BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kimberly Springsteen-Abbott, Holiday, FL, Respondent.	DECISION Complaint No. 2011025675501 Dated: August 23, 2016

Respondent misused investment fund monies by improperly allocating personal and other nonrelated expenses to the funds. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Oreinstein, Esq., Sean Firley, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Joel E. Davidson, Esq., Sandra D. Grannum, Esq., Davidson & Grannum, LLP

Decision

Kimberly Springsteen-Abbott appeals an Extended Hearing Panel decision issued on March 30, 2015. The Extended Hearing Panel found that, for three years, Springsteen-Abbott improperly used investment fund monies to pay for personal and other nonrelated business expenses, in violation of FINRA Rule 2010. For this violation, the Extended Hearing Panel fined Springsteen-Abbott $100,000, barred her from association with any FINRA member in all capacities, and ordered her to disgorge $208,953.75, plus prejudgment interest. After an independent review of the record, we affirm the Extended Hearing Panel's findings of violation and the sanctions it imposed.

I. Background

Springsteen-Abbott entered the securities industry in 1980. She currently is associated with Commonwealth Capital Securities Corp. ("Firm"), a FINRA member firm, as a general securities representative and direct participation programs principal. The Firm is the managing broker-dealer of 13 publicly and privately offered investment funds ("Commonwealth Funds" or "Funds") that were sponsored by the Firm's parent company, Commonwealth Capital Corp.

("Commonwealth" or "Parent"). The Firm has no other business, maintains no clearing relationships, and has no retail accounts.

II. Procedural History

This proceeding derived from a routine examination of the Firm in 2011, during which the staff of FINRA's Member Regulation Department ("Member Regulation") received regulatory tips from former Commonwealth employees who claimed that, among other things, Springsteen-Abbott had improperly allocated personal expenses to the Commonwealth Funds.[1] On October 22, 2013, FINRA's Department of Enforcement ("Enforcement") filed an amended complaint with a single cause of action alleging that, from December 2008 to February 2012, Springsteen-Abbott misused investor funds by allocating personal and other expenses not legitimately related to the Funds' businesses, in violation of FINRA Rule 2010. After a seven-day hearing, which included testimony of seven witnesses, the Extended Hearing Panel rendered a decision making the findings and imposing the sanctions as described above. This appeal followed.

III. Facts

Commonwealth is a family-owned business that leases medical, telecommunications, and information technology equipment on a short-term basis (between 12 to 36 months). Springsteen-Abbott took over the business around 2005 after her husband died and is the owner and top executive of all of the Commonwealth entities. Springsteen-Abbott is the chairman, chief executive officer, and chief compliance officer of the Firm. She is the sole shareholder, chairman, and chief executive officer of the Parent. In addition, she is the chairman and chief executive officer of the Funds' management company, Commonwealth Income and Growth Funds, Inc. ("General Partner").[2] During the relevant period, many of Springsteen-Abbott's relatives were Commonwealth employees holding various positions, including her current husband, son, daughter, son-in-law, brother, sister, brother-in-law, sister-in-law, and cousin.

A. The Commonwealth Funds

Between December 1993 and October 2013, Commonwealth raised more than $240 million in the sales of 13 publicly or privately offered investment funds to investors. Each Fund was initially a blind pool with no assets or operations. The Funds were sold to investors pursuant to offering documents that set forth the terms of the Funds' operating business. The offering

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[1] The regulatory tips precipitated the staff's examination of other risk areas raised by the tips, including the Firm's supervision, wholesaling and general sales practices.

[2] The General Partner and the Firm are wholly-owned subsidiaries of the holding company, Commonwealth of Delaware, Inc. Commonwealth of Delaware, Inc. is a wholly-owned subsidiary of the Parent, which sponsors the Fund offerings.

proceeds were used primarily to acquire and maintain leased equipment, and the investors shared in the Funds' profits and losses.

The Funds themselves had no employees. The General Partner managed all Fund operations, including purchasing the leasing equipment and negotiating, executing, and administering the equipment leases. The General Partner also handled the Funds' accounting and was responsible for all offering and operational expenses.

In accordance with the Fund offering documents, with limited exception, all Fund expenses were to be billed to, and paid for, by the Funds. This was accomplished in part through an expense allocation process by which expenses were allocated to a respective Fund or multiple Funds on a pro rata basis, and the General Partner or Parent received a reimbursement.[3] Expenses allocated to the Funds included any administrative expense that was "necessary to the prudent operation of the [Funds]." Controlling Person expenses, however, could not be charged as Fund expenses.[4] These included "salaries, fringe benefits, travel expenses and other administrative items incurred or allocated to any Controlling Person of the Manager." As a Controlling Person, Springsteen-Abbott's expenses could not be paid for by Fund assets, even if they related to Fund operations. Moreover, the Fund offering documents expressly prohibited the commingling of investment funds with funds of any other person.

B. Allocation of American Express Charges to the Funds

During the relevant period, Springsteen-Abbott oversaw all Commonwealth operations. She had an American Express corporate credit card for Commonwealth expenses. There was one American Express corporate account with Springsteen-Abbott named as the account holder. The American Express account was also linked to, and used by, other cardholders. This included her current husband, Hank Abbott, president and board member of the Parent and General

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[3] Each Fund is a separate legal entity. Per the Fund offering documents, the amount of reimbursable expenses allocated to a particular Fund increased or decreased depending on a number of factors including the number of investors, legal and compliance issues, and the number of existing leases.

[4] The Fund offering documents define a "Controlling Person" as any "person, whatever his or her title, performing functions for the Manager or its Affiliate similar to that of chairman or member of the Board of Directors or executive management (such as president, vice president or senior vice president, corporate secretary or treasurer) . . . or any person holding a five percent or more equity interest in the Manager or its Affiliates or having the power to direct or cause the direction of the Manager or its Affiliates, whether through the ownership of voting securities, by contract, or otherwise."

Partner, and Lynn Franceschina ("Franceschina"), Commonwealth's chief operations officer, principal financial officer, and board member of the Parent.[5]

Commonwealth did not have written policies or procedures on the allocation of American Express charges to the Funds. Springsteen-Abbott was responsible for reviewing the American Express account statements on a monthly basis and determining which charges to allocate to the Funds. She testified that she would review the account statements "fiercely" and looked at the statements "line by line" to determine how expenses on the account should be allocated. The account statements she produced had check marks next to each charged item and other handwritten notes concerning the allocation. Franceschina also reviewed the American Express account statements. Once she received Springsteen-Abbott's direction on how to allocate the charges, Franceschina facilitated the recording by journal entry of the allocated charge by Commonwealth's accounts payable group. Springsteen-Abbott further testified that she reviewed and approved the American Express bill before it was paid. She also reviewed and approved all final expense allocations to the Funds before they were made.[6]

Springsteen-Abbott, Hank Abbott, and Franceschina routinely charged personal expenses to the American Express credit card, even though it was a corporate credit card. Many of these personal charges were then allocated to, and paid for, by the Commonwealth Funds. Specifically, from December 2008 to February 2012, Springsteen-Abbott charged—and permitted others to charge—1,840 personal items and other non-Fund related expenses totaling $208,953.75 to the American Express corporate account.[7] Further, Springsteen-Abbott approved the allocation of the 1,840 charges to be paid for by the Commonwealth Funds.

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[5] Hank Abbott, also known as "Henry Abbott," incurred the largest portion of the allocated American Express charges at issue. He was considered a Commonwealth Controlling Person by definition since 2010 and is a registered principal of the Firm. Franceschina, also a Controlling Person, was registered with the Firm as a direct participation programs representative and principal and operations professional.

[6] Springsteen-Abbott's pre-hearing brief provided more details on the allocation of American Express charges to the Funds. She explained that each month she would receive the American Express corporate card statement. The General Partner would then allocate "each charge on the statement to [the Parent company], one or more [of the Commonwealth] Funds, or a combination thereof." She noted that because the allocations were done every month, the details of the charge were fresh in her mind, and thus referred to the allocation process as "relatively simple." Finally, the pre-hearing brief stated: "All allocations are subject to [Springsteen-Abbott's] final approval."

[7] There were two types of improper expenses that were allegedly allocated to the Funds: (1) personal expenses and (2) nonrelated business expenses, such as the expenses of Controlling Persons and Firm expenses related to continuing education training and CRD licensing of certain Commonwealth employees. An itemization of the American Express charges totaling $208,953.75, including the expense date, vendor name, amount, location, and type, can be found in the *Expense Schedule* attached to this decision. *See* "Attachment A."

The bulk of the 1,840 American Express charges at issue represented various types of personal expenditures, including but not limited to: airline and hotel accommodations, groceries, fast food, pharmacy, clothing merchandise, toys, kids' meals, car rentals, and home décor and improvement.[8] In some instances, thousands of dollars charged on the corporate card went towards Springsteen-Abbott's personal vacations, birthday celebrations, and other family events. In some cases, numerous personal charges were expended on the corporate card all in a single day.

C. FINRA's Investigates the Allocated Charges

After receiving regulatory tips suggesting that Springsteen-Abbott had charged personal expenses to the Funds and billed the charges as business expenses, the FINRA Member Regulation staff requested that Springsteen-Abbott produce the American Express statements, allocation schedules, receipts, and other supporting documentation reflecting the charges that were made. Springsteen-Abbott was directly involved in supplying the requested documents, which included a spreadsheet detailing whether the charge was allocated to a particular Fund or Funds, some receipts, and other documents. FINRA staff determined that there was a pattern of personal charges that were impermissibly allocated to the Funds. The staff further requested, and Springsteen-Abbott produced, additional documents and information related to the allocated charges.[9]

In August 2012, Enforcement staff issued Springsteen-Abbott a Wells notice, informing her that it intended to recommend that formal charges be brought against her. That same month, Springsteen-Abbott claimed that she recognized that some of the charges identified by the staff were allocated to the Funds in error and reversed those allocated charges. After Enforcement filed its original complaint in May 2013, Springsteen-Abbott produced additional documents in July and August 2013 to substantiate other allocated charges as legitimate business expenses. Based on the staff's review of Springsteen-Abbott's productions, Enforcement filed an amended complaint that removed approximately 400 charges that it concluded were allocable Fund expenses, but maintained its allegation that Springsteen-Abbott had misused Fund monies for personal and other unrelated business expenses in connection with the 1,840 remaining American Express charges.[10]

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[8] The Extended Hearing Panel's decision provided detailed accounts of the events and circumstances in which improper allocations were alleged. For brevity purposes, we summarily adopt as our own the facts presented in the Extended Hearing Panel's decision.

[9] At the hearing, FINRA principal examiner, Kelly Edwards, testified: "We sent multiple 8210 requests to both [the Firm] and Ms. Springsteen-Abbott. We took four days of testimony in this matter, reviewed the emails produced by the firm as well as other documentation such as receipts, supporting documentation for American Express charges, and reviewed the actual statements as well as allocation spreadsheets."

[10] Of the 1,840 improper American Express charges that FINRA identified in its amended complaint, Springsteen-Abbott's answer to the amended complaint stated that: (1) $1,868.79 of

[Footnote continued on next page]

Springsteen-Abbott also revised the allocation process after receiving the Wells notice. She implemented a new procedure to "better monitor and document the allocation of expenses by the Funds" by using an allocable expense ticket or "tick sheet," describing the expense and its business purpose "each time a Fund-allocable expense in excess of $200 is billed to one of the corporate American Express cards." The tick sheets were handwritten and backdated in some cases several years to include business justifications for the charges at issue. Springsteen-Abbott's January and February 2014 document productions to FINRA staff included the tick sheets, along with other documentation, to justify the 1,840 American Express charges as Fund business expenses.

D. Springsteen-Abbott Admits Her Mistakes

Springsteen-Abbott testified at the hearing that she exercised "good business judgment" in operating the Commonwealth Funds, but she admitted that some of the American Express charges at issue were allocated to the Funds in error. For example, she admitted: "I'm considered a control person. So none of my related travel, salary, benefits, meals, anything like that should be allocated to the funds." In agreement with FINRA staff, she also testified: "I believe that the investors should not pay for vacation expenses, yes." Following are examples where it is undisputed by Springsteen-Abbott's own admissions that she improperly allocated personal charges to the Funds:

- **Walt Disney World—Animal Kingdom Lodge Vacation**

In June 2010, Springsteen-Abbott went to Disney World—Animal Kingdom Lodge with her family. A summary of charges produced by FINRA staff from Springsteen-Abbott's document productions revealed that she and Hank Abbott spent $2,679.10 on fast food, hotel accommodations, rental cars, gas, and other merchandise such as kid strollers, "mickey mitts," and other toys purchased at the Disney store—all of which was paid for by the Commonwealth Funds. Springsteen-Abbott admitted in testimony that her trip to Disney World was a "family vacation" and the associated charges that were allocated to, and paid for, by the Funds were "mistake[s]" that "she did not catch."

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the charges were never allocated to any of the Funds; (2) $167,607.18 were fully documented business expenses that were properly allocated to the Funds; (3) $35,404.79 were previously "adjusted" or reversed in August 2012 (even though many of the charges were legitimate and properly allocated to the Funds); (4) $257.60 were mistakenly allocated to the Funds and had since been reversed; and (5) $39,237.66 had not been reconciled (i.e., were unidentifiable or she lacked supporting documentation of the charges). These amounts do not reconcile with the total amount of misallocations that we find in this case. As the hearing progressed, Springsteen-Abbott's position on which expenses were legitimate business expenses changed dramatically, thus affecting these estimates.

- **Supplier Diversity Conference**

Springsteen-Abbott allocated a meal expense at Quiznos to the Funds in connection with Hank Abbott's attendance at a supplier diversity conference in Phoenix, Arizona, from May 26-29, 2009. Yet, Hank Abbott did not attend the supplier diversity conference. On the date of the meal, he was actually in route with Springsteen-Abbott to Vancouver for a personal vacation. The expense was improperly allocated to and paid for by the Commonwealth Funds. To justify the charge as a business expense, Springsteen-Abbott produced copies of another employee's calendar that was unrelated to Hank Abbott's attendance or the expense. At the hearing, she admitted: "This was an error," agreeing that the backup documentation had nothing to do with the allocated expense.

- **Thanksgiving Dinner: November 2009**

In November 2009, Springsteen-Abbott spent Thanksgiving Day with her family at Dilworthtown Inn in West Chester, Pennsylvania. Two meal charges for Thanksgiving dinner totaling $459.61 were allocated to, and paid for, by the Commonwealth Funds. Springsteen-Abbott represented that the meal expense—on Thanksgiving Day—was a business expense in connection with a "CE Firm Element." She provided a Dillworthtown Inn receipt as justification for the expense, but the receipt was dated several weeks after the Thanksgiving dinner. Springsteen-Abbott also provided the CE Firm Element agendas as supporting documentation. But those agendas were dated several *years* later in 2011 and 2012. Springsteen-Abbott offered no documentation that the Thanksgiving Day meal allocated to the Funds was a legitimate business expense. Admitting in testimony that the meal expense was a family dinner, and thus a personal expense, Springsteen-Abbott stated: "[T]his should have never been allocated to the funds. This was an error."

- **Kids Meals at Cody's Roadhouse: August 2010**

In August 2010, Springsteen-Abbott had dinner with her daughter and grandchildren at Cody's Roadhouse in Tarpon Springs, Florida. The dinner receipt, totaling $104.23, included charges for kids menu items. The entire meal was allocated to the Funds. Springsteen-Abbott initially testified at the hearing that it was not a family dinner and that she ordered the kids meals because she was on a Jenny Craig diet. When Enforcement presented her with an email that she sent to her sister the following day, which stated in part "We had dinner with her and the kids last night," Springsteen-Abbott recanted her earlier testimony and admitted that the meal at Cody's restaurant was a personal family dinner, stating: "Yes. This is definitely an error."

These are just a few examples where Springsteen-Abbott admitted the expenses were improperly allocated to the Funds. During the seven-day hearing, Enforcement presented before the Extended Hearing Panel extensive evidence of other personal events and circumstances that were contested, but undermined Springsteen-Abbott's credibility regarding the legitimacy of the allocated charges to the Funds.

For example, in July 2010, Springsteen-Abbott threw Hank Abbott a 60th birthday celebration in New York. Just two months prior, she traveled to New York to scout a location for the party. Approximately $5,457 of American Express charges were spent on various related

expenditures, including dining at expensive restaurants, hotel accommodations, parking, gas, and other incidentals. Attempting to justify the charges as legitimate Fund expenses, Springsteen-Abbott claimed that a Commonwealth employee, along with Hank Abbott and two other people, took a business trip to New York to meet with a company in relation to an equipment lease. But the Commonwealth employee denied attending the trip and informed FINRA staff that he never traveled to New York on business. Springsteen-Abbott also sent a few days prior to her travel an email stating that she was planning a birthday party in New York for Hank Abbott, and they were traveling there to look at a facility for the party. The Extended Hearing Panel found that the charges were improperly allocated to the Funds, and that Springsteen-Abbott's insistence that the charges were legitimate Fund expenses damaged her credibility.

IV. Discussion

After an independent review of the record, including the briefs submitted on appeal, we affirm the Extended Hearing Panel's findings that Springsteen-Abbott improperly used investment fund monies to pay for personal and other nonrelated business expenses, in violation of FINRA Rule 2010. FINRA Rule 2010 states "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." It is an ethical provision that draws on the "professionalization of the securities industry," *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NASD NAC June 2, 2000). FINRA Rule 2010 proscribes "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *15 (Jan. 9, 2009) (internal quotations and citations omitted) *aff'd*, 586 F.3d 122 (2d Cir. 2009). The primary focus is on "a securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind." *Id*.

The evidence overwhelmingly establishes that Springsteen-Abbott, for three years, deliberately used Fund monies as if they were her own to the detriment of the Fund investors, in violation of FINRA Rule 2010. Springsteen-Abbott failed to provide any reliable evidence to justify her expenses or substantiate the reversal of certain charges allocated to the Funds in error. We therefore affirm the Extended Hearing Panel's findings of violation against Springsteen-Abbott to include all of the 1,840 improperly allocated charges identified in the *Expense Schedule*. On appeal, Springsteen-Abbott raises several arguments regarding her culpability under FINRA Rule 2010 that, as addressed below, we find unpersuasive.

A. FINRA Rule 2010 Applies to Springsteen-Abbott's Misconduct

Although Springsteen-Abbott admits that some of the charges were improperly allocated to the Commonwealth Funds, she argues that FINRA Rule 2010 does not apply to her conduct because the allocation process was independent of Firm activities, did not involve "conduct of the member's business" or any "customers" of the Firm, and therefore, FINRA lacked the authority to regulate her conduct.

Her arguments—previously raised in a long line of cases—have been repeatedly refuted. *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) ("[FINRA]'s disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable

principles of trade, even if that activity does not involve a security."); *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *16-17 (Mar. 29, 2016) (finding respondent's conversion of investment fund monies in violation of FINRA Rule 2010 need not bear a close relationship to the associated person's firm or firm customers); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *11 (Dec. 4, 2015) (holding respondent's unethical business-related conduct, even while performing insurance-related activities, falls under FINRA's jurisdiction), *appeal docketed*, No. 16-60056 (5th Cir. Jan. 25, 2016); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) (finding conduct inconsistent with just and equitable principles of trade and high standards of commercial honor when respondent charged expenses to a co-worker's credit card without authorization); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We consistently have held that misconduct not related directly to the securities industry nonetheless may violate [just and equitable principles of trade].").

It is well established that FINRA Rule 2010 governs any business-related conduct that is inconsistent with just and equitable principles of trade. As an associated person, Springsteen-Abbott was required to observe "just and equitable principles of trade" in all of her business or commercial dealings and not just those involving securities or a securities transaction. "[M]isuse of customer funds is 'patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote.'" *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *21 (Jan. 9, 2015), *aff'd*, 2016 U.S. App. LEXIS 1702 (2d Cir. Feb. 2, 2016). FINRA's disciplinary authority is not limited to securities-related conduct or Firm activities, but covers all unethical business-related conduct that "reflects negatively on [one's] ability to comply with regulatory requirements fundamental to the securities industry." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008); *see also Shvarts*, 2000 NASD Discip. LEXIS 6, at *16.

Springsteen-Abbott's misconduct was undoubtedly business-related. "An associated person's 'business' includes his business relationship with his employers and his commercial relationship with [investors]." *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4982, at *19 (Dec. 11, 2014). Springsteen-Abbott disclosed her position with Commonwealth as an outside business activity in the Central Registration Depository® system and was the *de facto* manager of the Commonwealth Funds. As the chairman and chief executive officer of the General Partner, she possessed a fiduciary duty to safeguard Fund assets in accordance with the Funds' terms of operation.[11] Even while servicing the Funds, Springsteen-Abbott cannot escape her ethical duty under FINRA Rule 2010 to observe high standards of commercial honor and not commit unethical acts and practices. *See Wiley*, 2015 SEC LEXIS 4952, at *15 (holding that FINRA Rule 2010 prohibits misconduct that "reflects on the associated person's ability to comply with the regulatory requirements of the securities

[11] Section 9.4.1 of the Funds' limited partnership agreement provides: "The General Partner shall manage and control the Partnership, its business and affairs." Section 9.4.3 also provides: "The General Partner shall have the fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in the General Partner's immediate possession or control."

business and to fulfill his fiduciary duties in handling other people's money"). Her misconduct harmed the Commonwealth Funds and the investors in those funds, even though the Commonwealth Funds were not "customers" of the Firm. FINRA Rule 2010 applies to this misconduct. *See Grivas*, 2016 SEC LEXIS 1173, at *17; *Ialeggio*, 52 S.E.C. at 1089.

B. Enforcement Met its Burden of Proof

Springsteen-Abbott argues that Enforcement proffered no evidence for the bulk of the 1,840 charges it alleged were improperly allocated, but instead shifted the burden to her to disprove the allegations. We disagree. Enforcement has the burden of proving a prima facie case based on a preponderance of the evidence that Springsteen-Abbott committed the alleged violation. *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16 (June 2, 2016) (applying a preponderance of the evidence standard to self-regulatory organization disciplinary actions). The entire itemized list of the 1,840 charges at issue was presented and accepted into evidence. We are unpersuaded by Springsteen-Abbott's argument in view of the full record. We find that, based on the evidence presented, Enforcement established its prima facie case of her alleged violation. An explanation detailing each of the 1,840 itemized charges was not required. Upon establishing a prima facie case, the burden shifted to Springsteen-Abbott to either discredit or rebut the evidence presented, which she failed to successfully do. *See Steadman v. SEC*, 450 U.S. 91, 101 (1981) (stating, "[Where] a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted"); *Kirlin*, 2009 SEC LEXIS 4168, at *64 n. 87.

The Extended Hearing Panel therefore appropriately found, by a preponderance of the evidence, that Springsteen-Abbott violated FINRA Rule 2010.

C. Springsteen-Abbott Acted Unethically and in Bad Faith

Springsteen-Abbott next argues that she could not have violated FINRA Rule 2010 because she did not act unethically or in bad faith. She asserts that her misconduct constituted either mere errors on her part or a failure to supervise other Commonwealth employees regarding the allocations, but her actions did not give rise to finding of a FINRA Rule 2010 violation. Springsteen-Abbott further contends that she was given no credit for the charges she reversed or her voluntary $2.4 million contribution to the Funds.[12] She also argues that the nature of the

[12] Specifically, Springsteen-Abbott claims that the Extended Hearing Panel failed to off-set the $208,953.75 in American Express charges with approximately $2.4 million in contributions she made to the Funds throughout the years. The contributions fell within three main categories: (1) a "built-in cushion" to which the Parent voluntarily paid 10 percent of all American Express charges and other operating expenses; (2) a capital contribution in the form of cash and "forgiveness" that waived fees and expenses owed to the General Partner in order to increase cash flow for certain Funds; and (3) the financing of a tech center that was built to bring audit and testing of the leasing equipment in-house, but the expenses of which were not allocated to the Funds.

charges at issue were *de minimis*. Springsteen-Abbott's arguments fail to appreciate the gravity of her misconduct.

While the SEC has "long applied a disjunctive bad faith or unethical conduct standard to disciplinary action under . . . J&E rules," *Dep't of Enforcement v. Golonka*, Complaint No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *23 (FINRA NAC Mar. 4, 2013), we support the Extended Hearing Panel's findings that Springsteen-Abbott acted unethically and in bad faith, in violation of FINRA Rule 2010. Springsteen-Abbott deliberately expensed personal charges and other improper expenses for reimbursement by the Funds and permitted other Commonwealth employees to do the same. Unbeknownst to Fund investors, the Funds paid for her personal and other nonrelated business expenses for several years. Her persistent practice of living off of the Funds' monies instead of her own was not only unethical and illustrated bad faith, but also constituted a breach of her fiduciary obligation to act in the best interest of the Funds.

Furthermore, the extensive nature of the charges at issue do not support Springsteen-Abbott's "mere error" or *de minimis* argument. Springsteen-Abbott caused the Funds to pay for 1,840 misallocated charges, ranging from purchases at local fast food restaurants, toys and household items, to hotel accommodations and lavish dinners while on personal family vacations. Her improper use of Fund monies did not involve a few meals that she could pass off as "inadvertent" accounting errors. In addition, while there is no *de mimimis* exception to misuse of investment funds for one's own benefit, *see Dep't of Enforcement v. Grey*, Complaint No. 2009016034101, 2014 FINRA Discip. LEXIS 31, at *30 (FINRA NAC Oct. 3, 2014) (finding that the minimal dollar amount of respondent's ill-gotten gains was no defense to his misconduct), the evidence overwhelmingly demonstrates that the extent of Springsteen-Abbott's misuse is not *de minimis*. The record evidenced more than $200,000 worth of personal and other nonrelated expenses that the Funds subsidized on a consistent basis for three years.

We also disagree that Springsteen-Abbott's $2.4 million contribution meant that she could not have acted in bad faith or unethically. The evidence in the record revealed that the majority of the $2.4 million contribution only related to two of the 13 Commonwealth Funds. Those two Funds, however, were not the subject of her misappropriation.[13] In addition,

[13] Because each Fund was a separate legal entity, FINRA staff prepared a summary chart that provided a breakdown by each Fund and per year of the total amount of misallocated charges. FINRA examination manager, John Clark, testified that the staff concluded that approximately $1.7 million of the contribution solely related to two public Commonwealth Funds, CIGF 3 and CIGF 4. Contributions to those two Funds, however, were inconsequential because no misallocated charges were attributed to those two Funds. The remaining $700,000 contribution amount was then reduced dramatically to about $63,000 when the staff offset the remaining contribution amount by the maximum amount of misallocated charges that was incurred by each Fund. For example, in 2011, Springsteen-Abbott contributed $55,464.07 to CIGPF1, a Commonwealth private fund. However, CIGPF1 only incurred $538.28 in misallocated charges for that year. Thus, the maximum amount that Springsteen-Abbott could possibly offset with the contribution is $538.28.

Springsteen-Abbott testified that the $2.4 million contribution in large part was made in response to significant litigation against key lessees that adversely affected the cash flow of certain Funds. Regardless, demonstrating good faith in certain aspects of Fund business is not a defense to violating FINRA Rule 2010. *Heath*, 2009 SEC LEXIS 14, at *25. Springsteen-Abbott's contribution to the Funds, no matter how extensive, does not exculpate her improper use of Fund monies for personal and nonrelated purposes. *See Denise M. Olsen*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *16 (Sept. 3, 2015) (rejecting respondent's attempt to offset converted funds and holding that "securities professionals are not entitled to self-help in this manner"); *Dep't of Enforcement v. Doan*, Complaint No. 2009019637001, 2011 FINRA Discip. LEXIS 56, at *10 (FINRA Hearing Panel Sept. 9, 2011) (finding conversion and rejecting respondent's self-help defense that he was entitled to reimbursement for office furniture); *Dep't of Enforcement v. John M. Saad*, Complaint No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *22 (FINRA NAC Oct. 6, 2009) ("The suggestion that he may have been able to obtain reimbursement for other legitimate expenses if submitted properly does not exonerate or lessen the significance of his unethical conduct."), *aff'd*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761 (May 26, 2010), *remanded on other grounds*, 718 F.3d 904 (D.C. Cir. 2013). Accordingly, our finding that Springsteen-Abbott violated FINRA Rule 2010 stands.

D. The Extended Hearing Panel Decision was not Biased

Springsteen-Abbott argues that the Extended Hearing Panel's findings and sanctions were biased against her. She contends that the Panel's decision unfairly drew conclusions that she attempted to conceal her misconduct, lied to FINRA staff and the Panel, and was unable to comply with the ethical standards of the industry in the future. She claims that the Extended Hearing Panel found she acted in bad faith because they did not like her and the Panel was biased in accepting Enforcement's view of what charges were not legitimate business expenses. She asserts that the Extended Hearing Panel's decision ignored her contributions to the Funds and other proper expenses that she did not allocate to the Funds and exhibited extreme bias in awarding sanctions of greater proportion than what Enforcement recommended. We find Springsteen-Abbott's claims of bias meritless.

A claim of unfair bias requires that Springsteen-Abbott demonstrate that FINRA's disciplinary action was motivated by a discriminatory purpose, such as race, religion, or the "desire to prevent the exercise of a constitutionally protected right." *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *41 (July 27, 2015). Mere conjecture and second-guessing the outcome of the case do not sufficiently support a bias claim. *See Tomlinson*, 2014 SEC LEXIS 4982, at *27-28 (noting the fact that respondent did not obtain the result he wanted or expected in the case did not in itself support a bias claim). After an independent review of the record, we find no evidence of bias in this case. The Extended Hearing Panel's findings and sanctions for Springsteen-Abbott's rule violation are substantiated by the evidence in the record, and were not discriminatory personal attacks against her.[14]

[14] Springsteen-Abbott's appeal references two cases in support her bias claim. These cases, however, are distinguishable or inapplicable to this proceeding. In *Blinder, Robinson & Co., Inc. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), the D.C. Circuit Court of Appeals questioned whether

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We also uphold the Extended Hearing Panel's finding that Springsteen-Abbott's testimony was not credible. She consistently impeached herself when testifying about the nature of the charges allocated to the Funds. The Extended Hearing Panel's decision abundantly detailed the events and instances in which Springsteen-Abbott's testimony directly conflicted with the evidence Enforcement presented. In addition, the documentation she provided to FINRA in support of her claims of legitimate business expenses were unrelated to the charges at issue and were demonstrably false.[15] Supplying no evidence or reasonable explanation for her inconsistent testimony, the Panel appropriately called Springsteen-Abbott's truthfulness into question. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *53, n.71 (Dec. 10, 2009) (noting that the credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor and that such a determination can only be overcome where the record reflects substantial evidence for doing so).[16] We also find no bias against

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the SEC's sanctions were so disproportionately severe that it singled out the respondent as a smaller, newer firm. Unlike *Blinder*, Springsteen-Abbott was not selectively prosecuted, did not receive any disparate treatment by the Extended Hearing Panel, and her sanctions are remedial rather than punitive. The Supreme Court case *Liteky v. U.S.*, 510 U.S. 540 (1994), is inapplicable because it addresses a judge's recusal, and states that, to be disqualified in a proceeding, the alleged prejudice or bias must stem from an extrajudicial source. Springsteen-Abbott, on the other hand, did not move to recuse or disqualify a panelist based on bias or a conflict of interest pursuant to FINRA rules.

[15] We find that the tick sheets Springsteen-Abbott produced to justify the charges as business expenses are unreliable evidence for a number of reasons. First, Springsteen-Abbott backdated the tick sheets using the date that the charge was incurred, which in some cases happened several years prior. Second, the tick sheets were handwritten and failed to provide sufficient detail regarding the business purpose of the charge. For example, some tick sheets stated that the charge was reallocated back to the Parent company, but lacked detail on how or when the reallocation occurred. Third, many of the tick sheets had supporting documentation attached that had nothing to do with the charge at issue or the business purpose stated on the tick sheet was wrong. For example, in November 2009, Springsteen-Abbott travelled to New York with her family members, including Hank Abbott, her son, her daughter, two other adults, and three children. Springsteen-Abbott testified at the hearing that she had a "family" dinner while in New York. Yet, she drafted the tick sheet, to which the family dinner receipt was attached, stating that the "business purpose" of the meal was to meet with "leasing vendors" for year-end, which she then admitted in testimony was false. The meal totaling $826.08 was a personal expense that should not have been allocated to the Funds.

[16] We also reject Springsteen-Abbott's claim of bias by the Extended Hearing Panel in issuing sanctions higher than what Enforcement had recommended. As we discuss in Part V. of

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Springsteen-Abbott in the Panel's determination that she acted in bad faith when she improperly allocated 1,840 American Express charges that were not legitimate expenses the Funds should have borne. The Panel did not ignore the $2.4 million contribution as Springsteen-Abbott argues but instead, for the reasons we previously discussed, found it not dispositive of her FINRA Rule 2010 violation.

V. Sanctions

For violating FINRA Rule 2010, the Extended Hearing Panel barred Springsteen-Abbott from associating with any member firm in all capacities. In addition, she was fined $100,000 and ordered to pay disgorgement in the amount of $208,953.75, including pre-judgment interest to FINRA, plus $11,037.14 in hearing costs. In considering FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein,[17] we affirm the Extended Hearing Panel's sanctions.

"Misappropriation or misuse of customer funds constitutes a serious violation of the securities laws, involving a betrayal of the most basic and fundamental trust owed to a customer." *West*, 2015 SEC LEXIS 102, at *33-34. For improper use of funds, the Guidelines recommend a bar, or a lesser sanction where the improper use resulted from the respondent's misunderstanding of the customer's intended use of the funds or other mitigation exists. The Guidelines further recommend a fine ranging from $2,500 to $73,000.[18]

In reviewing the Principal Considerations in Determining Sanctions, we find several aggravating factors in this case. The evidence shows a pattern of misconduct. Springsteen-Abbott's charging of personal expenses on the company American Express credit card became a way of life that the Commonwealth Funds subsidized for an extended period of time.[19] Her misconduct was pervasive, impacting the assets of multiple Funds at an unidentifiable dollar amount and size.[20] Her actions were deliberate and intentional and would have continued if not for whistleblowers who alerted FINRA of her misconduct.[21] She attempted to conceal her

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this decision, we find Springsteen-Abbott's sanctions consistent with the recommended FINRA Sanction Guidelines.

17 *See FINRA Sanction Guidelines*, 6-7 (2015), *available at* http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

18 *See Guidelines*, at 36.

19 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

20 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 18).

21 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

misconduct by supplying FINRA staff with business justifications on tick sheets and other documentation that were either inconsistent with the charge at issue or blatantly false.[22] Equally aggravating was Springsteen-Abbott's attempt to blame others for her regulatory obligations rather than accepting full responsibility for her misconduct.[23] Enforcement referred to the SEC's cease-and-desist order against Springsteen-Abbott as relevant disciplinary history and argued before the Extended Hearing Panel that Springsteen-Abbott was a recidivist, which would justify increased sanctions.[24] We affirm the Extended Hearing Panel's decision to not treat Springsteen-Abbott as a recidivist for purposes of imposing increased sanctions.

We find that Springsteen-Abbott's egregious misconduct warrants a bar from associating with a FINRA member firm in all capacities and a $100,000 fine.[25] In addition, disgorgement of her unjust enrichment is in order here.[26] We therefore affirm the Extended Hearing Panel's order

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[22] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10). While not alleged in the amended complaint, we note that providing false information to FINRA in itself is a violation of FINRA Rule 2010. *See Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23-24 (Aug. 22, 2008), *citing Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

[23] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

[24] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1). Springsteen-Abbott and the General Partner settled an SEC administrative proceeding without admitting or denying the findings that the respondents made misleading disclosures in the Commonwealth Fund offering documents concerning the salary expenses of controlling persons that it routinely expensed and charged to nine Commonwealth Funds, in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"), and 15(d) of the Exchange Act of 1934 ("Exchange Act") and rules thereunder. *See In re Commonwealth Income & Growth Fund, Inc. and Kimberly Springsteen-Abbott*, Exchange Act Release No. 70547, 2013 SEC LEXIS 3058, at *2-4; 10-14 (Sept. 27, 2013) (order instituting cease-and-desist proceedings pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act).

[25] We recognize that the $100,000 fine is above the Guidelines' recommended range. Consistent with the Guidelines, a higher fine is necessary given Springsteen-Abbott's pervasive misuse and repeated failure to judiciously handle investor funds entrusted to her to the detriment of the Fund investors, as well as her position as a Controlling Person of the Commonwealth entities. *See Guidelines*, at 10 (recommending fine and disgorgement sanctions even if the respondent is barred when the customer harm is widespread, significant, and identifiable, and the respondent received substantial ill-gotten gains).

[26] "[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched." *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991). "We may order disgorgement after a reasonable approximation of a respondent's unlawful profits." *Dep't of Enforcement v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *40 n.42 (FINRA NAC Oct. 3, 2011); *Laurie Jones Canady*, 54 S.E.C. 65, 84 (1999) (noting that "courts have held that the amount of disgorgement ordered need only be a reasonable

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of disgorgement in the amount of $208,953.75 plus pre-judgment interest, representing the full amount of charges improperly allocated to the Funds, as itemized in the *Expense Schedule* attached to the Extended Hearing Panel's and this decision.

We find that none of Springsteen-Abbott's arguments raised on appeal are mitigating. She first argues that she inherited the antiquated allocation system. But adopting wrongful practices and continuing to commit them is not mitigating. Further, we cannot find Springsteen-Abbott's later implementation of new allocation procedures mitigating because it occurred only after Enforcement issued the Wells notice and not prior to detection by a regulator.[27]

Springsteen-Abbott also argues that FINRA inspectors, independent auditors, and her own reviews failed to detect the errors and that virtually all of the misallocations were done by Franceschina, upon whom she relied. We reject Springsteen-Abbott's claim that she was not aware of the misallocations and that the misallocations were made by Franceschina through accounting mistakes. We find it inconceivable that Springsteen-Abbott was unaware of the misallocations and she cannot blame others for her misconduct. The American Express corporate account was in her name and thus her credit was at stake. She received and reviewed the American Express account statements "fiercely" each and every month and had sole discretion in determining whether to allocate an expense. Moreover, Springsteen-Abbott approved the allocations to the Funds before they were processed by Franceschina through accounts payable. Therefore, we find Springsteen-Abbott's claim that the improper allocations happened as a result of others' mistakes without her knowledge unbelievable.

Springsteen-Abbott next argues that a bar is "grossly unfair and excessive," stating that permanent bars require proof by clear and convincing evidence, and that the Extended Hearing Panel used a Guidelines for the misuse of "customer" funds even though no customer funds were involved in the case. We disagree. As a preliminary matter, it is well established that FINRA disciplinary proceedings, like the present one, are decided based on a preponderance of the evidence standard.[28] Furthermore, whether or not her misconduct involved a customer of the broker-dealer has no bearing on barring her from the industry. *See Grivas*, 2014 SEC LEXIS 1173, at *17 (clarifying that a misuse of funds violation need not relate to the associated person's customers or a securities transaction in order to be covered under FINRA Rule 2010). Moreover, the improper use of funds is a "serious offense which undermines the integrity of the securities

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approximation of profits causally connected to the violation") (internal quotation marks omitted), *aff'd*, 230 F.3d 362 (D.C. Cir. 2000).

[27] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 14).

[28] *See Butler*, 2016 SEC LEXIS 1989, at *16 (applying a preponderance of the evidence standard in FINRA disciplinary proceedings); *Dist. Bus. Conduct Comm. v. Bruno, Jr.*, Complaint No. C10970007, 1998 NASD Discip. LEXIS 51, at *8 (NASD NBCC July 8, 1998) (same).

industry." *Dist. Bus. Conduct Comm. v. Westberry*, Complaint No. C07940021, 1995 NASD Discip. LEXIS 225, at *24 (NASD NBCC Aug. 11, 1995). Springsteen-Abbott harmed the Funds and Fund investors when she failed to protect the Funds' assets entrusted to her from misuse. Given her misconduct, we find that her bar sanction is consistent with the Guidelines and is neither excessive nor oppressive.

Springsteen-Abbott lastly claims that the Extended Hearing Panel was punishing her when it ordered disgorgement in excess of what Enforcement recommended. She further argues that the Panel ignored her $2.4 million voluntary contribution and Enforcement presented no evidence that she was unjustly enriched. We reject her assertions and find that the record unequivocally demonstrated her unjust enrichment. The Extended Hearing Panel declined to accept Enforcement's recommendation that Springsteen-Abbott pay restitution in the amount of $174,321.73, noting that it was impossible "to determine which Fund should receive how much of any restitution that could be ordered." The Extended Hearing Panel instead ordered the equitable remedy of disgorgement to prevent Springsteen-Abbott from benefiting from her repeated misallocations. We agree with the Extended Hearing Panel's conclusions. The quantifiable amount of losses for each Fund caused by Springsteen-Abbott's improper allocations cannot be calculated based on the record. It was Springsteen-Abbott's burden to accurately identify with supporting documentation the misallocated charges that she purportedly reversed and fully reimbursed to the Funds, but she failed to do so. Likewise, ordering restitution to each Fund investor is not possible based on this record.[29] The disgorgement order is based on reliable evidence that meets the requirement of being a reasonable approximation of Springsteen-Abbott's unlawful profits. We therefore affirm the Extended Hearing Panel's order of disgorgement in the amount of $208,953.75, plus prejudgment interest paid to FINRA.[30]

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[29] Restitution is based on the *actual* amount of the loss sustained by the harmed victim as demonstrated by evidence and is typically used to restore victims to a status quo ante where a victim otherwise would unjustly suffer a quantifiable loss proximately caused the respondent's misconduct. *See Guidelines*, at 4.

[30] The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), the same rate that is used for calculating interest on restitution awards. *Guidelines*, at 11 (Technical Matters).

VI. Conclusion

Springsteen-Abbott improperly allocated personal and other nonrelated business expenses to be paid by the Commonwealth Funds, in violation of FINRA Rule 2010. For her misconduct, Springsteen-Abbott is barred from associating with any member firm in any capacity. She is fined $100,000 and she is ordered to disgorge $208,953.75 to FINRA, plus prejudgment interest calculated from February 12, 2012. Additionally, we affirm the Extended Hearing Panel's imposition of $11,037.14 in hearing costs and order that she pay $1,626.58 in appeal costs. The bar imposed in this decision will become effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary