a better understanding of the effectiveness of the trusted contact provision in Rule 4512: what methods have firms used in seeking to obtain trusted contact person information? What methods have firms found most helpful in obtaining such information? What have been the response rates from new and existing customers in providing the trusted contact person information?***

6. ***Has your firm suspected financial exploitation of a customer, but not had the trusted contact person information? If so, what did your firm do, if anything? Has your firm sought assistance from trusted contact persons, and, if so, was this outreach constructive?***

Regarding Rule 4512, NASAA is pleased that many firms appear to have added the trusted contact information request to new account forms or seek the information from existing customers when they contact customers to confirm addresses, suitability information, and similar information. These are positive steps and could be supplemented by sending a form letter by regular mail and email indicating the firm does not have trusted contact information on file, much like is done where a firm has no beneficiary identified for a retirement account.

Additionally, if a firm sees red flags for financial exploitation but there is no trusted third-party contact on file, the firm should reach out to appropriate state or federal agencies for assistance. While presumably well-intentioned, NASAA members have observed some registered persons taking it upon themselves to contact family members of the customer in the absence of a previously designated trusted contact. This practice should not be allowed, particularly since it is not unusual for designated third party contacts to be non-family members; family members often are the exploiters. Moreover, making contact without permission of the customer could violate privacy laws and can be disruptive for the customer depending upon current family dynamics of which the firm and registered representative may not be aware. Not harming the customer and their relationship with family members needs to be a consideration in addition to the potential for privacy violations no matter how well intentioned the firm and its registered persons are.

Reporting Requirements

7. ***Should FINRA develop a dedicated Rule 2165-related problem code for use in meeting reporting requirements pursuant to FINRA Rule 4530?***

NASAA does not express an opinion on this question in the Review.

8. ***Is guidance needed to address when complaints related to placing a temporary hold pursuant to Rule 2165 should be reported on Forms U4 and U5? To what extent have registered persons received complaints in situations relating to disbursement holds, and have they been reportable complaints?***

NASAA believes that to the extent such complaints would otherwise be reportable on Forms U4 and U5, they should be reported. However, such a report could reference Rule 2165 if the subject of the complaint related to placing a temporary hold pursuant to the rule. If the hold was placed in good faith and in reliance upon Rule 2165 and is noted as such on the Form U4 or Form U5, regulators can properly assess the weight to be given the complaint.

Rule 3240

9. ***Has Rule 3240 been effective in addressing potential misconduct in lending arrangements between registered persons and their senior customers? Has Rule 3240 been effective more generally as an investor-protection measure?***

NASAA adopted a model broker-dealer conduct rule in 1983 which includes a series of clearly identified dishonest and unethical practices. As it relates to registered persons, the model rule states that it is a dishonest and unethical practice for "agents" to engage "in the practice of lending or borrowing money or securities from a customer…"[6] It is the view of NASAA that registered persons should not be permitted to borrow from clients, as this represents an unacceptable conflict of interest. In the senior investor context, borrowing from clients crosses an important boundary which can be misconstrued by a customer that may be isolated from family and friends and lead to elder financial exploitation.

10. Should the types of permissible lending arrangements in Rule 3240 be modified or should the rule cover a broader range of lending arrangements or relationships?

As noted above, the NASAA model rule on dishonest and unethical practices includes lending money or securities to customers as a dishonest and unethical practice. NASAA does not believe that registered persons should be permitted to obtain loans from customers particularly elderly customers or others who are vulnerable. This is especially true in the case of an elderly customer who may be socially isolated from family and friends and may develop a friendship with a registered person. Registered persons are increasingly blurring professional boundaries and befriending customers, often with the initial intent to "help" older customers who are isolated. But this can quickly turn into a scenario in which the customer wants to "help" the registered person by lending them money once the customer learns of some financial hardship being experienced by the registered representative, which loan later is characterized as a gift in order to avoid an assertion of engaging in a dishonest and unethical practice. To that end, making gifts to or receiving gifts from customers should be prohibited as well.

11. Should the rule address borrowing and lending arrangements that were entered into prior to the existence of the broker-customer relationship?

The potential for abuse or exploitation by the registered representative exists even if the customer is in the business of making loans and even if the loans predate the broker-customer relationship. For example, a registered person that owes money to a customer may be inclined to sell higher commission products in order to pay the loan back more quickly. Alternatively, a registered representative may be inclined to discount fees or commissions as repayment for a loan at the expense of the associated firm. NASAA continues to believe that its approach of labeling borrowing and lending as impermissible dishonest and unethical practices is the appropriate approach, particularly in the context of vulnerable adults.

12. Should Rule 3240 apply for a specified period following an individual ceasing to be a customer (colloquially, a cooling-off period) of the firm or where a customer is reassigned to a different registered representative?

As stated previously and in reliance on NASAA's model rule on dishonest or unethical business practices, NASAA believes the potential for abuse or exploitation by a registered representative is so great that loans from customers should be prohibited under all circumstances. A cooling off period would be insufficient to address the potential risks even where a customer is

[6] NASAA Model Rule: Dishonest or Unethical Business Practices of Broker-Dealers and Agents (May 23, 1983), *available at* https://s30730.pcdn.co/wp-content/uploads/2011/07/29-Dishonest_Practices_of_BD_or_Agent.83.pdf

reassigned to a different registered representative. Allowing lending relationships where a customer's account is reassigned could encourage the sorts of conflicted practices related to borrowing and lending that the NASAA model rule on dishonest or unethical conduct is intended to prevent.

Sanctions Guidelines

13. Should FINRA amend the Sanctions Guidelines to add as a principal consideration the fact that a victimized customer is a "specified adult" (i.e., a person 65 or older or a person 18 or older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests)?

NASAA supports the addition of a principal consideration along the lines of what has been suggested. Consideration of the age or vulnerability of a victim is something that states have had in place for a number of years.[7] For example, Maine law authorizes the Administrator, in the case of an administrative action, or the Court, in the case of a civil action, to double civil fines if a violation involves an investor 65 years of age or older.[8]

General Effectiveness, Challenges and Economic Impact

14. Has each rule (mentioned above) effectively addressed the problem(s) it was intended to mitigate? To what extent has the original purposes of, and the need for, a rule been affected by subsequent changes to the risk environment, the markets, the delivery of financial services, the applicable regulatory framework, or other considerations? Are there alternative ways to achieve the goals of a rule that FINRA should consider?

In NASAA's view, additional information and empirical data regarding the benefit and harm to customers is needed to appropriately assess the effectiveness of the rules and particularly Rule 2165 and 4512. FINRA would benefit from hearing directly from customers who have had holds placed on disbursements as well as those who have not provided trusted contact information to learn more about their experiences. The systems put in place to supervise the use of the tools made available under these rules should also be carefully tested by FINRA to determine whether registered persons are following all of the parameters established. NASAA believes changes to these rules are premature at this point.

NASAA has no specific comments with regard to questions 15 and 16 in the Review.

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[7] *See*, *e.g.*, Mo. Rev. Stat. §§ 409.6-604(d)(3)(B); Utah Code Ann. §§ 61-1-21(3)(b)(v) and (4)(b)(5); Utah Code Ann. § 61-1-20(4)(b); Utah Code Ann. § 61-1-31(7); Wis. Stat. Ann. § 551.508(1m)(a); Wis. Stat. §551.603(4); and Wis. Stat. Ann. § 551.604(4).

[8] See 32 M.R.S. §16604(4) and 32 M.R.S. §16603(2)(B)(5), respectively.

17. Should FINRA require additional disclosure or heightened supervision for any particular product or investment strategy that is marketed to senior investors?

FINRA should require additional disclosure and heightened supervision in reviewing the marketing and sale of certain products, including variable annuities and other complex and alternative products which are often illiquid and difficult for customers as well as registered persons to understand. Additionally, strategies such as rolling over IRAs or other retirement funds, options trading, and other strategies that are often inappropriate for senior investors require additional disclosure and supervision.

18. Can FINRA make rules, guidance or attendant administrative processes related to senior investors more efficient and effective? If so, how?

NASAA commends firms for efforts made to create specialized positions and/or units focused on addressing senior customers and other vulnerable adults. To the extent possible, it would be beneficial for all firms to identify an individual who is specifically responsible for dealing with issues related to senior customers. Having a specific individual responsible for addressing issues escalated from the branch offices would assure consistency in response and would allow that person to become fully educated on the reporting obligations and opportunities as well as community-based resources readily available to assist with handling the issue in each jurisdiction in which the firm operates and has a footprint.

19. What additional guidance, tools or resources would be helpful to firms or the investing public to address suspected financial exploitation and other circumstances of financial vulnerability for senior investors? Are there areas where FINRA or the FINRA Investor Education Foundation should conduct additional research or publish additional materials to promote greater awareness and education?

NASAA and its members have benefited from the ability to partner and collaborate with FINRA on education and policy development regarding financial exploitation of senior investors. NASAA recommends that FINRA continue to partner with stakeholders such as AARP, state securities regulators, the SEC, and state and county adult protective services agencies to increase outreach to senior investors and firms in order to increase referrals to appropriate state agencies. Firms should also be encouraged to share information with adult protective services in the course of any investigation that results from a referral. Additionally, it is recommended that FINRA gather more fulsome empirical data in order to analyze the scope of elder abuse and the effectiveness of the tools provided to date in order to determine what, if any, additional rules and resources are needed to address the problem in a way that protects the dignity and autonomy of the individual investor.

20. Are there other approaches, policies, rules, programs, or partnerships not discussed herein that are within FINRA's jurisdiction and mandate that would further benefit senior investors?

NASAA offers the following considerations in response to this question in the Review.

A key to successfully protecting vulnerable adults and senior investors often comes in the form of "knowing your network." It can make a world of difference to a customer if the firm knows of the community-based and state and provincial services that can assist the senior especially if the senior has already been victimized. Financial exploitation and capacity issues are very diverse and so this network will also be diverse; networks may include adult protective services agencies, community based programs that offer ride shares (perhaps to get to medical appointments or church), transitional housing in the event of a lack of safe home environment, legal services organizations specific to seniors, community events to address social isolation, or even sexual assault or domestic violence support services. Further, having branch offices be familiar with resources in the community in which they operate including specific law enforcement and state agency contacts can provide for a quick response to problems when they are identified by those on the ground.

FINRA noted that it is considering rulemaking to address the ability of registered persons to be named a beneficiary, executor, power of attorney, trustee or similar position of trust on the account of a non-family member customer. NASAA strongly recommends that these practices be prohibited entirely except in cases of a family member of a registered person. As noted previously, as senior investors in some communities become more isolated from family and friends, registered persons are increasingly filling the gap. While these relationships often start with good intent, they can quickly move into exploitive situations. (In NASAA members' experience, it appears most firms already prohibit these practices, so adoption of a FINRA rule to this effect would simply codify existing industry practices.) In some cases, because the practice is prohibited by the firm, the registered person may have a spouse or other family member assume the trusted role but continue to direct the manner in which the family member handles the position of trust. Accordingly, a total prohibition on the ability of the registered person, the registered person's immediate family members, or members of the registered person's household should be put in place. One example of how these positions of trust can be abused is described in the attached sentencing memorandum presented in the matter of State of Maine v. Robert Kenneth Lindell.

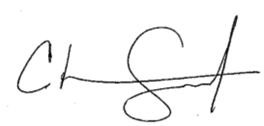
It is also worth noting that senior investors are often solicited by insurance producers who recommend the liquidation of securities products in order to effectuate the sale of insurance products, such as equity-indexed annuities. It is not unusual for the insurance producer to assist the customer in completing the liquidation of the securities product without the involvement of any securities registered person. FINRA should make it clear that only securities registered persons can recommend the liquidation of securities and any violation should be reported to the appropriate authorities.

Senior investors are also some of the most frequent visitors to local bank and credit union branches. As a result, they comprise the bulk of customers referred to registered persons in broker-dealer branch offices located at depository institutions. The advertising and supervision of these branches and their registered persons should be more closely monitored to ensure that the roles are clearly disclosed. Customers, particularly senior customers, must be told and helped to understand whether they are interacting with bank or credit union personnel, a broker-dealer agent, or an insurance producer. Disclosures must be absolutely clear that the product offered is a securities product offered by a broker-dealer and not the depository institution. Possible misleading practices which have been observed include the branch's use of a trade name that is similar to the depository institution's name, use of the trade name or the depository institution's name on the broker-dealer's account statements, not providing prominent disclosures regarding the entity through which the securities are being offered, and including employees of the depository institution known to and trusted by the senior customer in meetings with the customer to reinforce the validity of the products being sold. Further and clear distinctions between the depository institution and the broker-dealer needs to be required. Finally, FINRA should make it clear that any depository institution location from which a registered person operates must be identified as a branch of the broker-dealer and treated as such for purposes of audits and supervision by the broker-dealer.

In conclusion, NASAA applauds FINRA's ongoing efforts to protect senior investors and appreciates the opportunity to comment on the Review. We believe FINRA can take further steps as outlined above to assure appropriate protections are in place while respecting the financial independence of every investor.

If you have questions about these comments, please contact the undersigned (geroldc@dca.njoag.gov) or Michael Canning, NASAA's Director of Policy and Government Affairs (mc@nasaa.org).

Sincerely,



Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities

Attachment

STATE OF MAINE
PENOBSCOT, ss

UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-17-707

STATE OF MAINE

V.

ROBERT KENNETH LINDELL JR. (AKA R. KENNETH LINDELL OR R. KENNETH LINDELL JR.

) STATE'S SENTENCING MEMO

NOW COMES the State of Maine, by and through Assistant Attorney General Gregg D. Bernstein, and respectfully sets forth the State's sentencing recommendation of twenty-two (22) years with all but fifteen (15) years suspended, five years of probation, and $2,919,398 in restitution (for the benefit of the victims named in the Indictment).

The State's recommendation is based upon: the ages and physical and mental health of the three primary victims; the complexity and the value of the theft and fraud; Mr. Lindell's abuse of his positions of trust and authority; his past brokerage disciplinary history; other unrelated but similar fraud; failure to accept responsibility; and, what the evidence showed were multiple false statements he made during his testimony.

INTRODUCTION

After a jury trial Robert K. Lindell, a former State of Maine legislator and licensed Maine securities broker-dealer agent from coastal Maine, was convicted of theft, securities fraud, income tax evasion, and related income tax crimes—as a result of bilking two elderly widow clients, a disabled war veteran, related family members, and other beneficiaries out of cash and securities. Mr. Lindell accomplished this through the abuse of trust and authority placed in him to manage personal client securities and finances, along with the contents of an estate and two trusts through his role as a co-Personal Representative ("co-PR") of an estate and as trustee of two trusts.

Mr. Lindell engaged in the theft of more than $3.5 million dollars in his multi-year scheme. He used the money he stole to fund an extravagant lifestyle, which included expensive travel around this country and Europe, fine dining, shopping sprees, and the cash purchase and extensive renovation of a home in northern California wine country (which he then used to further enrich himself by taking out a $450,000 loan, using the home as collateral). See Exhibit 1, which sets forth the totality of Mr. Lindell's thefts from all sources.

Mr. Lindell's conduct highlights the risk that elderly, isolated, impaired, and trusting clients—and their families and heirs—find themselves in when confronted by an individual who will go to great lengths to engage in what the evidence at trial showed was a parasitic scheme of theft and fraud. Moreover, the trial evidence and materials discussed in this memorandum show Mr. Lindell's past is filled with additional similar conduct. Further, the trial evidence shows he testified falsely and blamed everyone but himself. All of these facts support the State's sentencing recommendation.

PROCEDURAL AND FACTUAL BACKGROUND

On March 1, 2017, Mr. Lindell was charged in a two count Indictment with one count of theft and one count of securities fraud. On July 26, 2017, the State obtained a three count Superseding Indictment, which added an additional theft count. On April 25, 2018, the State obtained a Second Superseding Indictment consisting of the same three counts plus additional income tax related counts. Jury selection took place on October 29, 2018. Trial began on October 30, 2018 and continued through November 7, 2018. The jury returned verdicts of guilty on all counts, as charged.

Trial Evidence

Mr. Lindell was a Maine licensed securities broker-dealer agent who resided and worked in Penobscot and Waldo Counties. He was very experienced in the insurance and securities industries. He had two long-time clients from whom he stole money and securities. Both were elderly widows: Phyllis Poor (of Belfast, Maine) and Gianna Lewis (of France). He also stole from Ms. Poor's disabled son, a Vietnam War veteran, Frederic J. Poor ("Frederic"), as well as assets set aside for his care.

a. Phyllis Poor

In or around the late 1990s or 2000 Phyllis Poor became one of Mr. Lindell's brokerage clients. Not long after she became a client Mr. Lindell engaged in grooming practices in an effort to obtain Ms. Poor's trust and access to her financial assets and estate planning affairs. As a licensed securities broker-dealer agent (and likely assisted by the cloak of being a Rotary member and state legislator), Mr. Lindell used predatory tactics to insert himself into Ms. Poor's personal and daily life in order to gain her trust. She was not close with her adult children, her husband had died in 1998, and she lived alone in rural Maine. He knew this and took advantage of this opportunity.

Mr. Lindell succeeded in getting Ms. Poor to place her faith and confidence in him, cultivating his relationship with her as much as possible. Beginning in the early 2000s he began meeting with Ms. Poor virtually every Wednesday at her home in Belfast (right after his weekly Rotary meetings). They had tea or lunch together at Ms. Poor's dining room table and discussed her securities and finances. Ms. Poor's wealth consisted of careful investments and her prudent management of her cash and securities. She did not outwardly appear like a millionaire, and lived a modest lifestyle. With direct access to Ms. Poor's securities and finances and the careful attention he paid to her, however, Mr. Lindell learned the details of her investment habits and wealth.

In August 2004, Mr. Lindell drove Ms. Poor (84 years old at the time) to an attorney's office at which Ms. Poor executed a power of attorney ("POA") and a trust document (both on the same date). In the POA Ms. Poor granted Mr. Lindell and her longtime friend, Barbara Gray, co-POA responsibilities. Ms. Gray testified at trial that she never exercised any authority under the POA and was not certain that she even knew of its existence. As for the trust, it was entitled the "Frederic J. Poor Trust" ("2004 FJP Trust"). Ms. Poor appointed Mr. Lindell as trustee and named Ms. Gray as successor trustee. Ms. Gray testified that she did not know of the existence of the 2004 FJP Trust and pointed out that her last name was misspelled in the section appointing her as successor trustee.

Frederic, now 70 years old, is one of Ms. Poor's four children. He is a disabled Vietnam War veteran and lives in an assisted living facility in Florida. The 2004 FJP Trust is a Maine-based trust designed to support Frederic when sufficient funds are not available through traditional sources.

Not long after Ms. Poor established the 2004 FJP Trust (and the POA), she executed a Last Will and Testament in 2005 in which she named the Defendant and Ms. Gray as co-PRs. Ms. Poor's will and the bequests she made were divided into thirds: one third to her grandchildren, one third for Frederic's benefit, and one third for charities and non-profit organizations. Her will established two testamentary trusts: one for her grandchildren and one for Frederic called the Frederic J. Poor Supplemental Needs Trust ("Supplemental Needs Trust," with a purpose virtually identical to the 2004 FJP Trust). The Supplemental Needs Trust, however, had as co-trustee Bar Harbor Trust Services, while the Defendant was the sole trustee of the 2004 FJP Trust; and, apparently, he was the only person other than Ms. Poor who knew of the existence of the 2004 FJP Trust (except perhaps the lawyer who drafted the trust document).

The Defendant used the relationship he had with Ms. Poor that he worked hard to develop, his authority under the POA, along with his status as trustee of the 2004 FJP Trust (particularly after Ms. Poor died), and his role as co-PR to loot her finances, estate, and assets in excess of $3.1 million. From 2010 through 2016, he committed theft regularly—often withdrawing cash, writing countless estate checks to himself or to his company RK Lindell & Co. (which he owned and ran himself) for phony management/estate/trustee fees (or simply writing checks with no memo lines). He frequently paid large personal expenses, including substantial credit card bills from money he placed in bank accounts in the name of the 2004 FJP Trust. He funded the 2004 FJP Trust with money and assets (e.g., cash, securities, an annuity, and an insurance policy) which were supposed to be used for Frederic's benefit. Furthermore, the Defendant purchased a home in northern California wine country (in Cloverdale, California), pretending it was an investment for the 2004 FJP Trust. He purchased and significantly renovated the home (for a total cost of approximately $900,000) for his personal and family use. Pictures of the renovated home are attached as Exhibit 2.

Mr. Lindell's thefts not only victimized Ms. Poor and Frederic, but also the other beneficiaries of Ms. Poor's generosity—her grandchildren and various charities and non-profit organizations who did not inherit the money and assets they should have because of Mr. Lindell's diversion of money away from the estate.

b. Gianna Lewis

Gianna Lewis was a long-time family friend of Mr. Lindell. She has known him perhaps since the day of his birth. Ms. Lewis and her late husband were close friends with Mr.

Lindell's parents (they often travelled together). He periodically visited Ms. Lewis in France over the years growing up, even getting engaged at her home.

Ms. Lewis' late husband trusted Mr. Lindell to manage US-based assets (here in Maine) Mr. Lewis set up for the benefit of his wife and their children. After Mr. Lewis died, Ms. Lewis continued to place her trust in Mr. Lindell, not only to manage these assets, but also to provide financial and investment advice and services. Unfortunately, Mr. Lindell was the only signatory on these Maine-based trust bank accounts.

As he did with Ms. Poor, from 2010 through early 2017, Mr. Lindell made numerous unauthorized withdrawals from Ms. Lewis' trust bank accounts and used her money to pay his personal and family expenses—with the theft exceeding $380,000. He accomplished this by writing checks to RK Lindell & Co., along with directly paying his or his family's bills (e.g., numerous credit cards and private high school tuition for one of his children).

Mr. Lindell tried to cover his tracks by comingling Ms. Poor's and Ms. Lewis' funds and transferring money between their bank accounts, using money from one victim to cover costs or transfers to the other victim (this was illustrated at trial when the State presented evidence of payments Mr. Lindell made to Ms. Lewis, which were shortly preceded by money he stole from Ms. Poor).

A Chronology of the Trial Evidence of the Defendant's Theft and Fraud

Mr. Lindell began stealing from Ms. Poor near the end of her life. Ms. Poor died at age 92 in June 2012. Beginning two years prior to her death when her health began to fail (from February 2010 through March 2012), he stole approximately $595,000 by engaging in securities fraud by diverting funds Ms. Poor entrusted to him for the purchase of various securities. On thirty-one (31) occasions over the course of approximately two years, Ms. Poor issued checks made payable to RK Lindell & Co., with Ms. Poor writing on the memo line the name of the security to be purchased. Instead of using the funds to purchase the specific security, he deposited the checks into his bank accounts and spent the money on himself and his family. On eleven (11) of these thirty-one (31) occasions, however, Mr. Lindell did purchase the securities identified in the memo lines, but did not use the money Ms. Poor gave to him—he had already spent that money on himself and his family; instead he used other funds (cash or margin) from Ms. Poor's brokerage account to make the purchases. The result was to charge Ms. Poor twice for these eleven (11) designated purchases (amounting to an additional $298,000 theft).

Mr. Lindell testified that Ms. Poor gave these funds to him (the thirty-one (31) checks) in a secretive manner (to make the checks seem less suspicious to the "spies" at the bank) in order to shore up the finances of his failing business, but his story kept changing. He first testified these thirty-one (31) checks were capital investments into his business. Then he testified they were gifts. Then he testified they were capital investments/infusions.

Mr. Lindell failed to explain how $595,000 of purported gifts/capital investments over the course of two years were insufficient to keep his essentially one-man shop afloat. Nor could he explain why a sophisticated and intelligent investor such as Ms. Poor would repeatedly give him money—either as gifts or capital investments—when he admittedly was losing money month after month and purportedly telling her of his regular losses.

Mr. Lindell further misappropriated funds from Ms. Poor before she died by paying himself fictitious POA fees and directly writing checks from her bank accounts (as POA) for his personal and family expenses. In fact, he testified that there were checks which he wrote himself as POA because Ms. Poor was <u>physically unable</u> to fill out and sign the checks herself.

When Ms. Poor died in 2012 she left an estate worth approximately $4.4 million after administration and taxes, along with additional non-estate assets worth approximately $1.1

million (a life insurance policy and an annuity). Although the Defendant and Ms. Gray were co-PRs, the Defendant handled all the day-to-day work of administrating Ms. Poor's estate, while Ms. Gray, who lived in Ohio, had limited involvement in estate-related activities; and, much if not all of the limited administrative work Ms. Gray did perform was per the Defendant's instructions.

In his capacity as co-PR of Ms. Poor's estate, the Defendant issued himself or his company checks from the estate accounts for i) fictitious fees and ii) checks with no description in the memo line of the checks. These checks totaled almost $500,000. In fact, at trial Mr. Lindell admitted that even after Ms. Poor's estate was effectively settled (by mid-2014), and the estate's funds were distributed, he kept writing himself or his company checks from the estate account, on a regular basis for the next couple of years, totaling approximately $231,000 (of the almost $500,000). He also diverted an additional approximately $267,000 from the estate to the 2004 FJP Trust between October 2012 and April 2013. In total, Mr. Lindell stole more than $760,000 from the estate.

In 2013, Mr. Lindell purchased the home in Cloverdale, California for $425,000 and then spent approximately $475,000 renovating it over the next year and a half. He purchased the home and renovated it with the money he stole in 2012 from the proceeds of a Midland National annuity and a Hartford life insurance policy, both of which he had sold to Ms. Poor several years prior—which she purchased for Frederic's benefit. Mr. Lindell moved himself and his family into the Cloverdale home in mid-2014. He claimed the home was an investment for the 2004 FJP Trust, acting as some sort of caretaker of a vineyard estate.

The evidence at trial showed Mr. Lindell's actions were all a charade. He concealed a large portion of the money he stole by depositing the funds into bank accounts in the name of the 2004 FJP Trust, which only he controlled. He did not disclose to Ms. Gray or anyone else that he opened these secret bank accounts or how he spent the money. None of the funds in these secret bank accounts were used for Frederic's benefit.

Ms. Gray also testified that Mr. Lindell directed her to liquidate securities in Frederic's name (totaling approximately $166,000) and to send the liquidated funds to him (Mr. Lindell) and she complied. Ms. Gray testified that she thought Mr. Lindell was going to deposit the funds into the testamentary Supplemental Needs Trust. Instead, he deposited the money into the 2004 FJP Trust—his personal hiding place—and spent the money.

At the same time, Mr. Lindell was raiding Ms. Poor's assets and money set aside for Frederic's benefit, her grandchildren, and charities and non-profits, he was stealing from Gianna Lewis. Ms. Lewis lives in France, where Mr. Lindell was born, and she has known him since he was a baby. She trusted him. See Exhibit 3, a statement from Ms. Lewis (in addition to her anticipated telephonic appearance expected at sentencing).

Mr. Lindell had direct access to Ms. Lewis' money because the funds were deposited in Maine bank accounts in the name of the Gianna Lewis Qualified Domestic Trust ("GLQDT"). Only Mr. Lindell had control of the GLQDT accounts. He used the same scheme to engage in theft from Ms. Lewis: he issued checks directly from the trust's Maine bank accounts to his company and to pay his personal credit card bills, withdrew cash, financed private high school tuition for one of his children, and paid for personal purchases at Macy's and Sam's Club, among other expenses.

In total, the Defendant stole approximately $382,000 from Ms. Lewis. At trial, he testified in sum and substance that much of the money he withdrew from Ms. Lewis' accounts (or which he transferred to his accounts by writing checks to his company) was part of an effort to assist Ms. Lewis with income tax evasion in France. Mr. Lindell testified that he brought Ms. Lewis large amounts of cash in order to help her evade French income tax, which Ms.

Lewis vehemently denied during her testimony. He backtracked on this assertion when the State cross-examined him on whether he was an accomplice to French tax evasion, participated in the federal crime of structuring, and failed to report bringing large amounts of cash into France.

In another example of the extent of the Defendant's theft and the means he used to perpetrate his scheme, the Defendant "resigned" as trustee of the 2004 FJP Trust in an effort to fraudulently obtain an $823,066 Midland National annuity payout that was designated for Frederic's benefit. Mr. Lindell testified that he resigned as trustee of the 2004 FJP Trust, appointed Ms. Gray, and then she later stepped down and reappointed him as trustee—all to satisfy Midland National's concerns of a conflict of interest (Midland initially declined to issue him the annuity payout, even in the name of the 2004 FJP Trust, because Mr. Lindell sold Ms. Poor the annuity).

Ms. Gray testified on her direct and rebuttal that she never took part in such a scheme and had no knowledge of what the Defendant did. She testified she did not know of the existence of the 2004 FJP Trust and had no knowledge of the theft, fraud, and machinations in which the Defendant engaged—and the documentary evidence presented at trial supported her testimony.

At trial, Mr. Lindell repeatedly asserted that he had the authority to spend Ms. Poor's and Ms. Lewis' money in the way that he did. Of course, the POA, will, and trust documents did not gift, bequeath, or permit him to spend money belonging to Ms. Poor, her estate, Frederic, the 2004 FJP Trust, or the GLQDT for his personal or family use—nor could these documents be read in any reasonable manner to support such a claim. He also testified that he spent money, liquidated securities, purchased the Cloverdale home, "sold" to the 2004 FJP

Trust artwork, among other things, all for the benefit of the 2004 FJP Trust. The evidence at trial, however, showed he acted for his own benefit and desires.

In addition to committing theft and securities fraud Mr. Lindell failed to pay income tax on the money he misappropriated for his personal use—this includes even the money he falsely labelled on memo lines in checks as fees, as well as money he earned by billing Bar Harbor Bank and Trust for fees related to the two testamentary trusts. He also stole state and federal income tax refunds because he failed to report all of the income he obtained under his fraudulent scheme—and therefore purported to qualify for thousands of dollars in income tax refunds.

Mr. Lindell's complete scheme of theft and fraud ran from 2010 through early 2017. In July 2014, he moved to the Cloverdale home. He continued to maintain a residence in Frankfort, Maine, through at least 2017 and filed part-time resident Maine income tax returns for 2014 and 2015.[1] He also lived in Maine from July 1, 2015, through August 31, 2015. Before Mr. Lindell moved to California, he had already stolen approximately \$2.8 million from the Poor family assets and had stolen approximately \$197,000 of the \$382,000 theft from Ms. Lewis. See Exhibit 4, which shows a timeline of his thefts and the location of his residence and the bank accounts from which he stole.

Mr. Lindell continued to steal from the Poor family assets and Ms. Lewis' assets, and commit income tax crimes, after he moved to California, by withdrawing or spending money from the Maine-based bank accounts by check and electronically, and submitting false income tax returns to Maine Revenue Services located in Augusta. Signature cards for each bank

[1] The Defendant paid his reported 2014 tax liability on 10/15/2015 with a check drawn on a bank account with a Frankfort, Maine address (he reported no tax liability for 2015).

account from which he stole show the legal and actual addresses for the banks accounts were located in Maine.

In total, Mr. Lindell: i) stole in excess of $3.5 million dollars from Ms. Poor, her estate (and related beneficiaries), Frederic, and Ms. Lewis; ii) stole almost $10,000 in federal and state income tax refunds; and, iii) evaded almost $200,000 in Maine income tax.

SENTENCING ANALYSIS

Mr. Lindell was charged with offenses which occurred from early 2010 through early 2017. He committed these crimes pursuant to a common plan and scheme. His crimes required planning and a great deal of effort to pull off and to keep secret. Once the veil had been lifted his crimes were obvious (albeit complicated to track and reconstruct), but absent this piercing Mr. Lindell was successful in keeping his actions under wraps for a long time. In the end, the evidence showed he acted as a result of greed—utilizing his position of trust and authority to his full advantage.

Hewey Analysis

Mr. Lindell was found guilty of all counts in the Indictment as charged, two of which were Class B theft offenses, and numerous Class C offenses (securities fraud and income tax evasion) and Class D income tax offenses. Since this case involves multiple crimes, this Honorable Court must craft an aggregate sentence which selects the most serious or representative count(s) and must engage in a *Hewey* analysis for each selected count. *State v. Downs*, 2009 ME 3, ¶14, 962 A.2d 950, 954-955 (Me. 2009). Here, the State is seeking the imposition of consecutive sentences. In order to impose consecutive sentences, this Honorable Court must state its reasons for doing so on the record or in the sentences. 17-A M.R.S. § 1256(4). This Honorable Court may impose consecutive sentences when "the seriousness of the criminal conduct involved in either a single criminal episode or in multiple criminal episodes…require a sentence of imprisonment in excess of the maximum available for the most serious offense." 17-A M.R.S. § 1256(2)(D).

The State recommends that the two theft counts and two income tax evasion counts be used for the *Hewey* Analysis and for the basis of consecutive sentencing.[2] The remaining counts should be made concurrent.

a. Basic Sentence

The first step in the sentencing process is to determine the "basic sentence." In doing so, this Honorable Court must consider the particular nature and seriousness of the offense(s) as committed by Mr. Lindell. 17-A M.R.S.A. § 1252-C (1).

i. Thefts

Mr. Lindell stole more than 300 times the Class B theft threshold of $10,001 from Ms. Poor, her estate and its beneficiaries, and Frederic. He stole more than 38 times the Class B threshold from Ms. Lewis. The trial evidence showed he did so through an intricate web of deception utilizing his status as a securities broker-dealer agent, POA, co-PR, and trustee—requiring him to act in good faith and/or in a fiduciary capacity. Moreover, the evidence at trial illustrated that if Ms. Lewis was no longer alive providing at least some limiting pressure on Mr. Lindell (i.e., if he stole too much she would have noticed) he likely would have stolen more money from her because that was the nature of his scheme (Mr. Lindell tried hard, though; Ms. Lewis testified at trial that when she questioned Mr. Lindell about some of her account statements he ripped them up and told her not to worry about them).

[2] The Securities Fraud count likely cannot be used for consecutive sentencing purposes since the offense was used to facilitate the Count 1 theft. See 17-A M.R.S. § 3 (B).

The trial evidence showed Mr. Lindell utterly abused the trust Ms. Poor and Ms. Lewis placed in him. These two elderly women were differently situated, but were equally isolated and vulnerable. Ms. Poor was isolated by the lack of close trusted family members and was in failing health when Mr. Lindell began stealing from her in earnest. Ms. Lewis has a close family, but speaks limited English and relied on Mr. Lindell to manage her money more than 3000 miles away.

Mr. Lindell's actions were part of a multi-year course of conduct, were well planned, and were detailed and intricate. Every theft is different, but it is hard to imagine more serious thefts which abuse trust and authority. Moreover, Mr. Lindell utilized secret bank accounts, checks and electronic transfers only he controlled, and misled his co-PR and several financial institutions. He also stole from a disabled war veteran who has no concept of finances and thus was a "perfect" victim for Mr. Lindell. And, by stealing from Ms. Poor's estate Mr. Lindell stole from her grandchildren, charities, and non-profits.

Given Mr. Lindell's abuse of trust and authority, the intricate and long-term nature of his theft, and the manner in which he used the 2004 FJP as his secret repository, the appropriate basic sentence for the Class B theft related to Ms. Poor (Count 1) is at least 9 years. A similar analysis applies regarding Mr. Lindell's theft from Ms. Lewis and her assets (Count 2). His task with Ms. Lewis' money was less difficult since there were no potential checks to his actions (such as Bar Harbor Bank and Trust, Ms. Gray, and Midland National—although even these checks on him did not stop his thefts). Mr. Lindell's actions in stealing from Ms. Lewis, however, were no less serious. And, while he stole less money from Ms. Lewis than he did from Ms. Poor that is only because there was less to steal—his goal and tactics were the same. A basic sentence of 6 years is appropriate for this Class B theft.

ii. *Income Tax Evasion*

Mr. Lindell engaged in five years of income tax evasion. While it is perhaps not surprising he failed to report as income the money he stole, the evidence at trial showed that he failed to report money he paid himself which he designated as estate/trustee/management fees and even failed to report the money Bar Harbor Bank and Trust paid him for the arguably legitimate work he did on behalf of the testamentary trusts established by Ms. Poor's will. There are a number of ways one can evade the payment of income taxes, such as simply failing to report income, keeping a double set of books, making false entries or alterations in bookkeeping records, destroying documents, concealing sources of income, handling one's affairs to avoid making records of transactions, or other conduct likely to mislead or conceal income. See *Spies v. United States*, 317 U.S. 492, 499 (1943) (citing examples of affirmative acts of income tax evasion, even when a taxpayer fails to file a return at all).

In this case, Mr. Lindell used secret bank accounts and assets only he controlled to conceal multiple sources of income, and arranged these sources of income to have as little of a trace to him as possible. He used the money he stole to finance a lifestyle filled with travel and dining, paying massive credit card bills, and to buy the Cloverdale home, all while providing a cloak of propriety to his wife, Ms. Gray, and all other involved parties. Utilizing Count 8 (for tax year 2013, the year in which Mr. Lindell evaded over $97,000 in income tax, almost 50 times the Class C income tax evasion threshold of $2,001), the appropriate basic sentence for such conduct is the upper tier for a Class C offense, 3 years. Utilizing a similar analysis for Count 7 (income tax evasion) regarding tax year 2012 in which Mr. Lindell evaded over $47,000 in Maine income tax, the appropriate basic sentence of two years is appropriate.

b. Maximum Sentence

The next step is to determine "the maximum period of imprisonment. . . by considering all relevant sentencing factors, aggravating and mitigating, appropriate to that case." §1252-C (2).

It is in the second step wherein all of Mr. Lindell's conduct and characteristics can be properly placed into context. For this step, in addition to the extent and breadth of Mr. Lindell's actions, along with his failure to accept responsibility, there are five areas this Honorable Court should consider in particular:

i) Mr. Lindell's past related conduct and securities disciplinary history;

ii) Mr. Lindell's bail violation;

iii) Mr. Lindell's use of the Cloverdale home to obtain a $450,000 loan to continue to fund his lifestyle, along with his so-called "sale" to the 2004 FJP Trust of the $150,000 loan he took from his aunt;

iv) Mr. Lindell's misuse of his wife's inheritance (Althea Lindell placed her inheritance from her mother in a joint account and relied on Mr. Lindell to manage the funds), as well as Mr. Lindell providing to Ms. Lewis fraudulent financial statements related to investments separate from the money he stole from her which was the subject at trial; and,

v) significantly, the evidence at trial showed that Mr. Lindell testified falsely, accusing Ms. Lewis and Ms. Gray of misconduct.

i. *Past History*. Mr. Lindell does not have a criminal record, but he is not a typical first-time offender. Not only was his conduct part of a long-running scheme—with him effectively committing crimes on a regular and continuous basis from 2010 through early 2017, he also has an administrative disciplinary record. This includes a 2002 action for allegedly arraying client investments contrary to client wishes and not being truthful about account balances and a 2013 action for allegedly engaging in unlawful, dishonest or unethical securities practices (both the 2002 and 2013 actions ended in consent orders). In fact, the 2013 action involved Mr. Lindell allegedly having a client write three checks directly to RK Lindell & Co., just like he did in this case when he had Ms. Poor directly write his company $595,000 in checks for securities purchases (thus taking the broker-dealer he worked for out of the supervisory picture). Further, subsequent to the 2013 action, Mr. Lindell (in mid-2015) again accepted a check made out to himself directly from the same client involved in the 2013 action. See Exhibits 5a through 5e, which includes copies of (redacted) checks and other disciplinary actions which the State will briefly discuss at the sentencing hearing.

ii. *Bail Violation.* In April 2018, this Honorable Court issued a warrant for Mr. Lindell's arrest because of alleged bail violations contained in the State's motion to revoke his bail. Mr. Lindell admitted at the bail hearing (July 2018) that the State had sufficient evidence to prove the factual allegations in the State's motion, although he argued he did not intentionally violate his bail. Essentially, the motion to revoke alleged that Mr. Lindell continued to act as trustee for the 2004 FJP Trust and he improperly spent money in the trust's name, contrary to his conditions of bail. The money Mr. Lindell spent came from a $450,000 "hard money" loan he obtained in the name of the 2004 FJP Trust before he was criminally charged. Hard money lenders lend money to borrowers who are not able to qualify for traditional loans. Payment terms and interest rates are typically costlier than with traditional lending.

Mr. Lindell obtained the hard money loan using the Cloverdale home as collateral (which he had purchased free and clear with the money he had previously stolen from Ms. Poor and Frederic). While Mr. Lindell did obtain the loan before this criminal action began, his conditions of bail prohibited him from acting in a trustee capacity (with a limited exception that does not apply here) or accessing accounts in Frederic's name or related to Frederic. Mr. Lindell used some of the loan proceeds to service his monthly loan payments and argued at the hearing on the State's motion to revoke that he was simply trying to keep the loan current. Of course, he also transferred in excess of $131,000 to his joint personal checking account (much of which he spent on numerous personal expenses), spent tens of thousands of dollars of the loan proceeds in the trust's name to buy digital crypto currency, and he withdrew $51,500 in cash in the name of the trust.

iii. *Loan Related Misconduct.* The $450,000 hard money loan was not just the eventual basis for the motion to revoke bail. Purchasing the home free and clear with stolen money gave Mr. Lindell a valuable asset. For reasons perhaps only he knows, he took out an extremely costly loan (at 10.99%, with payment terms that resulted in a total of $600,000 being owed and due in a 36 month loan repayment period). Mr. Lindell may very well have obtained this loan because he was aware of the State's criminal investigation and by the time he obtained the loan (February 2017) he had spent virtually all of the money from the available Poor family assets. Ms. Lewis was (and remains) healthy—and with more limited assets than that of Ms. Poor, Mr. Lindell had no more access to unlimited money.

What Mr. Lindell did with the proceeds from the $450,000 loan is not the only unfortunate part of the transaction. At trial, the State proved that Mr. Lindell submitted multiple false documents in order to obtain the loan. He represented that he did not live at the property and that it was being used for business purposes. Moreover, he falsified his wife's signature on a lease to make it appear he had a paying tenant.

iv. *Production of Falsified Financial Statements.* Ms. Lindell and her brothers and sisters inherited money from their mother. Ms. Lindell's share was approximately $100,000, which she placed into a joint brokerage account and trusted her husband to manage. A few months after Mr. Lindell was charged in this case Ms. Lindell asked her husband about her inheritance. He provided her fraudulent financial statements showing that the inheritance was still intact. Ms. Lindell checked with her broker-dealer and learned, in fact, almost all of the money was gone. See Exhibit 6a through 6e, which show the materials Mr. Lindell drafted for his wife, along with the (redacted) brokerage statements showing the actual value of her investments.

Mr. Lindell similarly provided Ms. Lewis with fraudulent financial statements regarding annuities and additional securities he was managing for her. He provided her with a fraudulent statement reporting far larger account balances than existed. See Exhibits 7a through 7b, which show how Mr. Lindell inflated account values and which the State will briefly discuss at the sentencing hearing.

v. *False Statements.* It is difficult to pinpoint all of the false statements Mr. Lindell made during his testimony. The trial evidence showed that he blamed everyone but himself. He accused Ms. Lewis of French tax evasion and testified that Ms. Gray reappointed him as trustee of the 2004 FJP Trust so that he could continue as trustee after he obtained the Midland National annuity proceeds. He testified that Ms. Poor, by all accounts a prudent and experienced investor who was very careful with her money, repeatedly gave him money to fund his essentially one-person business which he could not keep above water despite her "investing" or "gifting" him $595,000 over a period of just two years. In addition, over the State's objection Mr. Lindell was permitted to testify in detail about the value of various works of art which he estimated to be worth over $400,000 that he claimed to have sold to the 2004 FJP Trust. According to the attorneys who took over representing Frederic and his interests, and who were responsible for appraising and selling this artwork for Frederic's benefit, the artwork is worth a fraction of this amount. So far, approximately $10,000 has been recovered for the artwork. Moreover, some of the artwork Mr. Lindell allegedly "sold" to the trust was not his to sell, it belonged to his sister. See Exhibit 8, which are the documents the State received from Camden Law (the attorneys who represent Frederic's interests).

All of the examples listed above serve as aggravating factors. The State finds no mitigating factors (Mr. Lindell's assistance to Camden Law at the time of the bail violation hearing in identifying remaining assets was a self-serving exercise on his part). The maximum sentence on the Phyllis Poor family related theft (Count 1) should be increased to the maximum permissible sentence of ten years. The maximum sentence for the Gianna Lewis theft (Count 2) should be increased to seven years. The income tax evasion sentence (three years) (Count 8) should be increased, as well, but the aggravating factors are already sufficiently reflected by including them in the theft counts. The additional income tax evasion sentence (Count 7) should remain at two years. This totals twenty-two (22) years.

c. <u>Final Sentence</u>

The last step in the sentencing analysis is to determine what portion, if any, should be suspended. 17-A M.R.S.A. § 1252-C (3). An unsuspended portion of 15 years is appropriate in this case. There are several reasons for this and the analysis is similar to the second step in the *Hewey* analysis noted above.

First, this is not a typical first offender case. As noted, the trial evidence showed Mr. Lindell committed crimes on a regular basis over at least a six-year period and groomed Ms. Poor since the early 2000s and abused the trust both women placed in him. The trial evidence and materials included in this memorandum show Mr. Lindell has committed similar acts of dishonesty in past years with other clients and his (now ex) wife.

Mr. Lindell did not commit these crimes as a result of financial desperation. There was no family or health emergency. His actions were not a consequence of a lapse in judgment. His conduct spanned many years and was calculated, planned, and well thought out. And, he has failed to accept responsibility.

The evidence at trial showed Mr. Lindell stole much of the life savings from two individuals and their families, plundering the property and life savings of his clients and their beneficiaries. As a trusted and licensed financial professional, he should have helped them grow their assets in order to provide for their own health and care and that of their family and persons or organizations of their own choosing. He betrayed this most basic tenet.

Mr. Lindell leaves financial, emotional, and physical wreckage in his wake. And, he leaves his spouse (and children) devastated and left to move on independently. Althea Lindell has been joined as a defendant in a suit Frederic's legal representatives have filed against her ex-husband. Ms. Gray also is a defendant based upon her role as co-PR. Mr. Lindell's conduct has had far reaching consequences.

The State recognizes it is requesting the imposition of a very significant sentence. The facts of this case justify such a sentence. Title 17-A M.R.S. § 1151 contains several sentencing factors which are particularly relevant in this case and support the State's recommended sentence. These include promoting both specific and general deterrence and providing fair warning to the public of the nature of sentences imposed for this kind of conduct. 17-A M.R.S. § 1151(1) & (4). The recommended sentence also recognizes Mr. Lindell's past years of similar conduct and will serve to protect the public from an individual who the evidence shows does not comply with securities regulations, bail conditions, and preys on vulnerable individuals in ways which are very difficult to detect (in particular recognizing "[t]he age of [a] victim, particularly of a victim of an advanced age…who has a reduced ability to self-protect or who suffers more significant harm due to age"). 17-A M.R.S. § 1151(1) & (8).

In order to permit a partially suspended sentence the State suggests the following sentence:

i. three years straight on Count 8 (income tax evasion);

ii. a consecutive seven years straight on Count 2 (theft);

iii. a consecutive ten years, with all but five years suspended on Count 1 (theft); and three years of probation;

iv. a consecutive two years, all suspended on Count 7 (income tax evasion) with two years of probation;

v. a concurrent sentence of three years on Count 3 (securities fraud), concurrent sentences of two years on Counts 4 and 5 (theft of income tax refunds), concurrent sentences of two years on Counts 6, 9, and 10 (income tax evasion), and concurrent sentences of 180 days on Counts 11-15 (failure to pay tax); and,

vi. Restitution as part of the Judgment and Commitment in the amount of $2,919,398. This reflects the recovery of approximately $474,000 by Frederic's legal representatives. This also reflects money that Ms. Lewis recovered as a result of the comingling of funds (albeit at Ms. Poor's expense), and does not include the $298,000 of unauthorized securities purchases from the eleven (11) transactions discussed above, since it is possible Ms. Poor had the use and enjoyment of these funds before she died or that these eleven (11) securities passed to the estate—although, this is a significant assumption.

In terms of a breakdown, the restitution consists of:

a. \$2,400,028 for the benefit of Ms. Poor's estate (and its beneficiaries) and Frederic;

b. \$312,674 for the benefit of Ms. Lewis;

c. \$198,531 for the benefit of Maine Revenue Services; and,

d. \$8,165 for the benefit of the IRS (which the State will forward to the IRS).

The State suggests that the Judgment and Commitment state that any recovered monies are to be paid first to Ms. Lewis, then for the benefit of Frederic, then for the benefit of the remaining beneficiaries of Ms. Poor's estate, then to Maine Revenue Services, and then to the Internal Revenue Service. Mr. Lindell will receive credit for any additional money or assets recovered.

The State also respectfully rejects any claim Mr. Lindell may make that his services as co-PR, POA, or Trustee should be reasonably compensated beyond what he was paid by Bar Harbor Trust Services for the work he performed for the testamentary trusts (approximately \$30,000). The evidence at trial showed that he created and participated in a criminal enterprise and used the cover of legitimate work to ensure he could secretly raid the wealth of Ms. Poor, Frederic and Ms. Poor's estate (and her beneficiaries). And, the evidence at trial showed Mr. Lindell simply stole from Ms. Lewis' assets. He cannot reasonably claim he should be paid for managing Ms. Lewis' assets when he was managing them as a source of his theft. Moreover, aside from the e-mails he sent to Bar Harbor Bank and Trust Mr. Lindell produced no billing statements nor any reliable evidence of how much time he spent working on non-criminal activities and what the activities were.

Special conditions of probation should include: enter into a restitution payment plan per the Department of Corrections; timely and truthfully file all income tax returns and timely pay any liability thereon; be prohibited from acting, in any manner, as or in the capacity of a power of attorney, trustee, personal representative or executor, conservator, or fiduciary; be prohibited from engaging or assisting in the sale or trade of any "securities" (as the term is defined under the Maine Uniform Securities Act); and, be prohibited from acting or associating with a "broker-dealer," "broker-dealer agent," "investment adviser," or an "investment adviser representative" (as these terms are defined under the Maine Uniform Securities Act).

COMPARABLE SENTENCES

With respect to comparable sentences, the Law Court has held that sentencing justices should compare basic sentences, not final sentences, *see, State v. Stanislaw*, 2011 ME 67 ¶ 8, 21 A.3d 91, 94-95; *State v. Gauthier*, 2007 ME 156 ¶ 30, n.4, 939 A.2d 77, 85, but the State does not have a database of basic sentences imposed in theft cases. To the extent that final sentences can be used as a comparison, the State's proposed sentence reflects the grave and long-term nature of Mr. Lindell's crimes and is a proper extension of the sentences referenced below (which is not exhaustive and does not include complete criminal histories), but is provided to show the range of similar theft, fraud, and/or abuse of trust cases previously prosecuted). Most of these sentences resulted from plea resolutions, although a few were imposed after trial.

- Robert Howarth (consolidated in Waldo County, BELSC-CR-15-125 and ALFSC-CR-15-588). Howarth befriended Midcoast residents in 2009 and then defrauded them out of more than half a million dollars. He was sentenced to serve ten years, all but six years suspended and ordered to pay $575,000 restitution. Howarth had an extensive criminal record in Massachusetts for similar conduct. (R. Murray, J.)

- Claudia Viles (Somerset County, CR-15-1186). Viles was convicted after a trial of Class B Theft by Deception as well as a series of Class D charges in relation to embezzling excise taxes over an extended period in the Town of Anson. Viles was the town tax collector. Viles was sentenced to an eight-year term of imprisonment with all but five years suspended. She was also sentenced to three years of probation and ordered to pay $566,257.65 in restitution. She had no prior record. (Mullen, J.)
- Ronald Petersen (York County, CR-2013-01369) was sentenced to eight years, all but three years suspended, for fraudulently billing MaineCare for $403,236 for a purported substance abuse treatment facility, by falsely representing he had licensed or qualified staff and by falsely billing for services not provided. (O'Neil, J.)
- Leanne Parks (Penobscot County, CR-2012-2510) was sentenced after her plea of guilty to three years all but 18 months suspended for stealing $94,655 from a non-profit beagle rescue organization on which she served as president and a volunteer. (Campbell, J.)
- Paul Violette (Cumberland County, CR-2012-505), former executive director of the Maine Turnpike Authority, was sentenced to three years and six months after his plea of guilty to an Information alleging Class B theft by using Turnpike funds to purchase gift cards for international travel, hotels and restaurants and diverting them to his own use. He paid restitution of $144,000 prior to sentencing, so there was no purpose in probation or a split sentence. (Cole, J.)
- Bettysue Higgins (Kennebec County, CR-2011-112) was sentenced to six years, with all but three and a half years suspended for stealing $166,700 from the Maine Trial Lawyers Association while working as the Association's administrative assistant. (Marden, J.)

- James Philbrook (Aroostook County, CR-2011-10), a financial advisor, was sentenced after trial to eight years, all but three years suspended, for stealing $195,000 from his clients, an elderly couple who were potato farmers, instead of investing the money as represented to them. (Hunter, J.)
- Tammy Barker (Penobscot, CR-2010-187) was sentenced to eight years, with all but three and a half years suspended for failing to turn over $400,000 from the sales of mobile homes to the owner-sellers. (A. Murray, J.)
- Dawn Solomon (Oxford County, CR-2010-521) was sentenced to eight years all but 42 months suspended after a plea to an Information charging her with theft from MaineCare. Solomon admitted to obtaining $4 million by overbilling and submitting false cost reports in connection with her operation of Living Independence Network Corporation, which provided children's day habilitation services. A significant mitigating circumstance was that she had a minor special needs daughter who was dependent upon Solomon for her care. (Clifford, J.)
- Eric Murphy (Hancock County, CR-09-149) was sentenced after trial to nine years, all but five years suspended, for stealing approximately $450,000 from a Maine couple and several out-of-State investors based on misrepresentations on how he intended to use the funds. (Cuddy, J.)
- Jonathan Rosenbloom (Cumberland County, CR-07-1211). Rosenbloom entered a guilty plea to Class B Theft by Misapplication and two counts of Class C Securities Fraud in 2008 involving $160,000 of scam investments in Italian real estate and misuse of E*TRADE margin accounts to defraud acquaintances of over $20,000 in 2008. Rosenbloom was sentenced to eight years on the theft charge and four years on the securities charges. All but four years of imprisonment were suspended, with three

years of probation. Rosenbloom was ordered to pay $156,059.03 in restitution. (Warren, J.)

- Thomas Acker (Cumberland County, CR-06-423). Acker was convicted after pleading guilty to Class B Theft by Misapplication and Class C Sale of Unregistered Securities to business clients. Promises of extraordinary profits were made in the sale of those unregistered securities. Acker, an attorney, abused the trust of his victims. The total losses established were $2,600,000. Acker was sentenced to seven years of imprisonment with all but 2 years and 9 months suspended and order to pay $2,075,159.10 in restitution. (Cole, J.)
- Gerald Nelson, Jr. (Kennebec County, CR-06-568) was sentenced after a trial to seven years, all but four years suspended (reduced from five years when the conviction on one count was vacated by the Law Court), and ordered to pay restitution of $94,558 for pocketing the proceeds of the sales of wood harvested from 10 woodlot owners who had contracted with him for the service and had been led to believe that they would be paid for stumpage. (Horton, J.)
- William Gourley (Penobscot County, CR-05-557). Gourley pled nolo contendere to Class C Theft by Deception in relation to a sprawling real estate and mortgage scam involving over one hundred victims in what was, essentially, a Ponzi scheme. Gourley was sentenced, by agreement, to a five-year term of imprisonment with all but two years and six months suspended. He was also sentenced to four years of probation with special conditions including travel restrictions, waiver of extradition and restitution in the amount of $5,000,000.00. (Cole, J.)

- Felisa Ricks (Cumberland County, CR-05-2594) was sentenced to eight years, with all but four years suspended, for embezzling approximately $196,000 from her former employer; she had one prior misdemeanor conviction. (Alexander, J.)
- Paul McFarland (Hancock County, CR-00-62), a former funeral home director, was sentenced after his plea of guilty to nine years, with all but seven years suspended, for stealing approximately $500,000 from almost 200 mortuary trust accounts over a 10-year period. (Pierson, J.)
- Doris Reed (Kennebec County, CR-95-519). Reed, an assistant clerk for the Town of Chelsea, was sentenced to eight years, all but four years suspended, and four years of probation, for the theft of $100,000 in excise taxes. (Alexander, J.)

CONCLUSION

By reason of the foregoing, this Honorable Court should impose the sentence recommended by the State.

Respectfully submitted.

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Paul Rucha

Paul Rucha, Assistant Attorney General #3862
for GREGG D. BERNSTEIN
Maine Bar No. 8424
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800
Attorney for State of Maine