BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Alpine Securities Corporation Salt Lake City, UT, Respondent.	DECISION Complaint No. 2019061232601 Dated: March 25, 2025

Member charged an unreasonable and unfairly discriminatory fee, made unauthorized securities transactions, misused and converted customer assets, priced securities trades unfairly, and made an unauthorized capital withdrawal. Held, findings affirmed in part and modified, and sanctions modified.

Appearances

For the Complainant: Jennifer Crawford, Esq., Savvas Foukas, Esq., Kevin Hartzell, Esq., Pearline Hong, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Maranda Fritz, Esq., Brian Lanciault, Esq.

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Decision

Alpine Securities Corporation ("Alpine") appeals an Extended Hearing Panel decision. The Hearing Panel found Alpine charged unreasonable and unfairly discriminatory fees, made unauthorized securities transactions, misused and converted customer assets, priced securities trades unfairly and charged unfair commissions, and made an unauthorized capital withdrawal. As sanctions for this misconduct, the Hearing Panel ordered Alpine expelled from FINRA membership, instructed that it pay more than $2.3 million as restitution, and imposed a permanent cease and desist order.

After an independent review of the record, we affirm in part and modify the Hearing Panel's findings. We also modify the sanctions the Hearing Panel imposed.

I. Background

A. Alpine's Business, Owners, and Affiliates

Alpine is a FINRA member located principally in Salt Lake City, Utah. The firm specializes in clearing low-priced, "microcap" securities traded in the over-the-counter market.[1] Alpine has its own retail brokerage customers and supplies clearing services to customers of correspondent broker-dealers.

SCA Clearing, LLC ("SCA Clearing"), owns Alpine.[2] SCA Clearing is a holding company that was, during the period of Alpine's alleged misconduct, beneficially owned by trusts for which John Hurry and his wife, Justine Hurry, served as managing trustees.[3]

John Hurry and Justine Hurry also served as managing trustees for trusts that beneficially owned SCA Holding, LLC ("SCA Holding"), a holding company that owned Scottsdale Capital Advisors Corp. ("Scottsdale"), one of the correspondent broker-dealers for which Alpine supplied clearing services. Trusts for which John Hurry served as managing trustee likewise beneficially owned, indirectly, Alpine's landlord, SCAP 9 LLC ("SCAP 9"), and Alpine's principal lender, Alpine Securities Holding Corporation ("Alpine Holding").[4]

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[1] *See generally* SEC, *Microcap Stock: A Guide for Investors*, https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstock (last visited Mar. 10, 2025) (supplying an overview of microcap stocks).

[2] Alpine was formed in 1984. SCA Clearing acquired the firm in 2011.

[3] John Hurry now owns SCA Clearing directly.

[4] John Hurry, Justine Hurry, and their children were the beneficiaries of the trusts that owned SCA Clearing, SCA Holding, SCAP 9, and Alpine Holding.

B. Alpine's Board of Directors and Management

From May 2017 to August 1, 2018, Alpine's board of directors consisted of Justine Hurry, RN, and Christopher Frankel. After August 1, 2018, Alpine replaced this three-person board of directors with a board consisting of a single director, Robert Tew. Chris Doubek replaced Tew as the firm's sole director in December 2018, and he held this position until June 2021.

The makeup of Alpine's management also changed over time. From July 31, 2015, to August 1, 2018, Christopher Frankel served as Alpine's Chief Executive Officer and Chief Compliance Officer.[5] Robert Tew assumed these positions in August 2018, serving as CEO and CCO until December 14, 2018.[6] At all relevant times, Joseph Walsh served as Alpine's Chief Operations Officer, and he served as Alpine's CEO from January 2019 to April 2019. Chris Doubek succeeded Walsh as CEO in April 2019, and he held this position until June 2021. Doubek also served as Alpine's CCO from May 2019 to June 2021.[7]

II. Procedural Background

A. The Origins of the Disciplinary Matter

This disciplinary proceeding stems from a 2018 FINRA examination that focused on Alpine's securities certificate review process. On the last day of that examination, FINRA staff learned that Alpine intended to charge customers a $5,000 monthly account fee. This disclosure by Alpine's Chief Financial Officer, David Brant, resulted in a 2019 FINRA examination that focused solely on Alpine's fees.[8]

B. The Department of Enforcement Names Alpine as the Sole Respondent in a Disciplinary Complaint

On July 25, 2019, after FINRA staff completed the 2019 fee examination, the Department of Enforcement ("Enforcement") filed a disciplinary complaint that named Alpine as the sole respondent. Enforcement filed a six-cause, amended complaint on August 21, 2019. The amended complaint claimed broadly that Alpine responded to mounting financial difficulties by

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[5] After relinquishing these positions, Frankel served as an Alpine consultant from August 1, 2018, to late October 2018.

[6] Robert Tew also served as Alpine's President from July 2011 to December 2018.

[7] Chris Doubek replaced Jason Kane as Alpine's CCO. Jason Kane held this position on an interim basis from January 2019 to May 2019. After stepping down as Alpine's CCO, Jason Kane continued to serve until June 2019 as the firm's anti-money laundering compliance officer, a position he first assumed in January 2019.

[8] David Brant served as Alpine's CFO from May 2017 to December 2020.

engaging in serious violations of FINRA rules. Among other things, the amended complaint alleged that Alpine implemented a series of unreasonable and unfairly discriminatory fees, and misused and converted customer assets through multiple unauthorized transactions, all while effectively depleting its financial resources through a succession of payments to affiliates that were, in reality, capital withdrawals that FINRA did not approve.

Cause one of the amended complaint alleged Alpine, from October 2018 to July 2019, converted customer funds and securities in separate ways, in violation of FINRA Rules 2150 and 2010. First, cause one claimed Alpine intentionally took customer funds and securities, without authorization to do so, for the purpose of paying "exorbitant" fees imposed by the firm, including the $5,000 monthly account fee. Second, cause one asserted Alpine unfairly considered "worthless" every customer securities position valued at $1,500 or less, and without customer consent appropriated those securities for the firm's benefit. Lastly, cause one contended Alpine wrongfully treated other customer securities as "abandoned," and without customer authorization seized them by moving them to firm accounts.

Causes two and three alleged that the conduct informing cause one of the amended complaint also established the foundation for other violations of FINRA rules. Cause two asserted Alpine's acts of alleged conversion were also a misuse of customer assets, in violation of FINRA Rules 2150 and 2010. And cause three claimed the securities transactions covered by cause one were unauthorized, in violation of FINRA Rule 2010.

Cause four alleged Alpine unfairly priced securities trades, in violation of FINRA Rules 2121 and 2010. Specifically, cause four claimed that a market-making/execution fee that Alpine charged customers resulted, when combined with other commissions, fees, and charges, in unfair prices and commissions for their securities trading. Cause four asserted further that Alpine sold the customer securities positions it considered "worthless" to itself at unfair prices—one cent per position.

Cause five of the amended complaint alleged Alpine charged three distinct unreasonable or unfairly discriminatory fees, in violation of FINRA Rules 2122 and 2010. First, cause five asserted that the $5,000 monthly account fee Alpine charged customers for simply having an account was unreasonable and charged in an unfairly discriminatory manner among customers. Second, cause five claimed an illiquidity and volatility fee that Alpine assessed on customer securities transactions effected from September 2018 to March 2019 was unreasonable. Third, cause five claimed a $1,500 fee that Alpine charged customers to withdraw securities certificates from the Depository Trust Company ("DTC") was likewise not reasonable.[9]

Finally, cause six of the amended complaint alleged Alpine made eight separate payments to affiliated companies that were designed to evade regulatory limitations on the

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[9] "DTC is a registered clearing agency that provides central securities depository services." *Alpine Sec. Corp.*, Exchange Act Release No. 87599, 2019 SEC LEXIS 4757, at *2 n.2 (Nov. 22, 2019).

amount of capital a broker-dealer can withdraw at any one time. Because each of these payments amounted to more than 10% of Alpine's net capital, and FINRA did not approve them, cause six contended, they were each made in violation of FINRA Rules 4110(c)(2) and 2010.

C. The Parties Agree on a Temporary Cease and Desist Order

When Enforcement filed the complaint, it also started a temporary cease and desist action against Alpine.[10] On August 5, 2019, Enforcement and the firm agreed to the entry of a temporary cease and desist order. The order directed Alpine to cease and desist from violating FINRA Rule 2010 by misusing or converting customer funds and securities, or by engaging in any unauthorized transactions in customer accounts. The order specifically required that Alpine cease and desist from: (1) placing debits in customer accounts for Alpine's $5,000 monthly account fee, and transferring cash or securities from customer accounts to satisfy any debits resulting from this fee; (2) transferring from customer accounts any securities Alpine deemed "worthless" or "abandoned;" and (3) charging customers any unreasonable illiquidity and volatility fee or securities certificate fee that exceeded a stipulated threshold amount.

In addition to the foregoing prohibitions, the order instructed Alpine to: (1) reverse the $5,000 monthly account fee in any open customer accounts, reverse any debits placed in such accounts to satisfy this fee, and restore any cash or securities taken from such accounts to cover any such debits; and (2) return any securities taken from customer accounts that Alpine had deemed "worthless." Finally, the order required that Alpine provide to Enforcement, within 10 business days, a full accounting of: (1) any debits placed in customer accounts since October 2018 to satisfy the $5,000 monthly account fee, illiquidity and volatility fee, and securities certificate fee; (2) cash or securities transferred from customer accounts to discharge such debits; and (3) securities transferred from customer accounts after Alpine deemed such securities "worthless" or "abandoned."

On August 16, 2019, Alpine provided Enforcement with the accounting required by the temporary cease and desist order. The accounting included a file purporting to list the $5,000 monthly account fee, illiquidity and volatility fee, and securities certificate fee applied to customer accounts, and all transfers of cash from customer accounts to satisfy each of these fees. In this respect, Alpine averred it had reversed the $5,000 monthly account fee charged to customer accounts currently open and returned to these accounts more than $208,000 per the temporary cease and desist order. Alpine further claimed it did not sell any securities to satisfy any of the firm's fees without customer consent, but rather, it merely journalled the securities into a firm account. Nevertheless, the firm attested, it had restored those securities to customer accounts per the temporary cease and desist order.

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[10] The FINRA Rule 9800 Series allows Enforcement, with the prior written authorization of FINRA's Chief Executive Officer or his designee, to start a temporary cease and desist proceeding with respect to, among other things, alleged violations of FINRA Rule 2010 that involve claims of unauthorized trading or the misuse or conversion of customer assets. FINRA Rule 9810(a).

Alpine's accounting also delivered schedules that the firm claimed reflected the securities Alpine transferred from customer accounts after considering them "worthless" or "abandoned." Here, Alpine said it had returned to customer accounts "[a]ll securities identified as worthless in 2019 by Alpine, except with respect to accounts from which authorization was received." As for the firm's transfers of securities to an "Abandoned Securities Account," the firm simply stated that "[a]ll transfers of securities into that account were in accordance with negative response letters and/or notices it sent to its customers."

D. Alpine Answers the Amended Complaint

Alpine filed an answer to the amended complaint on September 9, 2019. Alpine denied it had engaged in any conduct that violated FINRA rules in the manner Enforcement alleged.

Alpine asserted its fees were not unreasonable or indiscriminately imposed. Rather, it claimed, these fees reflected the costs that Alpine shouldered to clear microcap securities for its customers and were disclosed to the firm's customers in advance of imposing them. It also claimed the fees about which Enforcement complained were not, as alleged, imposed as a pretext to convert customer assets. Instead, Alpine asserted, the fees resulted from the firm's decision in 2018 to cease carrying accounts for retail brokerage customers due to changes in the regulatory environment, and were intended to encourage those customers to close or transfer their accounts before they incurred any unwanted fees. If it took any customer assets to satisfy fees due the firm, Alpine averred, these actions were consistent with customer account agreements. Alpine thus denied it ever engaged in any unauthorized liquidation of securities to cover any fee or debit. The firm nevertheless asserted that it cancelled or reversed all transfers of securities to satisfy the fees it imposed.

Alpine further denied that its actions with respect to "worthless" or "abandoned" securities were wrong or unauthorized. Among other things, it averred that the firm followed a process to identify "worthless" securities having a value less than the cost of transfer, notified customers through negative response letters that such securities would be treated as "worthless," and placed the securities in a firm account, but never engaged in any liquidations of those securities because the firm considered them unmarketable. Alpine asserted that, based on discussions the firm had with regulators, it cancelled all transfers of "worthless" securities to Alpine's account. Similarly, with respect to its actions concerning "abandoned" securities, Alpine claimed it took proper steps to identify abandoned securities based on the failure of customers to abide by their account agreements, and the firm appropriately notified customers that it intended to transfer such securities to an Alpine account pending escheatment to the customer's state of residence.

Finally, Alpine denied it engaged in what Enforcement described in the amended complaint as a "looting" of the firm's coffers. In this respect, Alpine declared that it had engaged in FINRA-approved capital withdrawals and permissible payments of firm expenses only.

E. The Hearing Panel Conducts a Hearing and Issues a Decision, Which Alpine Appeals

The disciplinary hearing began on February 18, 2020. The Hearing Panel heard testimony and received evidence in person through February 22, 2020.[11] Thereafter, the hearing continued and concluded by videoconference because of problems posed by the global COVID-19 pandemic.[12] The Hearing Panel accordingly reconvened remotely for four hearing days during August and September 2020.[13] It met for nine more remote hearing days during September 2021.[14] In total, the hearing required 19 days to complete, and during this time the

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[11] During the February 2020 hearing days, the Hearing Panel heard the testimony of six witnesses.

[12] On February 23, 2020, the Hearing Officer adjourned the hearing because Alpine's lead counsel experienced a family emergency. Although the Hearing Officer scheduled the hearing to resume in person on April 30, 2020, she suspended the hearing indefinitely on March 30, 2020, due to the spread of the COVID-19 virus and federal guidelines requiring social distancing. The Hearing Officer similarly abandoned plans to have the Hearing Panel reconvene to hear testimony and receive evidence in person because of the virus's continued spread.

[13] The parties agreed to continue by videoconference for the purpose of hearing from three witnesses on these hearing days, but Alpine objected to continuing remotely to hear the testimony of the two other witnesses who testified at this time.

[14] On November 2, 2020, the Chief Hearing Officer issued an order informing the parties that the hearing in this matter would continue by videoconference. As further discussed below, the Chief Hearing Officer exercised discretion granted her in a temporary amendment to FINRA Rule 9261. *See* FINRA Rule 9261(b) *as amended by Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Temporarily Amend FINRA Rules 1015, 9261, 9524 and 9830 to Permit Hearings Under Those Rules to Be Conducted by Video Conference*, (hereinafter, "Temporary Amendment"), Exchange Act Release No. 89737, 2020 SEC LEXIS 4034 (Sept. 2, 2020) (SR-FINRA-2020-027) & *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Expiration Date of the Temporary Amendments set forth in SR-FINRA-2020-015 and SR-FINRA-2020-027*, Exchange Act Release No. 92685, 2021 SEC LEXIS 2336 (Aug. 17, 2021) (SR-FINRA-2021-019). On December 18, 2020, Alpine filed a motion that requested the Chief Hearing Officer reconsider her order. The Chief Hearing Officer denied Alpine's motion for reconsideration on March 1, 2021. In so doing, she ordered that the parties agree to a two-week block of time to complete the hearing in August or September 2021. In her order, the Chief Hearing Officer explained that she would continue to evaluate COVID-19 data and guidance, and if the feasibility and safety of an in-person hearing remained uncertain six weeks prior to the hearing date, the hearing would be completed by videoconference. On August 9, 2021, the Chief Hearing Officer entered an order confirming that, after considering the relevant data and guidance, she had decided that the hearing should be completed by videoconference.

Hearing Panel heard the testimony of 19 witnesses and received hundreds of exhibits as evidence.

The Hearing Panel issued its decision on March 22, 2022.[15] The Hearing Panel found that Alpine violated FINRA rules as Enforcement alleged in causes one through five of the amended complaint. With respect to cause six, however, the Hearing Panel found Alpine liable for making only one unauthorized withdrawal of capital from the firm—not eight as Enforcement alleged in the amended complaint.

The Hearing Panel imposed a unitary sanction—an expulsion of Alpine from FINRA membership—for the firm's unreasonable and unfairly discriminatory fees, unfair pricing of securities trades, unauthorized transactions, and misuse and conversion of customer assets.[16] In so doing, the Hearing Panel considered that each of the acts of misconduct covered by causes one through five of the amended complaint included violations of the most egregious character found in the securities industry. The Hearing Panel also found its decision to expel Alpine supported by the fact that the record presented aggravating factors only. These factors included evidence that Alpine engaged in ongoing misconduct after Enforcement filed the complaint, including by not following the terms of the temporary cease and desist order to which the parties agreed.

In addition to ordering Alpine expelled, the Hearing Panel found that the firm proximately caused identified customers quantifiable losses, and it ordered that the firm pay these customers restitution totaling $2,310,234, plus interest. This sum included $735,410 for losses arising from the $5,000 monthly account fee Alpine charged customers, $1,491,625 for losses related to Alpine's illiquidity and volatility fee, and $83,199 for losses stemming from Alpine charging customers the market making/execution fee.

Finally, having found that Alpine engaged in a pattern of misconduct that was ongoing, the Hearing Panel issued a permanent cease and desist order concurrent with its decision.[17] The

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[15] When it issued its decision, the Hearing Panel consisted of the Hearing Officer and one panelist. A second panelist assigned to the Hearing Panel voluntarily withdrew on the fourth day of the hearing, after Alpine informed the Hearing Officer that it intended to file a motion to disqualify the second panelist under FINRA Rule 9234(b). Exercising the discretion granted her under FINRA Rule 9234(a), the Chief Hearing Officer determined to not appoint a replacement panelist.

[16] The Hearing Panel assessed, but did not impose considering Alpine's expulsion, a one-year suspension and a $75,000 fine for the one unauthorized capital withdrawal in which it found the firm engaged under cause six of the amended complaint.

[17] FINRA Rule 8310 allows a Hearing Panel, when imposing sanctions, to impose a permanent cease and desist order against a member or person associated with a member. FINRA Rule 8310(a)(6). An appeal to the National Adjudicatory Council ("NAC") from a decision

[Footnote continued on next page]

Hearing Panel ordered that Alpine permanently cease and desist from violating the specific FINRA rules that it found the firm had violated and engaging in the conduct that caused those rule violations. The order also required that Alpine cease and desist from dissipating or converting the funds or assets of any customer or causing other harm to investors. Finally, the order required that Alpine deposit $2,310,234, the sum that the Hearing Panel ordered Alpine pay as restitution, into an escrow account within 10 days of the Hearing Panel's decision.

Alpine timely appealed the Hearing Panel's decision on April 15, 2022.[18]

III. Facts

A. Alpine Experiences Losses and Decides to Exit the Retail Brokerage Business

As a clearing broker-dealer, Alpine is subject to required fund deposits and excess net capital requirements imposed by the National Securities Clearing Corporation ("NSCC").[19] As of January 2018, NSCC required that Alpine have at least $1 million in excess net capital, which the firm met by keeping excess net capital more than $1.4 million above the NSCC requirement.[20]

Alpine's excess net capital cushion was consistent with the firm's profitability during calendar year 2017 and the first quarter of calendar year 2018.[21] Alpine, however, reported net losses of approximately $44,700 for the second quarter of 2018, and the firm's net losses increased to approximately $71,200 for the third quarter of 2018. By the end of August 2018, Alpine's excess net capital fell to within $200,000 of the NSCC requirement. And one month later, on September 30, 2018, the firm's excess net capital was only $43,267 greater than the NSCC requirement.

[Cont'd]

issued under FINRA Rule 9268 does not stay a permanent cease and desist order. FINRA Rule 9311(b).

[18] As we note above, the Hearing Panel found that Alpine engaged in one unauthorized withdrawal of capital from the firm, not eight unauthorized capital withdrawals as Enforcement alleged in cause six of the amended complaint. Because Enforcement did not cross-appeal any element of the Hearing Panel's decision, we do not revisit the Hearing Panel's findings that Enforcement did not prove that Alpine made seven other capital withdrawals in violation of FINRA rules.

[19] NSCC is a registered clearing agency that provides central counterparty services for equity securities in the United States. *Alpine Sec. Corp.*, 2019 SEC LEXIS 4757, at *1.

[20] Alpine's regulatory minimum net capital requirement is $250,000.

[21] Alpine reported $8,419,595 in net income for 2017. The firm added $2,755,309 in net income for the first quarter of 2018.

Several factors produced Alpine's turn of fortune. First, on June 5, 2017, the Securities and Exchange Commission ("Commission") filed a civil enforcement action against Alpine in the United States District Court for the Southern District of New York.[22] The Commission's action caused a substantial increase in Alpine's legal expenses throughout 2018.

Second, starting in April 2018, Alpine no longer possessed the ability to clear securities trades on an "ex-clearing" basis.[23] Until that time, Alpine relied extensively on the financial resources of other clearing broker-dealers with which it had ex-clearing relationships for the purpose of clearing trades on behalf of Alpine's retail brokerage customers and the customers of correspondent broker-dealers. Alpine's loss of its ex-clearing relationships required that the firm clear trades directly with NSCC acting as counterparty. Alpine thus became subject to NSCC required fund deposits for the specific securities transactions that the firm cleared.[24] In part due to Alpine's net capital position, risk profile, and the low-priced stocks it cleared, these deposit requirements could be significant. The deposit requirements significantly curtailed the volume of trades that Alpine could clear at any point in time, which resulted in a simultaneous decrease in firm revenues.

Third, because Alpine was subject to NSCC required fund deposits the firm needed to have additional capital or cash to supply clearing services to its customers and the customers of

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[22] As we discuss below, *infra* Part V.D.1., the Commission alleged that Alpine violated the federal securities laws because the firm did not follow Bank Secrecy Act requirements for filing Suspicious Activity Reports ("SARs"). On October 9, 2019, after granting the Commission summary judgment in part, the district court entered judgment against Alpine, permanently enjoining the firm and imposing a $12 million civil penalty. The United States Court of Appeals for the Second Circuit affirmed the district court's judgment on December 4, 2020.

[23] "An 'ex-clearing transaction' is a securities transaction that is not reported to a designated clearing agency and clears and settles otherwise than through a designated clearing agency." *See Collection Practices Under Section 31 of the Exchange Act*, 69 Fed. Reg. 41060, 41063 n.45 (July 7, 2004).

[24] NSCC maintains a clearing fund to address the risks it faces because of a broker-dealer's potential default. *Alpine Sec. Corp.*, 2019 SEC LEXIS 4757, at *5. The required fund deposit acts as the NSCC member's margin. *Id*. At all relevant times, the required fund deposit had several components, including an illiquidity charge applied to positions in certain illiquid securities and a volatility charge reflecting the amount of money that a portfolio could lose during a given period. *Id.* at *8; *see also Order Approving a Proposed Rule Change to Enhance NSCC's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV*, Exchange Act Release No. 90502, 2020 SEC LEXIS 4978, at *2-3 (Nov. 24, 2020) (SR-NSCC-2020-003). In July 2019, NSCC imposed on Alpine a minimum clearing fund deposit requirement of $2.3 million because the firm did not follow net capital reporting requirements or respond to information requests.

correspondent broker-dealers. SCA Clearing, Alpine's parent, was neither able nor willing at this time to infuse the estimated $10 to $15 million in capital Alpine needed for this purpose.[25] Instead, Alpine used a costly line of credit provided by its affiliate, Alpine Holding, to obtain the cash necessary to clear trades through NSCC.[26] Drawing upon this line of credit caused Alpine to incur considerable fees and interest expense that also negatively influenced the firm's bottom line.[27]

Finally, Alpine found itself with accounts orphaned by broker-dealers for which Alpine once cleared but had since ceased conducting a securities business, and so it had thousands of small accounts on its books. These accounts often traded infrequently or not at all, and Alpine incurred costs to support the accounts because of the staff and expenses connected with holding them.

The strain of the foregoing financial issues caused Alpine to examine its revenues, expenses, and business plan. Alpine found the need to address, among other issues, a failure to collect fees, an outdated fee structure, the costs associated with clearing low-priced securities, the costs of responding to regulatory inquiries, and staffing levels. Consequently, in July 2018, Alpine decided to drop its retail brokerage business, close inactive and orphaned accounts, and implement a new fee schedule. By so doing, Alpine prepared to shift its business plan to focus on becoming a wholesale clearing broker-dealer.

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[25] Alpine ordinarily distributed its profits monthly to SCA Clearing after receiving, when necessary, FINRA approval. SCA Clearing ceased taking these distributions in early 2018. From April 2018 to January 2019, Alpine kept any profits it recognized as retained earnings.

[26] The terms of this line of credit changed over time. Beginning in February 2018, the terms required that Alpine pay an annual fee equal to 10% of its $4 million credit limit, a monthly fee equal to 1.5% of the credit limit, and interest on borrowed funds at an annual rate of 36%. In May 2018, the terms were amended to increase Alpine's line of credit to $5 million, but the fees and expenses associated with the line of credit remained the same. In February 2019, however, the terms changed again. Although the amount of the line of credit remained at $5 million, and Alpine no longer had to pay an annual fee, this latest iteration of the agreement required Alpine to make an immediate $250,000 payment, pay a monthly fee equal to 8% of the credit limit, and pay interest on borrowed funds at an annual rate of 120%. Members of Alpine's board of directors and management testified consistently that Alpine could not find financing other than that provided by Alpine Holding.

[27] From March 2018 to June 2019, Alpine paid more than $3 million in fees and interest for the liquidity resources that Alpine Holding supplied through the line of credit.

B. Alpine Implements a New Fee Schedule and Charges New Fees

On August 31, 2018, Alpine revised its Schedule of Miscellaneous Account and Service Fees.[28] The revised fee schedule included the $5,000 monthly account fee, the illiquidity and volatility fee, the market-making/execution fee, and the securities certificate withdrawal fee that, in part, inform Enforcement's allegations that Alpine violated FINRA Rules.[29] Alpine appended the revised fee schedule to August 31, 2018 customer account statements, which included the following notice on the first page: "Please take note and review the Revised Fee Schedule that is included at the end of this statement."[30]

1. Alpine Adopts and Charges a $5,000 Monthly Account Fee

Alpine's revised fee schedule included the $5,000 monthly account fee, which replaced a $100 annual account fee that appeared on Alpine's prior fee schedules.[31] Alpine's management

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[28] The revision of Alpine's fee schedule coincided with the composition of the firm's board of directors changing from three members to a single member. There is no documentary evidence of either the three-member board or the single-member board ever approving the revised fee schedule.

[29] The fees listed on the revised fee schedule did "not include commissions, markups, commission equivalents or advisory fees."

[30] At the time it revised the fee schedule, Alpine prepared account statements for its retail brokerage customers and customers of its correspondent broker-dealers quarterly, unless there was activity in a customer's account during a given month, in which case Alpine prepared a monthly account statement for that account. Consequently, some customers did not receive a copy of the revised fee schedule until Alpine appended it to their account statements for the quarter ending September 30, 2018. In March 2019, Alpine began preparing account statements monthly for all customers regardless of the activity in their accounts during a particular month.

Many customers, consistent with their customer agreements, received their account statements from Alpine by way of an electronic portal through which they had log-in access only. In or around August 2018, in connection with Alpine's conversion to a new back-office system, the firm changed customer account numbers and log-in information. For that month, Alpine sent two statements to customers—one statement with the prior account number and a second statement, generated by the new system, which reflected the new account number. Many customers, however, met with failure when they tried to access their accounts using the new log-in information that Alpine supplied them, and the customers were unable to access their account statements and any attachments thereto for periods after August 2018. Alpine nevertheless worked to help customers who contacted the firm and correct any problems they encountered trying to access their online account information.

[31] Alpine's prior fee schedules did not include a monthly account fee. The prior fee schedules, however, included inactivity and dormant account fees. Customer agreements provided:

[Footnote continued on next page]

added the $5,000 monthly account fee to the firm's revised fee schedule at John Hurry's instruction.[32] The firm adopted the fee for two purposes.

First, and primarily, Alpine intended the $5,000 monthly account fee to capture its customers' attention and coerce them to close their accounts. Alpine believed that most customers, when confronted with the fee's size, would choose to close their accounts rather than pay the fee. At the time, Alpine's officers understood that Alpine would reverse the fee for any customer who contacted the firm and agreed to close their account or transfer their securities elsewhere.[33]

Second, Alpine meant the $5,000 monthly account fee to generate for the firm a minimum sum of revenues from the accounts of those customers who did not close their

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[Cont'd]

> If you have an account that you have not made a withdrawal from, deposit to, renewal of, or transfer involving your account for more than twelve (12) months, Alpine Securities Corporation may classify your account as inactive and may charge an inactive account service fee as allowed by applicable law and set forth on the Fee Schedule. If your account is classified as inactive and Alpine has been unable to contact you by electronic or regular mail during this period, Alpine may classify your account as dormant and may charge a dormant account service fee as allowed by law and set forth on the Fee Schedule.

Alpine nevertheless did not charge or collect these account fees consistently. John Hurry testified that, due to the firm's pressing financial problems, Alpine instead decided to implement a new business plan and charge a $5,000 monthly account fee rather than attempt to collect any fees past due from customers.

[32] Robert Tew, who was Alpine's sole board member, CEO, and CCO on August 31, 2018, testified that he was not involved with the decision to implement the $5,000 monthly account fee and believed that he was not able to override John Hurry's instructions to the firm's management that it add the fee to its fee schedule. Several members of Alpine's board of directors and the firm's management believed during the period the $5,000 monthly account fee was discussed and implemented that the fee was not feasible.

[33] John Hurry testified that Alpine did not have the financial resources to service most of the accounts held on its books. In his view, Alpine "really had to focus on picking the customers that we think we could make money on and service the best." Alpine therefore prepared to move select accounts to Scottsdale, and to force the closure of all other accounts. Of the firm's thousands of customer accounts, Alpine considered about 150 to 250 of them worthy candidates to transfer to Scottsdale.

accounts.[34] Members of Alpine's management team accordingly viewed the $5,000 monthly account fee as a "toll" the firm expected customers to pay for having an account open at the firm.

There is no evidence, however, that Alpine sought to relate the $5,000 monthly account fee to any specific service that Alpine supplied to customers or to allocate to the fee any specific direct or indirect costs that the firm incurred when a customer had an account open at the firm. In fact, when FINRA conducted its 2019 examination of Alpine's fees, the firm could not, in response to a staff information request, supply any documentation that justified the fee's reasonableness or that explained how the fee correlated specifically to any quantified costs.[35] That is because Alpine never conducted such an evaluation.[36]

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[34] John Hurry testified that Alpine imposed the $5,000 monthly account fee instead of requiring that customers keep a minimum-sized account that generated revenue with some level of certainty for services provided by the firm.

[35] Alpine supplied a narrative response to staff's request that read:

> When considering the reasonableness of fees, Alpine takes into consideration a variety [of] factors that include, among others, product demand, competition practices, internal costs, and regulatory and legal risks. The subject $5,000 monthly account fee is unique and the primary considerations for implementing [the fee] were to effect a strategic change in its business model and to address significant financial risks posed by NSCC charges. Essentially, because of the financial constraints and operational burdens posed by NSCC illiquid charges and DTC custody fees, the monthly fee is intended to purge Alpine of its retail account base in order to focus on larger, high-volume clients. The monthly fee will also give Alpine the ability to manage absorbent [sic] DTC custody fees created by non-tradable securities sitting in dormant accounts. Alpine published the fee well in advance of implementation. Alpine is also giving customers every opportunity to move or close their accounts without being assessed the fee. We are undergoing extensive efforts to contact customers and to workout [sic] solutions. Right now, the biggest concern from customers is that they have nowhere to take their accounts.

Alpine did not provide staff with any other information, for example, any information concerning the "product demand, competition practices, internal costs, and regulatory and legal risks" that the firm claimed it considered when deciding the reasonableness of its fees. The firm also did not explain how the $5,000 monthly account fee addressed "operational burdens posed by NSCC illiquid and DTC custody fees" given the other fees, including the illiquidity and volatility fee and DTC custody fees, that Alpine included elsewhere on the revised fee schedule.

[36] Alpine provided FINRA staff with only generalized reasons for implementing the $5,000 monthly account fee. For example, in response to another staff request for information issued during FINRA's 2019 examination of the firm's fees, Alpine supplied a "Fee Schedule Analysis" that described the fee simply as "Account Maintenance" and commented: "Replaces inactive

[Footnote continued on next page]

Alpine-prepared September 30, 2018 customer account statements included the firm's first specific reference and notice about the $5,000 account fee other than by simply appending the firm's revised fee schedule. On the first page of these statements, Alpine declared:

> Dear Valued Client,
>
> Alpine has made significant changes to both its systems and business model. [W]e feel they are important to share with you and might impact how you deal with Alpine.
>
> Of first mention, Alpine made a strategic change to its trading and operational systems. . . .
>
> . . . Unfortunately given the current landscape we have decided a strategic change to our business model was needed. To that end, Alpine will be moving away from the retail business to a wholesale model. What does this mean for you? As you know, we have recently changed our fee schedule. This change includes a new fee of $5,000 per month, per account. This fee is in addition to the fees listed on the fee schedule and is simply a fee that covers having an account open at Alpine. We understand how impactful this change and fee could be to you as a client and are prepared to work with you through this change. . . .

In October 2018, Alpine assessed the $5,000 monthly account fee and posted debits of equal amounts in the accounts of approximately 3,000 Alpine retail brokerage customers, which

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account fee. Inactive fee was not effective at clearing up inactive/passive accounts." The Fee Schedule Analysis also included the following "Service or Cost Rationale" for the $5,000 monthly account fee: "This general [fee] involves multiple persons and must be reviewed and retained correspondence. Time and costs varies and postage and handling. Also, unique AML and Accounting risks. Customer allocated CPA [costs per account] based on activity. Believe way under allocated for CPA."

David Brant testified that Christopher Frankel prepared this analysis, but Christopher Frankel testified that he did not do so and the rationale the analysis supplied did not "make any sense" to him. Chris Doubek testified that the Fee Schedule Analysis, which he reviewed when he joined the firm, represented the only analysis that Alpine prepared to justify imposing the $5,000 monthly account fee. From his perspective, the analysis conveyed only that "the fee is designed to fill a shortfall where expense is greater for an account that does not do any revenue[,] but the firm still sustains expenses associated with maintaining that account." As he admitted, however, the rationale Alpine provided in no way suggested that the $5,000 monthly account fee corresponded to the costs or expenses that Alpine incurred to keep a customer's account.

was reflected in the activity details of their October 31, 2018 account statements.[37] In November 2018, Alpine charged the monthly account fee and posted debits for $5,000 in approximately 1,100 customer accounts introduced by Scottsdale.[38] And in December 2018, Alpine charged the monthly account fee and posted debits for $5,000 in an additional 600 accounts, including the accounts of 273 customers introduced by correspondent broker-dealers Spencer Edwards, Inc. ("Spencer Edwards") and Primary Capital, LLC ("Primary Capital").[39] In total, from October to December 2018, Alpine charged 4,605 customer accounts more than $23,700,000 when it assessed the $5,000 monthly account fee.[40]

2. Alpine Implements and Collects an Illiquidity and Volatility Fee

Alpine's revised fee schedule also included the illiquidity and volatility fee, which Alpine said it would impose at "1% per day of the Illiquidity and Volatility Charge assessed to Alpine by NSCC" on each customer trade. Because at the time NSCC ordinarily cleared and settled trades two days after the trade date, Alpine's illiquidity and volatility fee amounted to at least 2% of the deposit required by NSCC to fund the trades that Alpine cleared for customers.[41]

Alpine adopted the illiquidity and volatility fee as a "pass through" fee to cover the costs and interest expense that the firm incurred when it borrowed from the line of credit that Alpine

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37 Alpine continued to append the revised fee schedule to the account statements that it prepared for its retail brokerage customers for the remaining months in 2018, but those statements did not include elsewhere any specific reference to the $5,000 fee.

38 The statements that Alpine prepared for accounts introduced by its affiliate broker-dealer, Scottsdale, were like those prepared for Alpine's retail brokerage customers in that the firm appended the revised fee schedule to the statements.

39 Unlike the account statements that Alpine prepared for its retail brokerage customers and customers of Scottsdale, the account statements that Alpine prepared for customers introduced by Spencer Edwards and Primary Capital did not include a copy of Alpine's revised fee schedule or any notice of the $5,000 monthly account fee before their accounts were assessed the fee in December 2018. David Brant testified that customers introduced by Spencer Edwards and Primary Capital should not have been charged the $5,000 monthly account fee and that the assessments were the result of a "clerical mistake." Alpine later reversed the fee for some but not all Spencer Edwards and Primary Capital customers.

40 If Alpine imposed the $5,000 account fee each month, Alpine customers would pay $60,000 annually in monthly account fees. Alpine, however, charged most customers the $5,000 monthly account fee only once. No accounts were assessed the $5,000 monthly account fee after December 31, 2018.

41 NSCC does not keep the funds that it requires Alpine deposit for a particular transaction, and it returns those funds to Alpine once the trade clears.

Holding supplied the broker-dealer to finance its NSCC required fund deposit.[42] When asked to give a written explanation about the purpose of the illiquidity and volatility fee during FINRA's 2019 examination of Alpine's fees, the firm responded:

> The Illiquidity and Volatility Fee is assessed to customers based on the cost of capital that is charged to Alpine in order to meet NSCC margin requirements for the customer's respective trade. The customers are charged either the 1% fee or the minimum charge of $150 for all trades that settle [the] regular way.

When it adopted the illiquidity and volatility fee, Alpine implemented a pre-trade approval process that required a customer complete and email to Alpine a pre-trade authorization form.[43] Alpine used the information that the customer supplied concerning a desired trade to calculate the firm's estimate of the NSCC required fund deposit and the amount of the illiquidity and volatility fee that Alpine would charge the customer to place that trade. If the customer agreed to pay the illiquidity and volatility fee, Alpine required the customer to call the firm to place the trade. If the customer received pre-approval for a trade but chose not to place the trade to avoid paying the illiquidity and volatility fee, or if Alpine was unable to execute the trade, the firm nonetheless charged the customer a $150 minimum processing fee, which Alpine disclosed on the pre-trade authorization form but not on the firm's revised fee schedule.[44]

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[42] The Fee Schedule Analysis that Alpine supplied to FINRA staff during the 2019 examination of the firm's fees described the illiquidity and volatility fee as a "Finance Charge imposed on Alpine for funds used to cover NSCC illiquidity and volatility charges." The "Service or Cost Rationale" for the fee said "Alpine draws on a line of credit to pay for NSCC illiquidity and volatility charges. This is a pass through fee to cover those finance charges."

John Hurry decided that Alpine should place the illiquidity and volatility fee on the firm's revised fee schedule. Christopher Frankel testified, "John [Hurry] was basically the one lending the money to the firm on the credit facility to fund the illiquidity fee, and that's what he wanted to get paid for lending his money." John Hurry and Alpine justified the illiquidity and volatility fee based on general representations about the risks and lost opportunity costs that Alpine Holding faced by supplying a line of credit to Alpine. John Hurry nevertheless did not explain how the firm justified the specific amount of the fee.

[43] The pre-trade authorization form said, "By placing any order on the above Security(ies) approved for sale, Customer agrees to sell only the amount up to the Approved QTY. Customer also agrees to pay the NSCC Finance Charge and all other charges in accordance with Alpine's Schedule of Miscellaneous Account and Services Fees, which can be found on Alpine's website . . . ."

[44] When Alpine provided FINRA with a written explanation of the illiquidity and volatility fee, it said that "[m]ost customers are afforded the courtesy of paying the capped $150 charge which represents less than the actual 1% of the NSCC illiquidity and volatility charge." FINRA staff's examination of the illiquidity and volatility fees Alpine charged nevertheless showed that most customers did not have the fee capped at $150.

Alpine began charging the illiquidity and volatility fee on September 11, 2018. From that time, until FINRA commenced a disciplinary action against the firm in July 2019, Alpine charged and collected illiquidity and volatility fees totaling $1,527,925. During this period, Alpine paid Alpine Holding at least $2.75 million in fees and interest for its line-of-credit borrowing.

3. Alpine Employs and Charges a Market-Making/Execution Fee in Addition to Commissions, Fees, and Other Charges

Alpine's revised fee schedule also introduced the firm's market-making/execution fee, the amount of which was shown as "2.5% of the best available price" per transaction. The fee depicted on the revised fee schedule was in fact two distinct fees. Alpine charged a market-making fee by marking securities down in an amount equal to 2.5% of the best available price when it executed trades on a principal or riskless principal basis.[45] Alpine charged an execution fee equal to 2.5% of a trade's principal amount when the firm functioned as a customer's agent.[46] This means Alpine effectively levied a 2.5% fee on all trade executions, in addition to the firm's other commissions, fees, and charges.

In a written response to an information request during FINRA's 2019 examination of Alpine's fees, the firm explained:

> The Market Making fee represents the firm's markup/markdown charged on trades in which Alpine acts as the market-maker in executing the trade in a principal capacity.[47] The Market Making Fee reflects Alpine's entry into the

[45] "A principal trade is a trade in which the broker/dealer buys or sells for an account in which the broker/dealer has a beneficial ownership interest (e.g., a proprietary account). When executing transactions from this account, the broker/dealer typically charges its customer a markup, markdown, or commission equivalent." *NASD Regulatory Notice 01-85*, 2001 NASD LEXIS 91, at *3 (Dec. 2001). "[A] riskless principal trade is one in which a broker/dealer, after having received an order to buy (sell) a security, purchases (sells) the security as principal, at the same price, to satisfy that order." *Id.* at *4. As in a principal trade, "[t]he broker/dealer generally charges its customer a markup, markdown, or commission equivalent for its services." *Id.*

[46] "An agency trade is a trade in which a broker/dealer, authorized to act as an intermediary for the account of its customer, buys [or sells] a security from [or to] a third party (e.g., another customer or broker/dealer). Such a trade is not executed in, or does not otherwise pass through, the broker/dealer's proprietary account. When executing an agency trade, the broker/dealer generally charges the customer a commission for its services." *Id.* at *3-4.

[47] There is no evidence that Alpine was a "market maker" as Exchange Act Section 3(a)(38) defines that term. *See* 15 U.S.C. § 78c(a)(38) ("The term 'market maker' means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer

[Footnote continued on next page]

> market-making line of business and is reflective of the customary method of charging for such service. The Execution Fee is charged for customer trades that are routed to outside counterparties for execution and reflect the expense of maintaining such counterparty relationships and the increased manual nature and risk borne by Alpine in executing trades other than through regular way settlement, including the manually and risk intensive same-day cash settlement services provided by Alpine.

Alpine admitted, however, that it did not have any documentation that justified its decision to impose the market-making/execution fee. The firm nevertheless claimed, without any further explanation or support, that the fee "was driven by considerations of the fair and reasonable market value of the unique nature of the execution and settlement services provided by Alpine."[48]

Alpine started charging the market-making element of the market-making/execution fee on November 21, 2018.[49] FINRA staff found that Alpine charged its retail brokerage customers market-making fees totaling $45,495 on 236 principal trades from November 21, 2018, to September 24, 2019. When added to Alpine's customary commissions, fees, and other charges, Alpine's retail brokerage customers paid Alpine total fees and charges of $159,325 for the 236 trades—an average of 8.75% per principal transaction.

Alpine began charging the execution element of the market-making/execution fee on March 1, 2019.[50] FINRA staff found that Alpine charged its retail brokerage customers execution fees totaling $44,675 on 204 agency trades from March 1, 2019, to September 24, 2019. When the execution fees are added to Alpine's customary commissions, fees, and other charges, Alpine's retail brokerage customers paid Alpine total fees and charges of $157,640 for the 204 agency trades, which reflected an average of 8.82% per agency trade.

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communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis."). FINRA staff's examination of Alpine's books and records showed that the firm did not keep an inventory of any specific security.

[48] As with Alpine's other fees, John Hurry directed that Alpine adopt and charge the 2.5% market-making/execution fee. Christopher Frankel explained that John Hurry viewed the market-making/execution fee as an added source of order-flow revenue.

[49] Alpine did not reflect the amount of the market-making fee on customer trade confirmations.

[50] Alpine did not charge an execution fee for every agency transaction executed by the firm. Unlike the market-making fee, Alpine showed the execution fee charged for agency trades on customer trade confirmations.

Alpine's retail brokerage customers paid total fees and charges, including the market-making fee/execution fee, greater than 10% on more than 125 of the 440 principal and agency trades that Alpine executed during the relevant periods.[51] In at least 50 cases, retail brokerage customers paid total fees and charges for their trades that exceeded 15% when accounting for the market-making/execution fee.

4. Alpine Increases the Fee to Withdraw Securities Certificates from DTC

Starting in October 2016, Alpine charged customers $1,000 to obtain paper certificates for securities deposited at DTC.[52] On April 1, 2019, Alpine increased this fee to $1,500.[53]

Alpine adopted the $1,500 fee to pass through to customers any charges that Alpine incurred to withdraw securities certificates on their behalf in paper form from DTC.[54] Alpine's Fee Schedule Analysis described the fee as "Stock Withdrawal by Transfer Sometimes referred to as a physical certificate or 'cert-out' request. Applies to each security position. DTC pass through charges apply as well." The "Service or Cost Rationale" for this fee stated, "This involves coordination of multiple staff. Activity requires contact with DTC, supervisory and

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[51] Alpine charged both a market-making fee and an execution fee on one of the 236 principal trades FINRA staff reviewed.

[52] Alpine's August 31, 2018 revised fee schedule described this fee as "Withdrawal by Transfer (from DTC) Regular." DTC offers several methods to transfer securities certificates in its custody, including by requesting paper certificates or transferring certificates electronically. *See generally* Depository Trust & Clearing Corporation, *Withdrawals Service*, https://www.dtcc.com/settlement-and-asset-services/securities-processing/withdrawals-service (last visited Mar. 10, 2025).

[53] In a letter attached to February 2019 account statements, Alpine informed customers that, for customers with cleared over-the-counter securities in their accounts, the firm would not allow the "transfer of free-standing shares to outside accounts for regulatory & compliance reasons." Instead, Alpine stated, "[c]leared shares must be returned the way they were originally delivered subject to applicable fees (see attached Fee Schedule)." Alpine therefore asked that customers "[p]lease send an email request to have your certificates returned or electronically returned to the Transfer Agent." Finally, Alpine advised, "the cost for returning a cleared certificate is currently $1,000 and that fee is being raised to $1,500 effective April 1, 2019[,] with the amended fee schedule." The referenced amended fee schedule notified customers that the amount of Alpine's fee for transferring securities certificates electronically was "$295 + cost."

[54] Chris Doubek, Alpine's sole director, instructed Joseph Walsh, whom Doubek replaced as CEO in April 2019, to raise the fee for withdrawing paper securities certificates from $1,000 to $1,500. Chris Doubek testified that he made the decision to increase the fee after he consulted with John Hurry, who did not believe that the $1,000 fee covered completely the expenses that Alpine incurred for providing this service to its customers.

compliance approval, possible AML issues, mailing and tracking of certificates, and general record retention. Customer allocated CPA based on activity."

At all relevant times, DTC charged Alpine $500 to withdraw paper securities certificates from the depository, and Alpine was assessed other, variable fees by transfer agents for their role managing these paper certificates. Chris Doubek testified that, in addition to any third-party costs, the firm incurred labor costs associated with keeping the staff necessary to communicate with transfer agents about requests to withdraw paper securities certificates from DTC. Alpine also incurred mailing and insurance costs in connection with these certificate withdrawals. Alpine nevertheless neither conducted nor provided to FINRA any review of the specific costs or expenses the firm incurred when providing this service to customers.

C. Alpine Removes Assets from Customer Accounts

1. Alpine Takes Cash and Securities for the $5,000 Monthly Account Fee

Alpine's customer agreements authorized the firm to debit a customer's account for "any and all reasonable charges as it may deem necessary to cover its services and facilities, including, but not limited to, custody, transaction and termination fees." The customer agreements further allowed Alpine to liquidate assets held in a customer's account and to apply the proceeds of the liquidation towards the satisfaction of any debts and obligations the customer owed to the firm.

Notwithstanding its original intentions to reverse the $5,000 fee for customers who contacted the firm, Alpine began taking cash from customer accounts to cover the $5,000 fee in October 2018. If a customer account held cash or was linked to a money market account when Alpine charged the $5,000 monthly account fee, Alpine took cash from the account to cover the debit posted for the fee.[55] If more cash came into the account, for example proceeds from the sale of securities or an incoming wire or check, Alpine took that cash and applied it to satisfy any debit balance that resulted from imposing the fee.[56] In total, Alpine took more than $1,700,000 in cash from 1,687 customer accounts as payment towards satisfying the $5,000 monthly account fee.[57]

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[55] If the cash attached to a customer's account was not sufficient to cover the entire $5,000 monthly account fee, any unpaid sum was reflected as a debit balance in the account.

[56] In some instances, customers sold securities or sent money to Alpine to pay the $5,000 monthly account fee. In fact, Alpine employees sometimes informed customers that they would need to send funds to pay for the $5,000 monthly account fee before they could close their accounts or transfer their securities to another broker-dealer.

[57] Only a fraction of the accounts charged the $5,000 monthly account fee had cash that Alpine could take to pay for the fee.

Alpine "reversed" the fee for most customers who contacted the firm and agreed to close their accounts or transfer their securities to another broker-dealer.[58] But in so doing, Alpine did not return any cash taken from the customer's account to pay the debit posted for the $5,000 monthly fee. Alpine instead simply "flattened" the account by writing off the amount of any debit balance, and the firm then closed the account.[59]

Alpine's goal to have most customers contact the firm and close their accounts nevertheless proved elusive. Consequently, in early 2019, Chris Doubek, who was then Alpine's sole board member, and Joseph Walsh, who was acting as Alpine's CEO in addition to being the firm's COO, decided that more "deliberate" or "dominant" notice was needed to carry out what they understood to be a mandate from John Hurry that Alpine close the firm's retail brokerage customer accounts.

For example, account statements for the month ending January 31, 2019, emphasized that the firm had "recently made significant changes to its business model. . . . Unfortunately given the current business landscape Alpine is moving away from servicing retail accounts to focus on clearing and market-making activities." The statements also said:

> As you may already know, the recently updated fee schedule includes a new monthly account fee of $5,000 reflecting the change to our business model. We understand that many account holders may not want to incur this fee, so we are working with every customer to close their accounts and avoid the fee either by: 1) liquidating positions currently held in the account; 2) returning all securities & funds to you as account holder; 3) writing off any worthless securities; or 4) referring you to our affiliated firm Scottsdale Capital Advisors to conduct ongoing business.

The following month, Alpine attached a one-page letter to February 28, 2019 account statements. The letter, which included at the top of the page a declaration that read "**IMMEDIATE ACTION REQUIRED**," explained:

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[58] Alpine also kept a short list of favored accounts for which it reversed the $5,000 monthly account fee when the firm imposed it. David Brant testified that these were "good" customers that Alpine did not want to lose. Randall Jones, a former Alpine employee engaged in business-development, testified that Alpine planned to keep these "better accounts" and eventually transition them to Scottsdale.

[59] For example, Alpine swept $2,862.16 in cash from customer WP's money market account to cover the $5,000 monthly account fee in 2018, leaving a debit balance of $2,137.83. At the end of May 2019, Alpine wrote off the remaining debit balance with an adjusting entry but did not return the cash it took to cover the fee. As another example, Alpine swept $3,398.35 from customer TEI's money market account to cover the $5,000 monthly account fee in 2018. In March 2019, Alpine made an adjusting entry to write off the remaining $1,601.65 debit balance but did not return the cash it took from this account.

> As previously announced, Alpine Securities has been required to update its business model due to increasing regulatory pressures & expense and will no longer carry direct accounts. Because of this business change we request your immediate attention and ask that you follow the steps outlined below to have any funds and or securities in your account returned to you. . . . Please be advised that **if we do not receive your direct instructions to close your account by May 1, 2019** we will have to liquidate positions to cover all outstanding fees including the $5,000 Monthly Account Fee.[60] (Emphasis in original).

Finally, a one-page letter attached to account statements for the quarter ending May 31, 2019, declared that Alpine needed customers' "**IMMEDIATE ACTION**."[61] It read:

> As previously announced in your statements over the past 9 months, Alpine Securities has updated its business model due to increasing regulation & expense and will no longer carry direct accounts, no exceptions. All accounts must be closed immediately. . . .
>
> **Effective June 1, 2019 Alpine Securities will take action to close all remaining accounts. This means no further statements will be generated for your account.**
>
> **Alpine will liquidate enough positions in your account that have an active market to cover any open debits.**

Alpine became frustrated with the small number of customers who contacted the firm to close their accounts or transfer their securities to another broker-dealer despite the foregoing notices. Consequently, on May 31, 2019, Joseph Walsh, with Chris Doubek's approval, informed Alpine personnel that the firm would no longer reverse the $5,000 monthly account fee for any customers.[62] Walsh explained, "This was an accommodation for those customers who pro-actively contacted us to transfer their securities and close their account." From this point forward, Alpine generally required that customers supply the funds necessary to cover any debits

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[60] Alpine attached an identical one-page letter to the account statements that it prepared for the periods ending March 31, 2019, and April 30, 2019, but the version of the letter that the firm attached to the later of these account statements extended the deadline for customers to close their accounts to June 1, 2019.

[61] Although Alpine dated the letter May 31, 2019, it was not available or sent to customers before June 11, 2019.

[62] By this time, Chris Doubek, in addition to being Alpine's sole board member, was the firm's CEO and CCO, and Joseph Walsh was the firm's COO.

in their accounts before the firm would agree to close their accounts or transfer their securities to another broker-dealer.[63]

In June 2019, Alpine decided to take securities from customer accounts to cover any remaining debit balances caused by the $5,000 monthly account fee. In a series of journal entries, Alpine moved these securities to an Alpine proprietary account that the firm had renamed "LIQ to Cover Customer Debit."[64] In total, during June and July 2019, Alpine took 178 securities positions valued at more than $1.15 million from 174 customer accounts and moved them to the "LIQ to Cover Customer Debit" account to settle debits created by the $5,000 monthly account fee.[65]

After intervention by state regulators, Alpine decided not to sell any of the securities that it moved to the "LIQ to Cover Customer Debit" account, despite its intention to do so.[66] Instead, beginning June 25, 2019, Alpine reversed the transfers of securities to the "LIQ to Cover Customer Debit" account and returned the securities to the customer accounts from which Alpine had taken them.[67] After Enforcement filed the complaint starting disciplinary proceedings against Alpine, and the parties agreed to a temporary cease and desist order, Alpine reversed the $5,000 monthly account fee for all customers whose accounts had been charged the fee and

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[63] For example, when customer TM discussed the closure of his account with Alpine in June 2019, Chris Doubek directed him to mail the firm a check for $5,395 to cover the $5,000 debit balance from the monthly account fee and $395 in fees associated with transferring a position in the account. Doubek told TM that the firm would transfer the position once it received the check.

[64] Alpine told customers who contacted the firm about closing their accounts or transferring their securities at this time that they would have to provide Alpine the funds necessary to cover any debit balances caused by the $5,000 monthly account fee before the firm would return their securities. For example, customer BG asked that Alpine return the shares in his account in June 2019. In response, he received an email from Alpine's "House Accounts" email address directing him to mail the firm a check for $5,414.17—$4,999.17 to cover the remaining debit balance from the monthly account fee and $415 to cover fees associated with transferring the position. After BG wired $5,514.17 to Alpine, the firm reversed a transaction by which it had earlier transferred BG's securities to the firm's "LIQ to Cover Debit" account.

[65] The value of the securities taken from customer accounts for the $5,000 monthly account fee exceeded the debit balances in those accounts. That is because Alpine's practice was to take marketable securities valued at twice the amount of the debit so that the firm was sure to recoup the full amount of the debit when it sold the positions to the market.

[66] Alpine chose the account name "LIQ to Cover Customer Debit" to reflect the fact that Alpine planned to liquidate the securities it took from customer accounts for the $5,000 monthly account fee and close the accounts.

[67] Alpine also reversed the $5,000 monthly account fee charged to these customer accounts.

remained open.[68] Nevertheless, Alpine did not return $735,410 in cash that it had earlier taken to satisfy debits posted to customer accounts for the $5,000 monthly account fee.[69]

2. Alpine Sells Customer Securities That It Unilaterally Considers "Worthless" to a Proprietary Account for One Penny Per Position

In February 2019, Alpine implemented another means of closing customer accounts—defining as "worthless" any securities position valued at less than $400. In the one-page letter Alpine attached to February 28, 2019 account statements, in which Alpine told customers it would begin liquidating securities to cover outstanding fees after May 1, 2019, the firm announced the following option for over-the-counter traded securities in customer accounts:

> ***Positions Worth Less than $400:*** Please submit a Worthless Securities Form found on our website to the email above and request account closure once the worthless security is processed. Positions worth less than $400 or have no active trading market, liquidation may incur greater fees and commissions than the position value.

Thereafter, on March 15, 2019, Alpine sent all customers with positions that Alpine valued at $400 or less a document titled "NEGATIVE RESPONSE WORTHLESS SECURITY LETTER."[70] This negative response letter explained:

> We are contacting you to inform you of the status of certain securities held in your brokerage account. The security listed above has been deemed "worthless" by Alpine Securities.[71] Securities may be given a "worthless"

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[68] As discussed later in this decision, *infra* Part III.E.1., however, Alpine delayed reversing some debits caused by the $5,000 fee. In addition, the firm inaccurately represented to FINRA that it had refunded cash taken to cover the $5,000 monthly fee to all open customer accounts when, in fact, some open accounts had not received a refund. Alpine provided refunds to the remaining open accounts only after FINRA sought further information from Alpine concerning its compliance with the temporary cease and desist order.

[69] The $735,410 amount includes cash taken from closed customer accounts. The temporary cease and desist order did not require Alpine to return cash to closed customer accounts.

[70] Chris Doubek and Joseph Walsh decided to send this letter with the intent that any customers who received the letter and did not object to having their securities thought "worthless" would have their accounts closed. Alpine did not send the letter to customers whose accounts then held securities positions Alpine valued at more than $400.

[71] The letter included information about the securities position Alpine considered "worthless," including the security's name, its trading symbol, and the number of shares of the security that customer held in the account.

status for one of the following reasons: (1) we are unable to find a ready market to conduct a liquidation of the security; (2) we are unable to find an independent transfer agent employed by the issuer to conduct stock transfer; or (3) costs involved in the sale of the security are greater than the proceeds generated from such sale.

All your shares of the security listed above will be sold to our "worthless securities account" for $0.01 proceeds. This will allow you to avoid potential fees associated with this security, including custody, transfer and inactivity fees. . . . You will have no further obligation or claim to the security. . . .

. . . .

To implement this assignment, no action is needed on your part. By not responding to this notification, you hereby acknowledge and agree you assign all shares of the above referenced security to Alpine Securities' worthless securities account for a sale price of one penny. We will move the shares to the worthless securities account 30 days from the date of this notice. You acknowledge and agree you will have no further claim to the above referenced shares. . . .

If you object to assigning the shares of the above referenced security to Alpine Securities' worthless securities account, then please sign the below Customer Objection and return [it to the mailing address provided].[72]

Alpine did not, however, take any securities positions worth $400 or less for its "worthless securities account" 30 days after sending the March 15, 2019 negative response letter.[73] Rather, more than two months after sending the letter, Alpine decided unilaterally to take from accounts securities positions valued at $1,500 or less to meet the firm's goal of shuttering its retail securities business.[74] Specifically, over a period of three days—May 28,

[72] Some customers who signed the negative response letter's customer objection section, and returned the letter to Alpine, later had their securities taken and moved to the firm's "worthless securities account" despite their objections.

[73] Alpine included the same definition and notice about "worthless" securities positions in the one-page letter that it attached to account statements for the periods ending March 31, 2019, and April 30, 2019, as it had in account statements it prepared for the month ending February 28, 2019. These account statements made no mention of the March 15, 2019 negative response letter sent to some customers.

[74] According to the testimony of Chris Doubek, Alpine grew tired of waiting for customers to close their accounts. John Hurry informed Doubek that he wanted Alpine to close all retail brokerage accounts in a brief period, and he threatened Doubek's position with the firm if his directive was not carried out. Doubek, Alpine's sole board member, CEO, and CCO, thereafter

[Footnote continued on next page]

2019, to May 30, 2019—Alpine removed securities positions worth $1,500 or less from all customer accounts because the firm deemed them "worthless."[75] In total, during this period, Alpine removed 2,235 securities positions from more than 1,400 customer accounts and transferred the positions to Alpine's "worthless securities account."[76] To effect each of these "worthless" securities transactions, Alpine bought the securities position for one penny and moved the position to a proprietary account that it controlled.[77]

Alpine did not notify customers that it had expanded the definition of "worthless" to include securities positions having a value of $1,500 or less before Walsh effected the

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took actions that he considered necessary to close those accounts, including deciding that the firm should take from customers any securities position worth $1,500 or less. Joseph Walsh testified that he disagreed with this decision primarily because Alpine had not supplied any notice to customers that the firm had decided to redefine a "worthless" securities position as one having a value of $1,500 or less. Doubek nevertheless instructed Walsh, the firm's COO, to take these securities positions because the process of closing customer accounts was taking too long.

[75] The $1,500 or less threshold for defining a securities position as "worthless" was chosen in May 2019 because it equaled the $1,500 fee that Alpine had begun to charge to withdraw securities from DTC in paper form on April 1, 2019. Doubek and Walsh testified, however, that this was the highest possible fee to withdraw a position, and that some positions deemed "worthless" could have been withdrawn or transferred electronically at a lower cost.

[76] Joseph Walsh, at Chris Doubek's instruction, effected all 2,235 "worthless" securities transactions made at the end of May 2019. Using Alpine's valuations at the time of the transactions, the total value of all 2,235 "worthless" securities positions taken by the firm was $349,340. Of the 2,235 positions Alpine treated as "worthless," 287 were worth more than $400 when Alpine took them. The total value of these 287 transactions was $267,956. Joseph Walsh explained that, because of changes in the market value of securities, customers who had securities valued at $400 or less taken as "worthless" in May 2019 may not have received the negative response letter that Alpine sent to some customers in March 2019.

[77] For all but 15 of these transactions, Alpine sent trade confirmations to customers showing that they had sold their "worthless" securities to Alpine for one penny per position. Alpine told customers who contacted the firm after receiving these trade confirmations that they would need to pay Alpine the debit balances due on their accounts before the firm would return their securities to them. For example, customer SG received trade confirmations from Alpine on May 28 and 29, 2019, that indicated securities held in her account had been sold for one penny per share. When SG called Alpine about these trade confirmations, she spoke to Chris Doubek, who indicated that Alpine had deemed the securities "worthless." Doubek also told SG that, to get her securities back, she would have to pay Alpine the debit balance caused by fees that the firm had charged to the account, including the $5,000 monthly account fee.

"worthless" securities transactions that occurred at the end of May 2019.[78] Alpine instead informed customers of its actions only after the fact.

In the one-page letter attached to account statements for the month ending May 31, 2019, Alpine explained that it intended to close customer accounts and liquidate securities to cover any outstanding debits, and declared also: "Please be advised that all positions with a market value of $1,500.00 or less have been deemed worthless as the cost to transfer these securities exceeds the value. These positions have been removed via a worthless securities sell transaction."[79]

The penny per position Alpine paid for these securities often did not bear any relationship to the market for the securities the firm took. Many of these "worthless" positions were for securities that had active markets, were listed on national securities exchanges, or were being actively traded by Scottsdale customers while Alpine deemed them "worthless" for its own retail brokerage customers.[80] Alpine never sold to the market or liquidated any of the "worthless" securities positions that it took from customer accounts. In July 2019, Alpine returned to customer accounts most of the securities positions that it had taken with a value of more than $400.[81] After Enforcement started a disciplinary proceeding against Alpine, and the parties agreed to the entry of a temporary cease and desist order, the firm reversed all the other "worthless" securities transactions that it effected in May 2019.[82]

3. Alpine Treats Customer Accounts as "Abandoned" and Transfers Securities to Alpine Controlled Accounts

At the beginning of June 2019, as the urgency to close all Alpine retail brokerage accounts increased, Chris Doubek instructed Joseph Walsh to unilaterally treat any remaining

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[78] None of the 1,400 customers affected by the May 28, 2019, to May 30, 2019 worthless securities transactions that Alpine caused either signed or returned to the firm a "Worthless Securities Form" like the one mentioned in Alpine's February, March, and April 2019 account statements.

[79] Joseph Walsh drafted this one-page letter, and Chris Doubek approved it. Alpine also delivered the one-page letter separate from account statements to some customers. Nevertheless, neither the May 31, 2019 account statements, nor the separate one-page letters that Alpine sent to some customers, were available or mailed to customers before June 11, 2019.

[80] Joseph Walsh testified that treating listed securities as "worthless" was an error.

[81] Joseph Walsh began reversing most of the "worthless" securities transactions valued at more than $400 after he discussed the transactions with FINRA staff during on-the-record testimony in July 2019.

[82] Joseph Walsh did not reverse some of the "worthless" securities transactions valued at more than $400 until November 2019, when he also reversed most of the "worthless" securities transactions valued at $400 or less.

open accounts as "abandoned" and to close them by the end of the month. From June 7, 2019, to June 24, 2019, Joseph Walsh, at Chris Doubek's direction, took 645 securities positions valued at more than $54 million from 545 customer accounts that he considered "abandoned," and he transferred the securities in those accounts to firm accounts over which customers had no control.[83]

When Joseph Walsh took these actions, Alpine's customer agreements said that the firm would consider an account "abandoned" only if it had been inactive for three years. Specifically, the customer agreements provided:

> If a deposit or withdrawal has not been made on the account, you have not otherwise indicated an interest in your account, or Alpine has had no other contact with you within three (3) years as required by the Uniform Unclaimed Property Act, the account will be presumed to be abandoned. Funds in abandoned accounts will be remitted in accordance with state law. Once funds have been turned over to the state, Alpine has no further liability to you for such funds. If you choose to reclaim such funds, you must apply to the appropriate state agency.

Joseph Walsh understood the terms of these agreements, but he nevertheless did not follow them when he decided which accounts to declare "abandoned" in June 2019. He instead declared "abandoned" nearly all remaining retail brokerage accounts without regard to whether, in the last three years, a deposit or withdrawal had been made on an account, a customer had contacted the firm or otherwise expressed an interest in an account, or there was any trading activity in an account.[84]

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[83] Joseph Walsh treated as "abandoned" securities positions that remained in customer accounts that Alpine had neither taken to cover outstanding debits nor moved to the firm's "worthless securities account." Walsh transferred these securities to Alpine-controlled accounts that he set up for each state in which a firm customer lived. After these transfers, the customer's securities no longer appeared in their account—instead, the securities appeared in the Alpine account for the customer's state. Joseph Walsh testified that he set up the Alpine-controlled accounts to which he transferred customer securities for the purpose of holding the securities until the firm could escheat them to the proper state. He nevertheless admitted that he did not undertake any investigation to determine whether treating customer accounts or securities as abandoned followed the escheatment laws of any state.

[84] In fact, many customers showed an interest in their accounts before Walsh considered them "abandoned." These customers emailed the firm, called the firm, deposited or withdrew funds, or traded securities during the months before the firm took securities from their "abandoned" accounts. The evidence shows that at least 23 customers emailed Alpine, 39 customers deposited or withdrew funds, and 66 customers placed trades in the months before Walsh effected the "abandoned" securities transactions at issue in this case.

When Alpine deemed accounts "abandoned," it did so without any prior notice to or express authorization from customers. Rather, Alpine notified customers that it would treat all remaining open accounts as "abandoned" only after Walsh began moving securities from customer accounts. The one-page letter that Alpine attached to May 31, 2019 account statements, in addition to notifying customers of its intention to liquidate securities to cover any outstanding debits, and to treat securities positions valued at $1,500 or less as "worthless," also declared, "**Effective June 1, 2019 Alpine Securities will take action to close all remaining accounts . . . All remaining positions will be moved to an Alpine Customer Abandoned Securities Account pending escheatment to the appropriate state.**" As we note elsewhere in this decision, however, this letter was not available or sent to customers before June 11, 2019. By that date, Alpine had already seized 57 securities positions from 43 "abandoned" accounts.

On June 25, 2019, after receiving complaints from customers who received the one-page May 31, 2019 letter, Alpine set up an automatic reply to emails addressed to the firm's "House Accounts" email address.[85] The automatic reply said:

> As stated in previous customer statements, all Alpine Securities Accounts which had positions or balances and were not transferred per customer request have been deemed "abandoned". All assets in your accounts have been submitted for processing to your state of residence for Unclaimed Property/Escheatment. Please contact your state for instructions on how to reclaim your assets.

In fact, this statement was not correct. Alpine did not send the assets that it had treated "abandoned" to any state as unclaimed property. Any customer who contacted their state could not reclaim their securities from that state because Alpine still held them in accounts that it alone controlled.[86]

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[85] Alpine had a toll-free phone number customers could use to contact the firm. By the end of March 2019, however, no one at Alpine answered calls to this phone number because Alpine had greatly reduced its staffing levels. On April 1, 2019, the firm directed customers to submit their questions and requests to an Alpine email address: houseaccounts@alpine-securities.com.

In addition, in May 2019, Alpine Securities locked its offices and placed a sign on the door that read: "Alpine Securities is closing all retail accounts. There are no representatives at this location. Please direct all inquiries to houseaccounts@alpine-securities.com. Thank you."

[86] For example, customer SO emailed Alpine's "House Accounts" email address on June 20, 2019 to ask why her account, which held more than $10,000 in securities, had been closed. Alpine responded that it had deemed SO's account abandoned and that her property would be moved to the "Alpine Customer Abandoned Securities Account pending escheatment to the appropriate state." When SO asked how she could access her holdings, Alpine instructed her to "[c]ontact Unclaimed Property in [her] home state." SO advised Alpine that she had "reach[ed] out to [her home state's] unclaimed property and they have no record of [an] Alpine filing." Some state authorities also expressed confusion. After receiving a copy of Alpine's May 31, 2019 letter stating that all remaining positions would be escheated to the proper state, the

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On June 26, 2019, Alpine began reversing the transactions by which it had transferred "abandoned" securities positions to firm-controlled accounts, after the firm received a FINRA inquiry about its actions and its management team discussed the "abandoned" securities process that Joseph Walsh had undertaken at Chris Doubek's direction. All such securities positions were eventually returned to their rightful owners.

D. Alpine Pays Its Affiliate Landlord Previously Unbilled Charges

On several occasions in early 2019, Alpine sought FINRA's permission to distribute excess net capital to its owner, SCA Clearing. While FINRA quickly had approved such requests in the past, FINRA staff took more time to consider these requests because of their concerns about Alpine's capital position and, specifically, the firm's treatment as income the funds derived from imposing the $5,000 monthly account fee.[87]

In March 2019, while FINRA was considering one of Alpine's requests to distribute $300,000 of excess net capital, Alpine's affiliate landlord, SCAP 9, sent the firm an invoice for $610,372.98 in previously unbilled "common area maintenance" or "CAM" fees from 2018.[88] The sum due under the invoice exceeded Alpine's total annual rent, and the firm had not received such an invoice from SCAP 9 before.[89] The sum due also exceeded more than ten percent of Alpine's excess net capital.

David Brant had concerns about the validity of the CAM fees that SCAP 9 asked that Alpine pay. He asked Chris Doubek and Joseph Walsh to request from SCAP 9 detailed support for the CAM fees reflected in its March 21, 2019 invoice. SCAP 9, however, did not supply any other details about the CAM fees that it had billed the firm. Although Alpine had concerns about the justification for these fees, the firm paid the invoice, in full, on April 3, 2019.[90] In so doing,

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Missouri State Treasurer's Unclaimed Property Division emailed Alpine to advise that the office had not received from the firm any information concerning unclaimed assets.

[87] Chris Doubek complained to FINRA staff on March 20, 2019, and March 21, 2019, about what he believed to be staff's delay in approving Alpine's request, explaining that John Hurry had "specifically requested a distribution of profits."

[88] The invoice described the CAM fees as "Expense Not Billed Management Fees, Partnership Tax, Depreciation Expense, and Interest Expense for 2018."

[89] Prior to receiving the March 21, 2019 invoice, Alpine paid CAM fees of approximately $4,600 to $8,000 a month, as billed in the monthly rent invoices from SCAP 9.

[90] Chris Doubek and John Hurry both testified that Doubek asked Hurry about the invoice, but that Hurry refused to supply any other information. Chris Doubek further testified that John Hurry explained to him that Alpine's lease allowed SCAP 9 to charge the firm for back-up

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Alpine transferred more than $600,000 in capital to an affiliated entity beyond FINRA's authority.[91]

FINRA approved Alpine's $300,000 capital-withdrawal request on March 22, 2019. FINRA did so without knowing that the day before, on March 21, 2019, SCAP 9 had sent Alpine the invoice for CAM fees. Alpine did not inform FINRA staff about receiving or paying SCAP 9's March 31, 2019 invoice for CAM fees until May 2019.[92]

E. Alpine Violates a Provision of the Temporary Cease and Desist Order and Plans to Evade Other Requirements under the Order

Despite Alpine's agreement to the August 5, 2019 temporary cease and desist order, the firm failed to comply fully with the order. As further discussed below, the firm provided to FINRA an accounting inaccurately representing that it had reversed all unauthorized "worthless" securities transactions and returned all cash taken to cover the $5,000 monthly account fee to open customer accounts. By doing so, Alpine violated the order's requirement that it provide a "full accounting" of securities "sold, journaled, or otherwise transferred from customer accounts" as "worthless" and all cash transferred from customer accounts to cover the $5,000 fee.

Alpine also took actions demonstrating its intent to evade some of its obligations under the temporary cease and desist order. Although the firm was ordered to cease and desist from charging the $5,000 monthly account fee, the firm prepared to implement a new fee schedule that split the $5,000 monthly fee into several monthly fees totaling $5,000. In addition, Alpine planned to close customer accounts by transferring customers' cash and securities to unclaimed property accounts for their states, despite the order's directive that Alpine "cease and desist from selling, journaling, or otherwise transferring securities from customer accounts on the ground that Alpine had deemed such securities or accounts to be 'abandoned.'" The firm discontinued these efforts only after FINRA intervened.

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information concerning the charges and that Alpine would have to pay a sizeable sum for that information.

91 As David Brant explained, when Alpine did so, the firm's capital was reduced "dollar-for-dollar."

92 A FINRA examiner testified that, had FINRA known about the invoice, it would not have approved the requested $300,000 capital distribution on March 22, 2019.

1. Alpine Violates the Temporary Cease and Desist Order by Providing an Inaccurate Accounting of Its Compliance with the Order

Although Alpine provided Enforcement with an August 16, 2019 accounting representing that it had fully complied with certain provisions of the temporary cease and desist order, some of these representations proved to be inaccurate. After reviewing Alpine's accounting, Enforcement was unable confirm whether, as represented, the firm had restored to its customers "[a]ll securities previously identified as worthless in 2019 by Alpine, except with respect to accounts from which authorization was received."[93] Accordingly, Enforcement staff served Alpine with a FINRA Rule 8210 request seeking further information concerning its accounting. After Enforcement served Alpine with a second FINRA Rule 8210 request and a motion to compel a response in late November 2019,[94] the firm reversed 1,858—approximately 83%—of the "worthless" securities transactions.[95] In December 2019, Alpine provided to Enforcement a second accounting confirming that it did not return most of the securities taken as worthless until November 2019.[96]

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[93] Alpine did not explain which "worthless" securities transactions it considered to be authorized. To the extent Alpine does not dispute that those transactions were not authorized, it likewise does not dispute that the "worthless" securities transactions it reversed pursuant to the temporary cease and desist order in November 2019 were unauthorized and, therefore, that it made a misstatement when it represented that "all" unauthorized transactions had been reversed as of the date of its August 2019 accounting.

[94] Alpine did not respond to Enforcement's initial FINRA Rule 8210 request. Accordingly, in late November 2019, Enforcement sent Alpine a second FINRA Rule 8210 request and, after Alpine failed to timely respond to this second request, a motion to compel a response.

[95] Joseph Walsh, Alpine's COO, testified that he did not learn of Alpine's obligation to reverse these transactions under the temporary cease and desist order until late November 2019. After Walsh learned of this obligation, it took him two days to reverse the transactions. Walsh described the reversals as a "simple process" that he could have completed over two days in August 2019, had he been directed to do so.

[96] Before November 2019, Alpine reversed 377 (approximately 17%) of the 2,235 "worthless" securities transactions. Specifically, Alpine reversed 323 of these transactions between the time Joseph Walsh, David Brant, and Chris Doubek provided on-the-record testimony to FINRA, in July 2019, and the entry of the August 5, 2019 temporary cease and desist order. Prior to Walsh's, Brant's, and Doubek's July 2019 testimony, the firm had reversed 27 worthless securities transactions. During the period between the August 5, 2019 temporary cease and desist order and Enforcement's service of its second FINRA Rule 8210 request and motion to compel in late November 2019, Alpine reversed only 27 additional worthless securities transactions. As noted above, most of the "worthless" securities transactions that Alpine reversed in November 2019 involved securities valued at less than $400, but some involved securities valued above $400. *See supra* at 27 & note 82.

Alpine's August 2019 accounting also represented that the firm had "revers[ed] the monthly fee and transfer[red] a total of $208,229.36 back to currently opened accounts." In connection with the August 2019 accounting, Alpine provided FINRA with a list of accounts that purportedly had received the refunds comprising more than $208,000. The firm's December 2019 accounting reflected, however, that 20 of the accounts on the list had not actually received a refund. In December 2019 and January 2020, the firm repaid the funds taken from those 20 accounts to cover the fee.[97]

Chris Doubek, who signed the temporary cease and desist order in his capacity as Alpine's CEO, and was responsible for ensuring Alpine's compliance with the order, admitted that Alpine's August 2019 accounting inaccurately represented that the firm, as of that date, had reversed all unauthorized "worthless" securities transactions and returned approximately $208,000 in cash taken from customer accounts to cover the $5,000 monthly fee.[98]

2. Alpine Plans to Evade Obligations under the Temporary Cease and Desist Order

Alpine demonstrated its intent to evade provisions of the temporary cease and desist order by making plans to charge and close accounts in a manner inconsistent with its obligations under the order. Specifically, the firm planned to implement a fee schedule that would evade, at least in part, the order's directive to cease and desist from charging the $5,000 monthly account fee. In September 2019, the firm published the new fee schedule and sent it to its customers. Instead of a $5,000 monthly account fee, the September 2019 schedule included four monthly fees that added up to $5,000: a $100 monthly account fee, a $3,500 minimum ticket charge and "OTC Deposit Related" fee, a $400 inactivity fee, and a $1,000 dormant account fee.[99] Alpine intended to charge the fees to customers but did not do so after FINRA intervened.[100] Doubek

[97] We acknowledge that the temporary cease and desist order did not include a deadline by which Alpine was required to reverse the "worthless" securities transactions and refund cash taken to cover the $5,000 monthly fee. Nevertheless, we conclude that Alpine's misstatements regarding these reversals and refunds violated the order's requirement that the firm provide a "full accounting" concerning these transactions.

[98] In addition, Chris Doubek and Joseph Walsh admitted that Alpine's answer to the amended complaint inaccurately represented that "all transfers of securities that were based [] on . . . [a] determination of worthlessness have been cancelled and reversed."

[99] Under the new fee schedule, not all accounts would be charged $5,000 per month—for example, an account that was not subject to the dormant account or inactivity fees would pay the minimum ticket charge and "OTC Deposit Related Fee" of $3,500 per month and a monthly account fee of $100. In his testimony, however, John Hurry agreed that a "dormant" account would pay $5,000 a month in fees under the new schedule.

[100] Chris Doubek testified that the September 2019 fee schedule was not immediately effective, but he had believed that Alpine would implement it after 30 or 60 days. In his

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testified that John Hurry created the September 2019 fee schedule to break the $5,000 fee into separate parts "so that each fee would have to be disputed" and Alpine would have "a better chance [] to bill what [] was the necessary amount to accomplish the service [the firm was] providing."

In addition, Alpine took steps to close accounts in a manner inconsistent with its obligation to cease and desist "from selling, journaling, or otherwise transferring securities from customer accounts on the ground that Alpine has deemed such securities or accounts to be 'abandoned.'" On December 31, 2019, Alpine sent to its customers a letter titled "Final Termination Notice," which stated that the firm "would soon take steps to close all remaining accounts, no exceptions shall apply." The letter advised that the firm would take several actions to close accounts including, for any accounts still open as of February 1, 2020, by transferring "all book entry securities and cash" to the "unclaimed property account" for the customer's state. Chris Doubek testified that he, John Hurry, and Joseph Walsh drafted the letter for the purpose of garnering its customers' attention and closing accounts "as quickly as possible." Alpine ultimately did not take the steps outlined in the letter after FINRA intervened.

IV. Discussion

The Hearing Panel found Alpine charged unreasonable and unfairly discriminatory fees, made unauthorized securities transactions, misused and converted customer assets, priced securities trades unfairly and charged unfair commissions, and made an unauthorized capital withdrawal. For the reasons discussed below, we affirm in part and modify the Hearing Panel's findings.

A. Alpine Charged an Unreasonable and Unfairly Discriminatory Fee

The Hearing Panel found that Alpine, consistent with the allegations in the fifth cause of Enforcement's amended complaint, charged a succession of unreasonable or unfairly discriminatory fees, in violation of FINRA Rules 2122 and 2010. We affirm the Hearing Panel's findings in part.

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testimony, John Hurry characterized the new fee schedule as an attempt to start a dialogue concerning the fees Alpine permissibly could charge its customers, but he also admitted that, prior to FINRA's intervention, "the intention was to charge" the fees.

1. FINRA Rules Require That Members Charge Reasonable and Not Unfairly Discriminatory Fees

FINRA Rule 2122 states:

> Charges, if any, for services performed, including, but not limited to, miscellaneous services such as collection of monies due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safekeeping or custody of securities, and other services shall be reasonable and not unfairly discriminatory among customers.

Under FINRA Rule 2122, to be reasonable, a charge or fee imposed by a member must be reasonably related to a service that the member supplies its customers and the actual costs that the member incurs to supply that service.[101] *See NASD Notice to Members 92-11*, 1992 NASD LEXIS 42, at *1 (Feb. 1992) (stating that, under Article III, Section 3 of the NASD Rules of Fair Practice, which also required that fees "be reasonable and not unfairly discriminatory," a fee imposed by a member must be related to the "actual" costs incurred when the members supplies a service to customers); FINRA, *2012 Annual Regulatory and Examination Priorities Letter*, at 7 (Jan. 31, 2012), https://www.finra.org/sites/default/files/Industry/p125492.pdf (reminding firms that fees "must be reasonable and related to the services performed" and advising that FINRA brought cases against several broker-dealers that charged "excessive fees . . . that were unrelated to actual costs"); *see also Dep't of Enf't v. E.S. Fin. Servs., Inc.*, Case No. 2015045608701 (FINRA AWC Nov. 23, 2015) (member violated NASD Rule 2430 by imposing a fee that was not reasonably related to any services performed or expenses incurred by the firm in performing those services); *Dep't of Enf't v. Newbridge Sec. Corp.*, Case No. 2012032048401, at 4 (FINRA AWC Jan. 29, 2013) ("The particular dollar amount charged was not attributable to any specific cost or expense incurred by the Firm in executing the trade . . . ."). Although FINRA's rules "do not specify and delineate exactly how a member may establish its . . . charges, they require that they must be fair under the relevant circumstances and a member should be prepared to justify that its prices are fair as to each customer and transaction." *NASD Notice to Members 75-65*, 1975 NASD LEXIS 68, at *1 (Oct. 1975); *see also NASD Notice to Members 03-68*, 2003 NASD LEXIS 78, at *6 & n.6 (Nov. 2003) (reminding members that they "must comply with their longstanding obligations under [NASD] Rule 2430," the substantively identical predecessor to FINRA Rule 2122, and with the requirement that members stand "prepared to justify" their charges and fees).

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[101] All FINRA disciplinary actions cited herein (other than those available on LEXIS) are available at https://www.finra.org/rules-guidance/oversight-enforcement/finra-disciplinary-actions-online (search "Case No.;" check mark the box "By selecting this box, I agree to the Terms of Use;" then click "Submit").

2. The $5,000 Monthly Account Fee Was Unreasonable and Unfairly Discriminatory

The Hearing Panel found the $5,000 monthly account fee that Alpine added to its August 31, 2018 revised fee schedule, which the firm charged customer accounts during a three-month period in late 2018, was unreasonable and unfairly discriminatory, in violation of FINRA Rules 2122 and 2010. We agree.

Enforcement demonstrated that Alpine intentionally set the $5,000 monthly account fee at an arbitrary amount not related to any service the firm supplied customers or the costs it incurred to provide such service.[102] First, we find that the $5,000 monthly account fee was not reasonably related to any service that Alpine provided to its customers. Instead, as the evidence plainly shows, Alpine intentionally adopted and charged the fee to compel the immediate closure of accounts and, for any remaining customers, as a source of a minimum sum of revenue, or "toll," that Alpine wanted to extract from their accounts irrespective of any specific service that the firm supplied them.[103] In this respect, Alpine aptly described the $5,000 monthly account fee to customers as "simply a fee that covers having an account open at Alpine."

Second, we conclude that the $5,000 monthly account fee was not reasonably related to any actual costs that Alpine incurred to supply a service to its customers. In fact, as Christopher Frankel and David Brant, Alpine's CFO, each unequivocally testified, the $5,000 monthly account fee was *not* correlated to any actual costs that Alpine incurred when a customer had an account open at the firm. The evidence shows that the $5,000 figure set for the monthly account fee was an indiscriminate sum, and Alpine implemented this fee without ever attempting to allocate to it any quantified direct or indirect costs that the firm incurred when a customer had an open account.

Third, Alpine's inability to provide FINRA staff with any documentation showing that Alpine concluded that the $5,000 monthly account fee was reasonable supports our conclusion

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[102] The burden of proof rests with Enforcement. *Dep't of Enf't v. Holaday*, Complaint No. 2012032519101, 2016 FINRA Discip. LEXIS 64, at *10 (FINRA NAC Oct. 3, 2016). This burden includes the burden of production—the burden of going forward with proof of Enforcement's claims—and the burden of persuasion—the burden of persuading the trier of fact. *See Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) ("The 'burden' in a civil case involves not one but *two* elements . . . .").

Preponderance of the evidence is the standard of proof in FINRA disciplinary proceedings. *David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003). This standard is equivalent to a "more likely than not" standard. *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011).

[103] Christopher Frankel, a member of Alpine's board, and its CEO and CCO until August 1, 2018, testified that John Hurry decided that Alpine should impose the $5,000 monthly account fee because "he was trying to make more money on the existing business."

that the firm imposed the fee in violation of FINRA Rule 2122. *See NASD Notice to Members 75-65*, at *1; *see also NASD Notice to Members 03-68*, at *6 & n.6. During FINRA staff's 2019 examination of the firm's fees, Alpine did not supply any documents that evidenced that the firm had concluded the fee was reasonable based on the services it provided to customers or that explained how the fee specifically related to Alpine's actual costs to provide such services. Indeed, we find it compelling that, during their testimony, no member of Alpine's management team, whom John Hurry charged with implementing the $5,000 monthly account fee, defended or justified the reasonableness of the fee or directed the Hearing Panel to any assessment performed by the firm about how the fee correlated to its actual costs of maintaining a customer's account.

Finally, we find that Alpine imposed and taxed the $5,000 monthly account fee among customers in an unfairly discriminatory manner. Alpine at once reversed and waived the fee for its favored customers, despite the firm's assertion that the fee was meant to cover the cost of maintaining accounts for those customers who chose to keep their accounts open at the firm. Moreover, when it initially imposed the fee, in August 2018, Alpine reversed and waived it for those customers who complained and agreed to close their accounts or transfer their securities to another broker-dealer. In May 2019, however, the firm decided that it would no longer waive the fee, despite customer objections, and it began taking securities from customer accounts to pay for it.[104]

Based on these conclusions, we find that the $5,000 monthly account fee that Alpine adopted and charged was patently unreasonable, and unfairly discriminatory, in violation of FINRA Rules 2122 and 2010.[105] In so doing, we reject Alpine's appeal arguments that the Hearing Panel erred in reaching the same conclusion.

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[104] In finding Alpine's fee discriminatory, we do not suggest that a firm may never differentiate among its customers for purposes of the charges or fees it imposes, including lesser fees or waiving fees for preferred customers. In this case, however, Alpine failed to make meaningful distinctions among its customers based on fair and objective criteria, nor did it consistently apply the fee or fee waivers based on such criteria. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 286 (2011) (explaining that the ordinary meaning of "discrimination" is the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored") (quoting Black's Law Dictionary 534 (9th ed. 2009)); *see also Newbridge Sec. Corp.*, Case No. 2012032048401, at 4 (the firm's handling fee was discriminatory when its brokers had discretion to set the fee within a range that differed by branch and the firm did not use a "formula applicable to all customers" to determine the fee). Notably, there was no meaningful and objective standard, such as a minimum account balance or minimum trading activity, that qualified accounts for a fee waiver. And, Alpine inconsistently applied the fee to customers by exercising discretion to waive the fee for some—but not all—of those customers who contacted the firm to close their accounts.

[105] 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." Conduct that violates the federal securities laws or another FINRA rule also violates FINRA Rule 2010. *See Dep't of*

[Footnote continued on next page]

For instance, Alpine claims the Hearing Panel ignored evidence that the $5,000 monthly account fee reflected a "fair appraisal" of services that Alpine supplied its customers and was "commensurate" with the actual costs that Alpine incurred to keep a customer's account. The firm's Fee Schedule Analysis, however, described the $5,000 monthly account fee loosely as "Account Maintenance." The Fee Schedule Analysis also did not justify the fee's reasonableness with reference to any actual costs or expenditures that Alpine incurred when it provided the "service" of maintaining a customer account. Instead, it included, without any specificity or quantification, only a laundry-list "Service or Cost rationale" that claimed the fee covered "multiple persons," "[t]ime and costs," "postage and handling," "unique AML," "[a]ccounting risk," and "CPA."[106] Chris Doubek, whose testimony Alpine cites in support of its assertion that the $5,000 monthly account fee represented a "fair appraisal" of the actual costs associated with keeping a customer's account, clearly attested that the Fee Schedule Analysis in no way suggested that the fee was related to Alpine's actual costs to maintain a customer account.

Next, Alpine contends that it fully disclosed the $5,000 monthly account fee to customers, beginning with the firm's issuance of August 31, 2018 account statements. The disclosure of a fee, however, does not excuse a member's decision to impose a charge or fee that violates FINRA Rule 2122. *Cf. Zero-Coupon Sec.*, Exchange Act Release No. 24368, 1987 SEC LEXIS 2005, at *3 n.8 (Apr. 21, 1987) (noting that NASD's Rules of Fair Dealing, including predecessors to both FINRA Rules 2121 and 2122, "are not antifraud rules, but rules reflecting just and equitable principles of trade," and thus prohibit unfair prices "even if disclosed"); FINRA Rule 2121, Supplementary Material .01(b)(5) ("Disclosure itself . . . does not justify a commission or mark-up which is unfair or excessive in light of all other relevant circumstances."); *cf. also NASD Notice to Members 75-65*, at *1 (likening fair prices, commissions, and charges under Article III Section 3 (services) and 4 (commissions) of NASD's Rules of Fair Practice). FINRA Rule 2122 is concerned with whether a charge or fee imposed by a member is reasonable and not unfairly discriminatory among customers. Members have a separate obligation to disclose the fees they intend to impose on customers. *See NASD*

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Enf't v. Luo, Complaint No. 2011026346206, 2017 FINRA Discip. LEXIS 4, at *20-21 (FINRA NAC Jan. 13, 2017).

[106] In 2016, in response to a Cautionary Action Letter issued by FINRA staff for Alpine's failure to establish, maintain, and enforce written supervisory procedures to ensure the firm's compliance with FINRA Rule 2122, Alpine stated that, "in order to evidence the firm's assessment of the reasonableness of the fees it charges to customers," the firm would establish and maintain a matrix of the various fees it charged. Alpine asserted that this "Fee Review Matrix" would have, among other things, the "direct hard cost" that could be "allocated" to each fee, a "rationale" for any "soft" costs associated with the fee, and a "reasoned basis" for any "risk weighted cost" of the fee. The Fee Schedule Analysis that Alpine provided to FINRA staff during their 2019 examination of the firm's fees had none of this information about the $5,000 monthly account fee.

Notice to Members 92-11, at *1 ("In addition to being reasonable in nature, the NASD believes that customers must be provided with adequate notice prior to the member's implementation or change of a service fee."). Crediting mere disclosure as a defense would inevitably obviate the purpose and text of FINRA Rule 2122.[107] *Cf. Victor Elias Photography, LLC v. ICE Portal, Inc.*, 43 F.4th 1313, 1319 (11th Cir. 2022) ("A statute should be construed to give effect to all its provisions, so that no part of it will be inoperative or superfluous, void or insignificant.")

Lastly, Alpine contends that FINRA Rule 2122 says nothing about a member's "actual" costs and thus requiring that a charge or fee imposed by a member be reasonably related to the member's costs of supplying a service or services amounts to impermissible rulemaking by FINRA. We reject this argument. As an initial matter, the record reflects that Alpine was familiar with the requirement that its fees be reasonably related to its "actual" costs. RN, a member of Alpine's board of directors until August 2018, testified that he discussed with other members of the board that the $5,000 monthly account fee would be acceptable under FINRA rules "if in fact you were passing through the actual cost of processing those securities," the fee "directly correlated to actual costs," and the fee corresponded to a "demonstrable expense per

[107] In a related argument, Alpine claims that the $5,000 monthly account fee is the result of "freely negotiated contracts" into which it entered with customers and is thus presumptively reasonable under the *Mobile-Sierra* doctrine. The *Mobile-Sierra* doctrine, however, is limited to issues concerning the Federal Energy Regulatory Commission's ("FERC") authority to regulate freely negotiated wholesale-energy contracts under the Federal Power Act, which requires regulated utilities to file compilations of their rate schedules with the FERC and to supply service to electricity purchasers under the terms and prices in the rate schedules. *See generally Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531-35 (2008) (discussing FERC's powers to abrogate contract rates that are not "just and reasonable" under the Federal Power Act).

Alpine presents no compelling arguments as to why the *Mobile-Sierra* doctrine should be applied under the separate and distinct regulatory framework within which broker-dealers work, as provided by the Securities Exchange Act of 1934 ("Exchange Act") and FINRA rules, and we decline to find that the doctrine has any relevance or application here. *See, e.g.*, *Scottsdale Cap. Advs. Corp. v. FINRA*, 844 F.3d 414, 417-18 (4th Cir. 2016) ("Congress, through the Exchange Act, delegated the power to register national securities associations ('RSAs' or 'associations') to the . . . SEC. Pursuant to this authority, the SEC registered FINRA as an RSA. FINRA, comprised of financial brokers and dealers, promulgates rules to enforce broker-dealer compliance with the Exchange Act, 'the rules and regulations thereunder . . . and the rules of the association.'"). We also find without merit Alpine's implicit argument that a customer may bargain away FINRA's ability to enforce its rules. *See Bruce Zipper*, Exchange Act Release No. 90737, 2020 SEC LEXIS 5226, at *35 (Dec. 21, 2020) ("But even assuming Dakota's customers approved of and did not complain about its longstanding practice of misidentifying the representative of record, Dakota is still liable for its rules violations."); *cf. Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *23 (Dec. 7, 2010) ("FINRA's power to enforce its rules is independent of a customer's decision not to complain.").

client." *SIG Specialists, Inc.*, 58 S.E.C. 519, 530-32 & n.26-27 (2005) (observing that the relevant standard of conduct was "common knowledge" among those responsible for knowing exchange rules). And, as noted above, Alpine responded to a 2016 Cautionary Action Letter from FINRA by stating that, in the future, it would comply with FINRA Rule 2122 and *NASD Notice to Members 92-11* by establishing a fee matrix allocating "hard" costs to a fee, providing a rationale for allocating any "soft" costs to a fee, and providing "[a] reasoned basis for any risk weighted cost of the fee charged." *See Smith Barney, Harris Upham & Co.*, 48 S.E.C. 11, 15 (1984) (noting that the respondent recognized the misconduct at issue because it "imposed restrictions on its own employees" to prevent that misconduct).

Moreover, the responsibilities that we find Alpine violated under FINRA Rule 2122 are fairly and reasonably implied by the rule.[108] *See Consol. Arb. Applications*, Exchange Act Release No. 97248, 2023 SEC LEXIS 868, at *18 (Apr. 4, 2023) (finding that a FINRA ruling was not the adoption of a new rule because "a rule need not explicitly address each of its intended applications," particularly when the rule "states a broad principle"); *SIG Specialists*, 58 S.E.C. at 530-31 (rejecting applicant's claim that the exchange of which it was a member disciplined it under a standard that was not apparent from the face of an exchange rule because "the obligations to which [applicant] was subject were reasonably and fairly implied by [the rule] and, therefore, gave fair notice of what was required under the circumstances"). FINRA's public statements concerning the rule have long indicated that a fee or charge must be reasonably related to "actual" costs or expenditures that a member incurs to provide a service or services to customers. *See SIG Specialists*, 58 S.E.C. at 530-31 (finding that exchange "Information Memo[s]" gave fair notice to respondent of what was required under an exchange rule). *NASD Notice to Members 92-11* made clear more than 30 years ago that charging fees unrelated to a member's "actual" costs for a service or services would run afoul of the member's obligation to ensure that its fees are "reasonable." This standard was reiterated in FINRA's 2012 Annual Regulatory and Examination Priorities Letter, which notified FINRA members of actions taken against several broker-dealers for charges and fees that were unrelated to "actual" costs, and has also been stated repeatedly in publicly available enforcement actions.[109] *See Smith Barney*, 48

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[108] Citing *General Bond & Share Co. v. SEC*, 39 F.3d 1451 (10th Cir. 1994), Alpine asserts the proposition that *any* interpretation of a rule that sets forth a new standard of conduct for FINRA members must be sent to the Commission as a rule change under Section 19(b)(1) of the Exchange Act. As the court's opinion in *General Bond* cautioned, however, "[o]ur ruling should not be taken to mean that every disciplinary action taken by NASD or SEC will be considered a 'rule change' unless an interpretation has been previously submitted to the SEC showing that identical conduct has been held to violate an NASD rule. Under SEC regulations, application of a Rule of Fair Practice to the particular facts of a case would not be considered a rule change where it is reasonably and fairly implied." 39 F.3d at 1460 n.4.

[109] FINRA has consistently reaffirmed that FINRA Rule 2122 requires that fees be related to actual costs or expenditures. *See, e.g.*, *Dep't of Enf't v. Legend Sec., Inc.*, Complaint No. 2012030422902, at 10-11 (FINRA OHO Default Decision May 25, 2017) (member violated NASD Rule 2430 because it charged customers fees that "were not connected to any services performed and accordingly were not reasonable"); *Dep't of Enf't v. Caldwell Int'l Sec. Corp.*,

[Footnote continued on next page]

S.E.C. at 15 (concluding respondent did not lack sufficient notice that its conduct might be violative of an exchange rule when it received an exchange circular notifying members of disciplinary action taken against a member for similar misconduct); *E.F. Hutton & Co.*, 49 S.E.C. 829, 835 (1988) ("Even a new interpretation of an existing rule may be announced through adjudication . . . as long as the burden it imposes is outweighed by the danger of permitting a result that is inconsistent with 'a statutory design or . . . legal and equitable principles.'"); *see also Notice of Filing of a Proposed Rule Change Relating to FINRA Rule 8313 (Release of Disciplinary Complaints, Decisions and Other Information)*, Exchange Act Release No. 69178, 78 Fed. Reg. 17975, 17976-77 (Mar. 25, 2013) (SR-FINRA-2013-018) (explaining that "information regarding [FINRA's] disciplinary actions provides valuable guidance and

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Case No. 2014039091903 (FINRA Order Accepting Offer of Settlement Aug. 25, 2016) (member violated NASD Rule 2430 by charging a fee that served as an additional source of remuneration or revenue and was not correlated to any separate service the firm provided customers); *E.S. Fin. Servs., Inc.*, Case No. 2015045608701 (member violated NASD Rule 2430 by imposing a fee that was not reasonably related to any services performed or expenses incurred by the firm in performing those services); *Dep't of Enf't v. Fortrend Sec., Inc.*, Case No. 2014039056101, at 2 (FINRA AWC Oct. 12, 2016) ("FINRA has repeatedly emphasized to member firms its concerns about charging fees unrelated to actual costs for account transfers via ACAT."); *Newbridge Sec. Corp.*, Case No. 2012032048401, at 4 ("The particular dollar amount charged was not attributable to any specific cost or expense incurred by the Firm in executing the trade, or determined by any formula applicable to all customers."); *Dep't of Enf't v. Pointe Cap., Inc.*, Case No. 2009015974701, at 2 (FINRA AWC Sept. 6, 2011) ("[T]he charge was not reasonably related to any direct handling-related services performed by the firm, or handling-related expenses incurred by the firm . . . ."); *Dep't of Enf't v. John Thomas Fin.*, Case No. 2009016304801, at 3-4 (FINRA AWC Sept. 6, 2011) ("The fee was designed primarily to serve as a source of additional transaction based remuneration or revenue to the firm . . . rather than to cover any direct handling-related services performed by the firm or handling-related expenses incurred by the firm in connection with the transactions."); *Dep't of Enf't v. First Midwest Sec., Inc.*, Case No. 2009016348801, at 2 (FINRA AWC Sept. 8, 2011) ("The 'handling fee' charged by First Midwest was not reasonable because . . . the amount of the fee was not reasonably related to any direct handling-related services performed by the Firm, or any direct handling-related expenses incurred by the Firm . . . ."); *Dep't of Enf't v. A&F Fin. Sec., Inc.*, Case No. 2009016292001, at 2 (FINRA AWC Sept. 6, 2011) ("The handling fee charged by A&F was not reasonable because it was effectively the same as a commission to the firm and the amount of the fee was not reasonably related to any direct handling-related services performed by the firm, or handling-related expenses incurred by the firm . . . ."); *Dep't of Enf't v. Salomon Whitney, LLC*, Case No. 2010022181901, at 3 (FINRA AWC Sept. 6, 2011) ("The fee was designed primarily to serve as a source of additional transaction based remuneration or revenue to the firm . . . rather than to cover any direct handling-related services performed by the firm or handling-related expenses incurred by the firm in connection with the transactions.").

information to members, associated persons, other regulators, and investors" and clarifying that such information includes an AWC).

Requiring that a member justify the reasonableness of a charge or fee with reference to the member's "actual" costs or expenditures to provide a service or services does not, as Alpine claims in this appeal, "work an insurmountable . . . burden on firms requiring that they forego [sic] any opportunity to recoup expenses associated with the business." We agree with Alpine that a member is "not required to continue in an area of operations that has become unprofitable."[110] That nevertheless does not mean, as Alpine argues repeatedly, that a member may justify a fee as reasonable by simply referencing, without any verifiable documentation of its attempt to allocate the fee to the member's actual costs, the "rationale" that a fee covers myriad unspecified and unquantified costs, like "compliance, accounting and operations," to which any broker-dealer could refer endlessly in an effort to justify its fees.[111] Any burden imposed by requiring that a broker-dealer demonstrate that its charges and fees are reasonably related to the broker-dealer's actual costs of a service is outweighed by the harm of concluding that the broker-dealer may justify a fee as reasonable based on nothing more than vague or conclusory claims, such as those Alpine presents here, that its business is "expensive." *Cf. E.F. Hutton & Co.*, 49 S.E.C. at 835 ("Here, any burden imposed by requiring disclosure is outweighed by the harm of concluding that, absent a specific rule, a broker-dealer may conceal the fact that it intends to prefer its own interests to those of its customers.").

In this appeal, Alpine argues that requiring that a member justify its charges or fees as reasonable, by reference to the member's actual costs of providing a service, ignores "basic economic approaches to the issue of pricing," such as "activity-based-pricing," which it describes as "a method of accounting for and allocating overhead and indirect costs to a product or service." With this decision, we pass no judgment on the application of "activity-based" or other methods of pricing other than to conclude that such methods must be reasonably related to and supported by reference to a member's actual costs or expenditures. *See NASD Notice to Members 75-65*, at *1. Because we find that Alpine set the $5,000 monthly account fee at an arbitrary amount that was not related to any service the firm supplied customers or the costs it incurred to provide such service, we also do not with this decision pass any judgment on the

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[110] Alpine's customer agreements authorized the firm, "in its sole discretion and for any reason, [to] prohibit, halt, restrict trading of securities or substitution of securities in any of your accounts on either a temporary or permanent basis. . . . Alpine may terminate any of your accounts . . . at any time." As John Hurry testified, if Alpine had simply collected the inactivity and dormant account fees that the firm included on its fee schedule, Alpine would have closed most customer accounts the firm held before the end of 2018.

[111] As RN testified, "FINRA does not expect you to go broke providing a service to the industry. It does, however, require that you not exceed the guideline . . . without exceptional circumstances and those exceptional circumstances as I testified would be correlatable costs and expenses . . . ."

ability of FINRA members to charge an all-encompassing account fee for its services or the reasonableness of any sum charged for such services.

3. Enforcement Failed to Prove That Alpine's Other Fees Were Unreasonable

The Hearing Panel also found unreasonable, in violation of FINRA Rules 2122 and 2010, both the illiquidity and volatility fee that Alpine began charging customers in September 2018 and the $1,500 fee to withdraw securities certificates from DTC that Alpine began charging customers in April 2019. We conclude that Enforcement did not carry its evidentiary burden to prove that either of these other fees was in fact unreasonable.

a. The Illiquidity and Volatility Fee

Alpine adopted the illiquidity and volatility fee to defray the costs and interest expense the firm incurred when it borrowed against the line of credit that Alpine Holding supplied the broker-dealer to pay NSCC the required fund deposits needed for Alpine to execute and clear trades for customers. Alpine described the fee on the firm's Fee Schedule Analysis as the "Finance charge imposed on Alpine for funds used to cover NSCC illiquidity and volatility charges," and it gave as a "rationale" for the fee, "Alpine draws on a line of credit to pay for NSCC illiquidity and volatility charges. This is a pass through fee to pay those finance charges." Based on these facts, and absent any countervailing evidence or argument that Alpine imposed the illiquidity and volatility fee for another purpose, we are unable to conclude that Enforcement proved that the illiquidity and volatility fee was not reasonably related to a service that Alpine supplied its customers, namely the service of clearing customer transactions.[112]

Moreover, Alpine's revised fee schedule said that it would charge the illiquidity and volatility fee at the rate of "1% per day of the Illiquidity and Volatility charge assessed to Alpine by NSCC," which amounted to two percent of the deposit required because it ordinarily takes NSCC two days to settle a trade. Although both Enforcement and the Hearing Panel suggest that this equated to an annualized "interest rate" of more than 200%, the illiquidity and volatility fee was not a rate of interest that the firm imposed on customers as a cost for their trading, and no customer was assessed a fee that approached 200% of the NSCC charge assessed on Alpine. The

[112] Enforcement alleged in the amended complaint's sixth cause of action that the line of credit Alpine Holding supplied the broker-dealer had commercially unreasonable terms, which Alpine purportedly then used to make sham payments to affiliates that constituted unapproved capital withdrawals made in violation of FINRA Rules 4110(c)(2) and 2010. The Hearing Panel, however, dismissed these elements of Enforcement's claims. As we explain above, *supra* note 18, we do not revisit the Hearing Panel's findings that Enforcement did not prove that Alpine made seven capital withdrawals in violation of FINRA rules by using the line of credit. We therefore do not question the validity of the line of credit for purposes of reaching a decision about the alleged unreasonableness of the liquidity and volatility fee that Alpine charged customers.

fee was instead intended to approximate the sum that NSCC required Alpine to deposit to execute a customer's trade, which Alpine used to defray the costs and interest expense it incurred when it borrowed against the line of credit that Alpine Holding supplied.[113] Enforcement did not conduct or offer any analysis showing that the illiquidity and volatility fee that Alpine charged customers was not reasonably related to the costs Alpine incurred when it borrowed against the line of credit that Alpine Holding supplied the firm.[114] The limited evidence the parties presented on this issue, which is summary in nature, shows that Alpine spent more than $2.75 million for borrowing against the line of credit at the same time it charged and collected illiquidity and volatility fees totaling approximately $1.5 million. We therefore are unable to find, based on the record we confront, that Enforcement proved that the illiquidity and volatility fee was not reasonably related to the actual finance costs Alpine incurred for the purpose of clearing customer trades through NSCC.

We accordingly reverse the Hearing Panel's findings, and dismiss Enforcement's claims, that Alpine engaged in misconduct in violation of FINRA Rules 2122 and 2010 by imposing and charging the illiquidity and volatility fee.

b. The $1,500 Securities Certificate Withdrawal Fee

Like the illiquidity and volatility fee, Alpine imposed the $1,500 securities certificate withdrawal fee to "pass through" to customers the costs and expenditures that the firm incurred to withdraw securities in paper form from the DTC depository. Alpine's Fee Schedule Analysis described the fee as "Stock Withdrawal by Transfer Sometimes referred to as a physical certificate or 'cert-out' request. Applies to each security position. DTC pass through charges apply as well."

Enforcement does not claim, nor does the record show, that the $1,500 was not reasonably related to a service that Alpine supplied customers. Enforcement instead maintains that this fee represented three times the cost—$500—DTC charged Alpine to withdraw a physical certificate from the depository, and that it thus was not reasonably related to Alpine's actual costs of supplying the service of withdrawing securities certificates in paper form. Although it is true that DTC charged Alpine only $500 to withdraw paper securities certificates from the depository, Alpine incurred other costs and expenditures to process customer

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[113] Enforcement and the Hearing Panel's decision also highlight the fact that NSCC returned to Alpine the money that it posted to meet required fund deposits when a trade cleared. While this is true, it does not diminish or contradict the fact that Alpine incurred costs and interest expense to make the required fund deposits with NSCC.

[114] FINRA staff also did not ask that Alpine supply information showing how the firm calculated the illiquidity and volatility fee for purposes of completing the pre-trade approval process it implemented when it began charging this fee.

withdrawal requests.[115] These additional costs and expenditures included transfer agent fees, which Christopher Frankel testified could be as much as $600, paying staff to communicate with transfer agents regarding the withdrawals, and Alpine's handling, mailing, and insurance costs.[116] Based on the limited evidence the parties presented on this issue, we decline to find that Enforcement proved that the $1,500 fee was not reasonably related to the actual costs Alpine incurred to withdraw securities certificates in paper form from DTC for its customers.

We accordingly reverse the Hearing Panel's findings, and dismiss Enforcement's claims, that Alpine engaged in misconduct in violation of FINRA Rules 2122 and 2010 by imposing and charging a securities certificate withdrawal fee of $1,500.

B. Alpine Made Unauthorized Transfers of Securities, and Misused and Converted Customer Assets

The Hearing Panel found that Alpine caused unauthorized securities transactions, and misused and converted customer funds and securities, as alleged in causes three, two, and one, respectively, of the amended complaint. We affirm the Hearing Panel's findings.

1. FINRA Rules Require Members to Act Consistently with Their Customers' Instructions and Prohibit the Improper Use or Conversion of Customer Assets

A broker-dealer may act only as authorized by its customers. *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1128 (D.C. Cir. 1990) ("A broker is an agent who owes his principal a duty to act as authorized."). It therefore must obtain consent from a customer before it causes a transaction for a customer's account that involves securities. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *23 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014). It is well-settled that unauthorized securities transactions violate the "high standards of commercial honor and just and equitable principles of trade" required of all members under FINRA Rule 2010. *Dep't of Enf't v. Vincent J. Puma*, Complaint No. C10000122, 2003 NASD Discip. LEXIS 22, at *12 n.6 (NASD

[115] In this respect, the testimony and evidence presented at the hearing was generally consistent with the "Service or Cost Rationale" supplied in Alpine's Fee Schedule Analysis, which said that the $1,500 securities certificate withdrawal fee "involves coordination of multiple staff. Activity requires contact with DTC, supervisory and compliance approval, possible AML issues, mailing and tracking of certificates, and general record retention. Customer allocated CPA based on activity."

[116] As a basis for finding that the $1,500 securities certificate withdrawal fee was unreasonable, the Hearing Panel cited testimony provided by Joseph Walsh explaining that a request to withdraw a securities certificate from DTC required only the completion of an electronic form on a terminal, which he estimated took less than one hour to complete. We do not find Walsh's testimony dispositive.

NAC Aug. 11, 2003); *accord James O. Baxter*, Complaint No. C07990016, 2000 NASD Discip. LEXIS 3, at *15 (NASD NAC Apr. 19, 2000) (*citing* NASD Interpretive Material 2310-2, *Fair Dealing with Customers* (the execution of transactions that are unauthorized by customers violates the responsibility of fair dealing and is not within the ethical standards established in the NASD's Rules)). Engaging in transactions in customer accounts without approval or authorization may also serve as a predicate for other serious violations of FINRA rules, including the improper use and conversion of customer assets. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *19 (finding applicants engaged in the improper use and conversion of customer securities in violation of NASD rules after "they intentionally transferred 21,061 shares of their customers' . . . stock into [a firm] account without prior notice to, or approval from, the customers").

FINRA Rule 2150 states that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." FINRA Rule 2150(a). A member improperly uses a customer's securities or funds when it uses those assets for a purpose other than that authorized by the customer. *Dep't of Enf't v. Taboada*, Complaint No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *35-36 (FINRA NAC July 24, 2017); *accord Dep't of Enf't v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *33 n.33 (FINRA NAC Oct. 3, 2011) (defining misappropriation or misuse of customer assets as the "unauthorized, improper, or unlawful use of funds or other property for a purpose other than that for which [it was] intended"). This includes instances in which a broker-dealer transfers assets from a customer account to an account of the firm or another customer without the customer's consent. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *19 (finding respondent improperly used customer assets by transferring securities without authorization from customer accounts to a firm account); *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *47-48 (Feb. 1, 2010) (finding respondent violated just and equitable principles of trade by transferring assets from one customer account to another customer account without authorization); *DBCC v. Pinchas*, Complaint No. C10930017, 1998 NASD Discip. LEXIS 59, at *18 & n.13-15 (NASD NAC July 12, 1998) ("Misappropriation or improper use of customer funds has been found to exist in cases in which a representative . . . transferred funds from one customer's account to another's without authorization . . . ."), *rev'd on other grounds*, 54 S.E.C. 331 (1999).

Conversion, which is defined broadly as "'an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it,'" is conduct that violates FINRA Rule 2010.[117] *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *22 (Feb. 10, 2012) (quoting *FINRA Sanction Guidelines* 38 (2007)). Misuse of a customer's securities or funds rises to the level of conversion when a member, or person associated with a member, intentionally takes property that does not belong to it. *Dep't of Enf't v. Wicker*, Complaint No. 2016052104101, 2021 FINRA Discip.

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[117] Conversion is conduct that violates FINRA Rule 2010 because it "indicates a troubling disregard for basic principles of ethics and honesty." *Dep't of Enf't v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *24 (FINRA Bd. of Gov. May 9, 2014), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015).

LEXIS 31, at *18 (FINRA NAC Dec. 15, 2021), *aff'd*, Exchange Act Release No. 100148, 2024 SEC LEXIS 1119 (May 15, 2024), *appeal docketed*, 24-1220 (D.C. Cir. June 20, 2024).

2. Alpine Made Unauthorized Transfers of Securities, and Misused and Converted Customer Assets, for the $5,000 Monthly Account Fee

a. Alpine's Customer Agreements Did Not Authorize Its Actions

Alpine does not dispute that, in June 2019, it decided to remove securities from customer accounts to cover any debit balances caused by the $5,000 monthly account fee. In total, during the two-month period of June and July 2019, Alpine took 178 securities positions from 174 customer accounts and moved those securities to the "LIQ to Cover Customer Debit" account, an Alpine proprietary account. Alpine's customers did not consent to these transfers of their securities.

Although Alpine contends that its customer agreements justified its actions, we disagree. "While a firm may deduct amounts from a customer's account for services rendered without first obtaining the customer's permission for the particular withdrawal, it can do so only if the customer has previously expressly granted the firm that authority." *Joseph H. O'Brien*, 51 S.E.C. 1112, 1115 & n.11 (1994). Alpine's customer agreements permitted Alpine to liquidate assets to satisfy debits owed the firm, but only for those debits caused by "any and all reasonable fees." As we find above, Alpine's $5,000 monthly account fee was neither reasonably related to a service that it supplied customers nor reasonably related to the costs that Alpine incurred while providing a service. Instead, Alpine intentionally imposed and charged an arbitrary $5,000 monthly account fee to gain leverage over its customers and force the immediate closure of customer accounts, and as a source of revenue that Alpine could be assured of receiving regardless of any specific service that the firm supplied to customers.

Given these facts, and because Alpine adopted the $5,000 monthly account fee for a patently unreasonable purpose, we find that Alpine could not plausibly rely on its customer agreements to justify its actions. *See Dep't of Enf't v. Reeves*, Complaint No. 2011030192201, 2014 FINRA Discip. LEXIS 41, at *11-13 (FINRA NAC Oct. 8, 2014) (finding respondent liable for unethical conduct when he transferred funds to himself "without any plausible reason to believe he was entitled to receive them"), *aff'd*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568 (Nov. 5, 2015). We therefore conclude that Alpine engaged in unauthorized securities transactions when it transferred securities from customer accounts to an Alpine proprietary account for the $5,000 monthly account fee.[118] Consequently, Alpine violated FINRA Rule 2010. *See Puma*, 2003 NASD Discip. LEXIS 22, at *12 n.6.

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[118] We do not suggest that every unreasonable fee may lead to claims of unauthorized trading if a firm takes funds or securities from customer accounts to pay for that fee. Our findings are based on the specific facts of this case, which show that Alpine did not impose the fee for the purpose of covering a service it supplied its customers or its costs, but to give Alpine leverage over the firm's customers so that it could promptly close its retail securities brokerage

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b. Alpine Used Customer Assets Improperly to Pay for the $5,000 Monthly Fee

In addition to taking securities valued at more than $1.15 million from customer accounts and transferring them to a firm proprietary account, Alpine took for its own accounts more than $1,700,000 in cash from 1,687 customer accounts for the $5,000 monthly account fee. These transfers of customer assets were not, for the reasons we find above, authorized by customers. The improper use or misuse of customer assets includes actions by which a broker-dealer transfers assets from a customer account to a firm proprietary account without the customer's consent. We therefore find that Alpine engaged in the improper use of customers' assets, in violation of FINRA Rules 2150 and 2010, when it took securities and cash from customer accounts without authorization to cover the $5,000 monthly account fee. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *19; *Katz*, 2010 SEC LEXIS 994, at *47-48; *Pinchas*, 1998 NASD Discip. LEXIS 59, at *18 & n.13-15.

c. Alpine Converted Assets to Pay for the $5,000 Fee

Finally, we find that Alpine converted customer assets when the firm, without customer authorization, took funds and securities from customer accounts and transferred them to firm accounts to pay for the unreasonable $5,000 monthly account fee. In this respect, we conclude that Alpine's decision, made by members of its executive team, to take funds from customer accounts to pay for the fee was intentional. If a customer account held cash or was linked to a money market account, Alpine took cash from the account to cover the debit Alpine posted for the $5,000 monthly account fee. In total, Alpine took cash from 1,687 customer accounts to cover the fee. Alpine purposefully took these funds to force the closure of accounts and secure additional revenue for the firm. We acknowledge that, when customers contacted Alpine and agreed to close their accounts or transfer their securities, Alpine ordinarily agreed to reverse any debit balance caused by the fee. Nevertheless, in so doing, Alpine did not return any funds that it took from the customers' accounts for the fee.

We also conclude that Alpine's decision to transfer customer securities positions to a firm proprietary account was intentional. Here, the evidence shows that Alpine's stated goal of having customers close their accounts so that the firm could rid itself of its retail securities brokerage business did not materialize as planned. In May 2019, Alpine became frustrated with the small number of customers who contacted the firm and agreed to close their accounts or transfer their securities to another broker-dealer. John Hurry informed Chris Doubek that he wanted Alpine to take actions necessary to unilaterally force the closure of the firm's remaining accounts. Therefore, on May 31, 2019, Joseph Walsh, with Chris Doubek's consent, instructed

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business and quickly rectify the firm's financial problems. In this case, Alpine may not use its customer agreements as a shield from disciplinary action for unauthorized trading. *See Reeves*, 2014 FINRA Discip. LEXIS 41, at *11-13.

Alpine employees that the firm would no longer reverse the monthly account fee for any customers. At that time, Chris Doubek and Joseph Walsh also decided to take from customer accounts marketable securities valued at *twice* the amount of any debits in those accounts. Indeed, the May 31, 2019 letter that Alpine sent to customers explained that the firm intended to close all remaining accounts and would simply liquidate customer securities in furtherance of its efforts to do so.[119] Alpine thereafter, acting through Joseph Walsh, took hundreds of securities positions valued at more than $1.15 million from customer accounts and transferred them to the firm's "LIQ to cover Customer Debit" account.[120]

In this appeal, Alpine argues that it did not intend to liquidate the securities that it transferred from customer accounts to the "LIQ to Cover Customer Debit" account, and that the firm eventually reversed the transactions by which it moved the securities to a proprietary account of the firm. We find, as a factual matter, that Alpine intended to liquidate the securities it took from customer accounts.[121] Nevertheless, we need not determine that Alpine intended to permanently deprive its customers of their assets to find that the firm engaged in conversion. *See Dep't of Enf't v. Johnson*, Complaint No. 2018056848101, 2021 FINRA Discip. LEXIS 23, at *17 (FINRA NAC Oct. 6, 2021) (rejecting respondent's argument that his failure to spend converted funds defeats a finding of conversion), *aff'd*, Exchange Act Release No. 99596, 2024 SEC LEXIS 444 (Feb. 23, 2024). A temporary deprivation of customer property, if intentional, is enough to establish conversion under FINRA rules. *See Dep't of Enf't v. Clarke*, Complaint No. 2016050938301, 2020 FINRA Discip. LEXIS 42, at *21 (FINRA NAC Sept. 17, 2020) ("Clarke . . . argues that he cannot be held liable for conversion because he did not intend to keep the money indefinitely. Even if Clarke intended to repay [customers], he intentionally used the money for an unauthorized purpose."), *aff'd in relevant part*, Exchange Act Release No. 97860, 2023 SEC LEXIS 1756 (July 10, 2023). We also need not find that Alpine used or disposed of customer assets for its own benefit to find that it converted customer securities and funds. *See Johnson*, 2021 FINRA Discip. LEXIS 23, at *17 ("Johnson . . . maintains that, even though he moved the money from his RBC account to his checking account, he did not spend it . . . . While these actions could serve to mitigate his misconduct, they are not exculpatory."). In this respect, Alpine's decision to return the securities it moved to the "LIQ to Cover Customer Debit" to customer accounts does not negate a finding that the firm engaged in conversion. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *21 ("Such attempts to undo their misconduct do not

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[119] This letter was consistent with the sentiments and tenor of other letters and notices that Alpine sent to its customers, which Chris Doubek admitted were intended to further Alpine's plans to close customer accounts "as quickly as possible."

[120] Chris Doubek instructed Joseph Walsh to repurpose and rename an existing Alpine proprietary account to receive the securities Alpine transferred from customer accounts for the purpose of eventually liquidating them.

[121] Joseph Walsh testified clearly that it was in fact the firm's plan to liquidate the securities it moved to the "LIQ to Cover Customer Debit Accounts," but that the firm decided against this action and instead reversed the transfers of securities after intervention by state regulators.

negate Applicants' original conversion."); *Joel Eugene Shaw*, 51 S.E.C. 1224, 1225-26 (1994) (finding that representative converted customer funds even though the representative repaid those funds after his firm discovered his misconduct).

We therefore find that Alpine intentionally, and without customer authorization, took customer securities and funds for itself, and thus converted customers' assets.[122] *See Mission Sec. Corp*, 2010 SEC LEXIS 4053, at *32-33 (finding applicants converted customer assets by intentionally transferring customer securities to a firm account without customer authorization). Accordingly, we find that Alpine violated FINRA Rule 2010. *See Olson*, 2014 FINRA Discip. LEXIS 7, at *24.

3. Alpine's "Worthless" Securities Transactions Were Unauthorized and Resulted in the Misuse and Conversion of Customer Securities

a. The "Worthless" Securities Transactions Were Not Authorized

Over a three-day period in late May 2019, Alpine unilaterally took from customer accounts securities positions valued at $1,500 or less as an additional step to fulfill the firm's plan to shutter its retail securities business. Specifically, on May 28, 29, and 30, 2019, Alpine removed from all customer accounts securities positions worth $1,500 or less by deeming them "worthless." During this period, Alpine removed a total of 2,235 securities positions, valued at $349,340, from more than 1,400 accounts and transferred the positions to an Alpine proprietary account. In each of these "worthless" securities transactions, Alpine purchased the securities position for one penny and moved the position to the firm's "worthless securities account."

Alpine never advised customers that it had decided to define "worthless" to mean securities having a value of $1,500 or less before it caused the foregoing transactions. Alpine instead informed customers of this decision only after the fact. Moreover, the negative response letter that some customers received did not constitute customer authorization for Alpine to sell securities valued at $400 or less to itself.[123] We therefore conclude that these "worthless"

[122] In reaching this conclusion, we impute the conduct of Chris Doubek, Alpine's sole board member, CEO, and CCO, and Joseph Walsh, Alpine's COO, to the firm. *Cf. SEC v. Sells*, No. C 11-4941 CW, 2012 U.S. Dist. LEXIS 112450, at *24 (N.D. Cal. Aug. 10, 2012) (concluding that an officer's "knowledge may be imputed to [his firm] by application of the doctrine of respondeat superior under which wrongful acts of an employee undertaken within the scope of employment can be imputed to the employer"); *Kirk A. Knapp*, 50 S.E.C. 858, 860 n.7 (1992) (explaining that FINRA properly attributed scienter of the firm's owner to the firm and thereby found a primary antifraud violation by the firm based on the owner's conduct).

[123] Alpine contends that the negative response letter the firm sent to certain customers on March 15, 2019, authorized its decision to treat as "worthless" and take for its own account securities that it valued at $400 or less. We find this claim without merit. First, FINRA rules permit members to use negative response or consent letters only for limited purposes. *See Notice to Members 02-57*, 2002 NASD LEXIS 70, at *2 (Sept. 2022) ("NASD rules do permit member

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securities transactions were unsanctioned, and Alpine therefore caused unauthorized securities transactions, in violation of FINRA Rule 2010. *See Murphy*, 2013 SEC LEXIS 1933, at *22.

b. Alpine's "Worthless" Securities Transactions Were an Improper Use of Customer Assets

By treating securities as "worthless" and purchasing them for its own account without customer authorization, Alpine also engaged in the improper use or misuse of customer securities. As FINRA found in a case involving a nearly identical fact pattern, where an employee of a FINRA member treated customer securities as "worthless" and moved them to an account owned by the member without first obtaining authorization from customers, a clearer

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firms to use 'negative response letters' to obtain authorization to take certain actions on behalf of their customers, without obtaining affirmative consent, but only in limited circumstances."); *see also, e.g.*, FINRA Rule 2124(c)(1) (permitting negative consent letters for net transactions involving institutional customers); FINRA Rule 3260(d)(2) (excepting the use of negative response letters for bulk exchanges of money market mutual funds from the requirement that discretionary authority be granted in writing). In this regard, FINRA rules do not authorize the use of negative response letters to deem securities "worthless." *See Dep't of Enf't. v. Mission Sec. Corp.*, Complaint No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *19 (FINRA NAC Feb. 24, 2010) ("[R]espondents have not cited to any FINRA or Commission rule permitting them to unilaterally determine that the customers' Chartwell shares were worthless and then cause the shares to be transferred to Mission's own account without any customer authorization or notification."), *aff'd*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010). Alpine was, therefore, required to obtain affirmative consent from its customers before it took their securities for the firm's "worthless securities account." *See Notice to Members 02-57*, at *4 ("The staff generally believes that a customer should affirmatively consent to the transfer of his or her account."). Second, Alpine did not treat securities positions as "worthless" pursuant to the March 15, 2019 negative response letter. The firm instead waited more than two months to act and, during this period, it informed customers, through letters attached to account statements, that Alpine required customers to provide affirmative consent by submitting a "Worthless Securities Form" to have any position with a value of $400 or less treated as "worthless" by the firm. None of the more than 1,400 customers affected by Alpine's May 2019 worthless securities transactions executed a "Worthless Securities Form." Third, Alpine cannot show that the customers whose securities Alpine deemed worthless in May 2019 received the negative response letter that it sent certain customers in March 2019. As Joseph Walsh testified, the query he used to determine which securities Alpine valued at $400 or less in May 2019 was different than the one he used in March 2019. Finally, Alpine must have known that its negative response letter did not provide authorization to treat any securities positions as worthless. Jason Kane, Alpine's CCO from December 2018 to May 2019, testified that he expressed to Alpine's management his view that a negative response letter did not authorize the firm to take securities from customers by deeming them "worthless."

case of misuse of customer assets "is difficult to imagine."[124] *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *33. We accordingly find that Alpine violated FINRA Rules 2150 and 2010. *See id.* at *32-33; *Katz*, 2010 SEC LEXIS 994, at *47-48; *Pinchas*, 1998 NASD Discip. LEXIS 59, at *18 & n.13-15.

c. Alpine Converted Customer Assets When It Deemed Securities "Worthless"

Finally, we find that Alpine's practice of deeming securities "worthless" was intentional and amounted to conversion. The record shows that Alpine's management grew impatient waiting for customers to close their accounts. John Hurry therefore pressured Chris Doubek to close all retail accounts immediately, including by threatening Doubek's job. Chris Doubek consequently pursued actions that he viewed as crucial to shutter those accounts, including by deciding that Alpine should take as "worthless" customer securities positions valued at $1,500 or less.[125] Although Joseph Walsh disagreed with this decision, he nevertheless followed Chris Doubek's instructions because Doubek told Walsh that the process of closing customer accounts had gone on for too long.[126] Joseph Walsh, at Chris Doubek's direction, thus effected all 2,235

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[124] In its appeal brief, Alpine claims that the "movements of stocks to worthless securities accounts" is "a common occurrence in relation to microcap securities," and it suggests, without any support, that its decision to act pursuant to a negative response letter represents an industry standard. We reject Alpine's claim that its taking of securities as "worthless" in this case conformed to a standard of industry practice. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *26 ("We also reject Applicants' claim that the appropriation of their customers' Chartwell stock conformed with 'known standard industry practice with respect to worthless securities.'").

[125] The evidence does not support Alpine's assertion that the customer securities positions it deemed "worthless" were in fact worthless. The penny that Alpine paid for each of the securities positions that the firm took as "worthless" often did not bear any relationship to the market for the securities the firm took. As we note above, many of these "worthless" positions were for securities that had active markets, were listed on national securities exchanges, or were being actively traded by Scottsdale customers while Alpine deemed them "worthless" for its own retail brokerage customers. Thus, based on this record, it appears many of the "worthless" securities that Alpine took unilaterally from customers in fact had value. *See Mission Sec. Corp.*, 2010 FINRA Discip. LEXIS 1, at *17 ("[T]he record shows that Chartwell shares were not worthless."); *id.* at *19 & n.14 (citing the predecessor rule to FINRA Rule 11530(b), which establishes procedures for the delivery of over-the-counter securities between FINRA members and defines "worthless" securities as "those instruments which have no known market value").

[126] Alpine avers in this appeal that the firm did not intentionally take securities the firm unilaterally deemed "worthless," citing what Chris Doubek claimed was a "miscommunication" between himself and Joseph Walsh that caused Walsh to "inadvertent[ly]" treat securities positions valued at $1,500 or less as "worthless." The Hearing Panel, however, found Joseph Walsh's testimony credible that he followed Chris Doubek's clear instructions to take all securities from customer accounts valued at $1,500 or less as "worthless." Based on our

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"worthless" securities transactions by which Alpine moved securities from customer accounts to a firm proprietary account at the end of May 2019. He did so not based on a genuine belief that these transactions were authorized but to comply with John Hurry's and Chris Doubek's directives to close accounts as quickly as possible. *See Johnson*, 2021 FINRA Discip. LEXIS 23, at *15-16 (explaining that the respondent converted funds when he took them without a genuine belief that he was entitled to them); *Reeves*, 2014 FINRA Discip. LEXIS 41, at *11-15.

Based on these facts, we find that Alpine converted customer securities, in violation of FINRA Rule 2010, when it deemed all securities positions valued at $1,500 or less "worthless" and bought those securities for Alpine's "worthless securities account" for the price of one penny per position without customer consent.[127] *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *33 ("As FINRA accurately observed, '[a] clearer prima facie case of misuse and conversion is difficult to imagine.'").

4. Alpine's Treatment of Accounts as "Abandoned" Was Unauthorized and Likewise Led to the Improper Use and Conversion of Customer Assets

a. Alpine Did Not Have Authority to Treat Securities as "Abandoned"

In early June 2019, as the urgency to close all Alpine retail brokerage accounts reached its pinnacle, the firm engaged in additional, unauthorized transactions in a final attempt to close its retail securities brokerage business. At that time, Chris Doubek, while continuing to act as Alpine's CEO and CCO, as well as serving as the firm's sole board member, instructed Joseph Walsh, the COO, to treat any remaining open accounts as "abandoned" and to close them by the

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independent review, we agree with this finding. *See Wilfredo Felix*, Exchange Act Release No. 101733, 2024 SEC LEXIS 3309, at *14-15 (Nov. 25, 2024), *appeal docketed*, No. 25-1038 (D.C. Cir. Jan. 24, 2025). In reaching this conclusion, we find that Joseph Walsh's testimony is consistent with other evidence in the record, including Alpine's May 31, 2019 letter to customers, which informed customers "that all positions with a market value of $1,500.00 or less have been deemed worthless as the cost to transfer these exceeds the value. These positions have been removed via a worthless securities transaction." This letter, which Chris Doubek approved, and Alpine sent to customers only after the firm had already deemed securities positions "worthless," is compelling evidence that Alpine acted intentionally, not inadvertently, in this case.

[127] Consistent with our findings that Alpine converted customer assets when it took securities and funds to cover the debits caused by the $5,000 monthly account fee, we impute the conduct of Chris Doubek, Alpine's sole board member, CEO, and CCO, and Joseph Walsh, the firm's COO, to the firm. *Cf. SEC v. Sells*, 2012 U.S. Dist. LEXIS 112450, at *24; *Knapp*, 50 S.E.C. at 860 n.7.

end of the month. Consequently, from June 7, 2019, to June 24, 2019, Joseph Walsh, at Chris Doubek's direction, took 645 securities positions valued at more than $54 million from 545 customer accounts that he considered "abandoned," and he transferred the securities in those accounts to accounts that Alpine controlled without any prior customer notification or consent.

When Joseph Walsh made these transactions, Alpine's customer agreements stated that the firm would consider "abandoned" any account that had been inactive because the customer had not, during the prior three years, made a deposit or withdrawal on the account, had not otherwise indicated an interest in his or her account, or had not contacted Alpine. Although Joseph Walsh understood the terms of the firm's customer agreements, he did not follow them when he deemed accounts "abandoned" in June 2019. Instead, he declared "abandoned" almost all remaining customer accounts without any regard as to whether customers had truly abandoned them. He did not conduct any investigation into an account's last activity or prior customer contact before he declared accounts "abandoned."[128] We therefore conclude that Alpine did not have authorization to cause any of the "abandoned" securities transactions that it made during June 2019, and the firm hence engaged in unauthorized trading in violation of FINRA Rule 2010. *See O'Brien*, 51 S.E.C. at 1115 & n.11.

b. Alpine Improperly Used and Converted "Abandoned" Securities

We further find that Alpine's "abandoned" securities transfers caused the firm to improperly use and convert customers' assets.[129] *See Mission Sec. Corp.*, 2010 SEC LEXIS

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[128] As we note above, customers had in fact shown an interest in their accounts before Joseph Walsh considered them "abandoned," including by emailing the firm, calling the firm, depositing or withdrawing funds to or from their accounts, or trading securities during the months before Alpine took securities from their "abandoned" accounts.

[129] In its appeal briefs, Alpine contends that it could not have converted the customer securities it deemed "abandoned" because those securities remained the property of the customers when Alpine placed them in abandoned securities accounts controlled by the firm. Alpine misperceives the misuse and conversion of customer assets under FINRA rules. Alpine's actions, whereby it intentionally took securities that it unilaterally, and without authorization, deemed "abandoned" out of customer accounts, and then placed them in accounts that Alpine solely controlled, is plainly sufficient to find that Alpine converted those securities. *See Johnson*, 2024 SEC LEXIS 444, at *12-13 (rejecting argument that conversion occurs only when there is a change in ownership and explaining that applicant converted funds when he transferred them to an account under his control, regardless of whether he ultimately repaid the funds to the rightful owner); *Katz*, 2010 SEC LEXIS 994, at *47-48 ("Katz's conduct would violate [just and equitable principles of trade] whether she gave the money to another customer, kept it herself, or eventually gave it back to customers."). As we discuss above, *see supra* Part IV.B.2.c., we need not find evidence of customer harm or of a broker-dealer's financial gain to find conversion under FINRA rules. *See also Mission Sec. Corp.*, 2010 SEC LEXIS 4053 at *21 ("Even if we concluded that no customers were harmed, . . . Applicants' conduct still flouts the ethical standards to which members of [the securities] industry must adhere.").

4053, at *28 (affirming FINRA findings that a member misused and converted customer assets when the record did not support the member's claim that customers had abandoned their accounts). Here we find ample evidence that Alpine removed securities from customer accounts in a consistent pattern of activity that had nothing to do with the purported reasons for those takings but as a means of forcing the closure of customer accounts as quickly as possible so that the firm could focus on becoming a wholesale clearing broker-dealer. Doubek testified that he instructed Walsh to "eliminate those accounts off the books of the firm." Joseph Walsh testified that Doubek instructed him to close all of Alpine's remaining accounts by unilaterally treating them as "abandoned," and that is what he did by deeming accounts "abandoned" without regard for the firm's customer agreements. Thereafter, Alpine notified customers of the actions that it in fact had already begun to take, namely closing all remaining accounts by deeming the securities in those accounts "abandoned." Alpine's actions as to "abandoned" securities were thus patently intentional and unauthorized by customers.[130] *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *19 (finding applicants intentionally transferred customer securities into a firm account without prior notice to or approval from customers).

We therefore conclude that Alpine improperly used, and in the end converted, customer securities by unilaterally treating the accounts in which a customer held those securities as "abandoned" and intentionally transferring the securities to accounts that Alpine controlled, in violation of FINRA Rules 2150 and 2010.[131] *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *32-33 ("[W]e conclude that Applicants misused, and ultimately converted, their customers'

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[130] As with Alpine's other acts of conversion, we impute the conduct of Chris Doubek, Alpine's sole board member, CEO, and CCO, and Joseph Walsh, the firm's COO, to the firm. *Cf. SEC v. Sells*, 2012 U.S. Dist. LEXIS 112450, at *24; *Knapp*, 50 S.E.C. at 860 n.7.

[131] Alpine claims that a decision finding that it misused and converted "abandoned" securities, by transferring them out of customer accounts and into an Alpine account established for the state in which a particular customer resided, would effectively cause broker-dealers that comply with the escheatment laws of the various states to engage in conversion. This argument is meritless. "[S]tate law establishe[s] specific requirements that holders of abandoned property must take when dealing with such property . . . ." *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *29 (citing SEC, *Escheatment Process, Accounts-Abandoned or Unclaimed*, https://www.sec.gov/fast-answers/answersescheat (last visited Mar. 10, 2025)). As Joseph Walsh admitted during his testimony, he did not undertake any investigation to determine whether Alpine's decision to treat customer accounts or securities as abandoned conformed to the escheatment laws of any state. Moreover, before a broker-dealer can consider a brokerage account abandoned, it must make a diligent effort to locate the account owner. *See Escheatment Process, Accounts-Abandoned or Unclaimed*, https://www.sec.gov/fast-answers/answersescheat. Alpine, however, deemed almost all remaining customer accounts "abandoned" without any regard as to whether customers had truly abandoned them. Finally, all states require a broker-dealer to report when they are holding property that a customer has abandoned and is subject to a state's custody under the state's escheatment laws. *See id.* Alpine did not comply with this requirement.

securities . . . ."); *see also Katz*, 2010 SEC LEXIS 994, at *47-48; *Pinchas*, 1998 NASD Discip. LEXIS 59, at *18 & n.13-15.

C. Alpine Paid Unfair Prices in Securities Transactions

The Hearing Panel found that Alpine, as alleged in the amended complaint's fourth cause of action, violated FINRA Rules 2121 and 2010 because the firm: 1) paid customers unfair prices in principal transactions in which it imposed a market-making fee; 2) charged unfair commissions in agency transactions in which it imposed an execution fee; and 3) paid customers unfair prices in transactions in which it paid one penny for the securities positions that Alpine unilaterally deemed "worthless." We affirm in part and modify the Hearing Panel's findings.

FINRA Rule 2121 requires members to deal with customers at only fair prices in principal transactions and to charge only fair commissions in agency transactions.[132] The rule effectively regulates the amount of compensation a firm may receive on a customer's retail securities transaction.[133] In a principal transaction in which a member buys its customer's securities for its own account, the member's compensation is the mark-down.[134] The mark-down is the difference between the price the member pays the customer and the security's prevailing market price. *J.W. Korth & Co., LP*, Exchange Act Release No. 94581, 2022 SEC LEXIS 852, at *2 (Apr. 1, 2022). FINRA Rule 2121 regulates the amount of the mark-down by requiring the member to pay the customer a fair price. Under FINRA's longstanding "5% Policy," when the mark-down is 5% or less of the prevailing market price, i.e., the price paid to the customer is at least 95% of the market price, the price generally is considered fair. *See Meyer Blinder*, 50 S.E.C. 1215, 1217 (1992) ("The firm was required to charge customers no more than a fair

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[132] FINRA Rule 2121 states:

> In securities transactions, whether in "listed" or "unlisted" securities, if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or sell at a price which is fair, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved, and the fact that he is entitled to a profit; and if he acts as agent for his customer in any such transaction, he shall not charge his customer more than a fair commission or service charge, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense of executing the order and the value of any service he may have rendered by reason of his experience in and knowledge of such security and the market therefor.

[133] *See Atlanta-One, Inc. v. SEC*, 100 F.3d 105, 107 n.1 (9th Cir. 1996) (stating that FINRA Rule 2121's predecessor, Article III, Section 4 of the NASD Rules of Fair Practice, "deals with the appropriate level of compensation in retail transactions").

[134] This case involves mark-downs only because Alpine's business was liquidating securities for its customers.

'markup,' generally 5% or less, over the 'prevailing market price.'"). In an agency transaction, the member's compensation is the commission. The commission typically is calculated as a percentage of the security's market price. Rule 2121 regulates the amount of the commission by requiring the firm to charge only fair commissions. Under the 5% Policy, when a firm's commission is 5% or less of the market price, it generally is considered fair. FINRA Rule 2121, Supplementary Material .01(c)(4) (stating that the 5% policy applies to agency transactions). The 5% Policy is a guideline, not a rule.[135] FINRA Rule 2121, Supplementary Material .01(a)(1). In a disciplinary proceeding, once Enforcement establishes that the respondent's compensation on a transaction—whether a mark-down, mark-up, or commission—exceeds 5%, the burden shifts to the respondent to justify the compensation based on the surrounding facts. *Steven P. Sanders*, 53 S.E.C. 889, 895 (1998).

1. Alpine Paid Unfair Prices in Principal Transactions in which It Imposed a Market-Making Fee

The Hearing Panel found that Alpine paid unfair prices in 236 principal transactions in which it purchased its customers' securities because it charged excessive mark-downs. Alpine's mark-downs included the market-making fee in addition to the firm's ordinary commissions, fees, and charges.[136] We modify the Hearing Panel's finding of violation.

a. Alpine's Mark-Downs Exceeded 5% in 229 Principal Transactions

At the hearing, Enforcement introduced a spreadsheet that showed the details of Alpine's mark-downs on 233 principal transactions executed between November 23, 2018, and September 24, 2019.[137] *See* Appendix A-1. Enforcement's investigator testified that she created the

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[135] *See also, e.g.*, *Mkt. Surveillance Comm. v. Theys*, Complaint No. MS-1138, 1992 NASD Discip. LEXIS 119, at *38 (NASD NBCC June 16, 1992) (stating that the 5% policy "is not a rule intended to impose a maximum ceiling and to limit all mark-ups to five percent"); *J.W. Korth & Co.*, 2022 SEC LEXIS 852, at *2 (finding that mark-ups and mark-downs of less than 5% on municipal bond transactions were unfair).

[136] Enforcement does not allege that Alpine violated FINRA rules by charging both a mark-down and a commission in principal transactions, and we do not decide that issue here. *See C.A. Benson & Co.*, 42 S.E.C. 107, 109 (1964) (finding that a broker-dealer acting in a principal capacity "is not entitled to charge the customer a commission over and above [its] mark-down or mark-up, and the impropriety is not cured by a disclosure on the confirmation of the principal transaction that a commission has been exacted").

[137] Enforcement also introduced a summary exhibit relating to these transactions. The Hearing Panel relied on the summary exhibit in its decision. There are minor inconsistences between the summary exhibit and the spreadsheet. For example, according to the summary exhibit, there were 236 principal transactions in which Alpine charged the market-making fee. According to the spreadsheet, however, there were 233 such transactions. While Alpine did not object to the admission of either the summary exhibit or the spreadsheet, we find that the

[Footnote continued on next page]

spreadsheet based on a trade blotter and other information that Alpine provided. The spreadsheet showed that Alpine's mark-down on each transaction typically comprised four components: the market-making fee, a "commission" (usually 4.5% of the principal amount), a settlement fee (usually .95% of the principal amount), and a ticket charge (either $45 or $95). For each transaction, the spreadsheet showed the principal amount of the transaction and the dollar amount for each component of Alpine's mark-down. For each transaction, the spreadsheet also showed Alpine's mark-down as a percentage of the principal amount. The investigator testified that most of the information on the spreadsheet was taken directly from Alpine's trade blotter, but that she had to calculate the amount of the market-making fee and the mark-down percentage herself.[138] The investigator said that, in calculating the market-making fee, she "followed instructions provided by the firm . . . that [the market-making fee] would be two-and-a-half percent of the principal amount of the transaction."[139] Alpine did not object to Enforcement's spreadsheet, nor did Alpine challenge Enforcement's methodology in calculating the market-making fee or the mark-down as a percentage of the principal amount for each transaction.

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spreadsheet contains more reliable evidence because it provides detailed information about each transaction. To reach a decision in this case, we rely only on the spreadsheet.

[138] In some cases, particularly those involving broker-dealers that claim to be market makers, the parties disagree about the base price that should be used when calculating the size of the firm's mark-down or mark-up. *See, e.g.*, *Alstead, Dempsey & Co.*, 47 S.E.C. 1034, 1035 (1984); *Richard R. Perkins*, 51 S.E.C. 380, 382 n.11 (1993). Alpine does not raise that issue and does not challenge Enforcement's calculation of its mark-downs.

[139] Alpine does not dispute Enforcement's calculations, but it appears that Enforcement erred in calculating the market-making fee and the mark-down percentage for each transaction, although its error did not produce materially inaccurate results. According to Alpine's fee schedule, the market-making fee is 2.5% of the best available price, i.e., the market price, not the principal amount. The principal amount should, therefore, represent the aggregate best available price less the market-making fee. To reconstruct the "best available price" from Alpine's trade blotter, Enforcement should have divided the principal amount by .975. It should then have calculated the market-making fee as 2.5% of the "best available price." Further, it should have calculated the mark-down percentage by dividing Alpine's total fees by the best available price, rather than the principal amount. This method produces a slightly higher market-making fee but a slightly lower mark-down percentage for each transaction. As shown on Appendixes A-1 and A-2, the differences in these amounts for each transaction are relatively small. When evaluating the fairness of Alpine's mark-downs, we apply whichever method produces a more favorable result for Alpine.

According to Enforcement's spreadsheet, Alpine's mark-down exceeded 5% in 229 of 233 transactions.[140] The table below shows the distribution of Alpine's mark-downs in all 233 of these transactions:

Mark-down Pct.	**No. of Transactions (Enforcement's Calculations as shown on Appendix A-1)**	**No. of Transactions (Revised Calculations as shown on Appendix A-2)[141]**
5.0% or less	4	4
>5% to 6.0%	3	4
>6% to 7.0%	2	1
>7% to 8.0%	2	11
>8% to 9.0%	66	64
>9% to 10.0%	47	45
>10% to 11.0%	19	18
>11% to 12.0%	25	25
>12% to 13.0%	14	13
>13% to 14.0%	8	7
>14% to 15.0%	6	6
>15% to 16.0%	4	3
>16% to 17.0%	1	1
>17% to 18.0%	2	2
>18% to 19.0%	4	5
>19% to 20.0%	3	3
> 20% to 30%	9	7
>30% to 40%	4	4
>40% to 50%	2	2
>50%	8	8
Total Transactions	233	233

Because Enforcement established that Alpine's mark-downs exceeded 5% on these 229 transactions, the burden shifts to Alpine to show that each mark-down was justified. *Sanders*, 53 S.E.C. at 895.

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140 As shown on Appendix A-1, Alpine's mark-downs did not exceed 5% in Transaction Nos. 2, 195, 200, and 209.

141 Appendix A-2 was created using the information on Enforcement's spreadsheet. Based on that information, we calculated the best available price and re-calculated the mark-down percentage using the methodology discussed, *supra* note 139.

b. Alpine Failed to Justify 224 of its Mark-Downs

In determining the fairness of Alpine's mark-down on a transaction, we take into consideration all relevant circumstances, including the market conditions with respect to the security at that time, the expense involved, and the fact that Alpine is entitled to a profit. FINRA Rule 2121. Our determination of the fairness of Alpine's mark-down is "based on a consideration of all the relevant factors, of which the percentage of [the mark-down] is only one." FINRA Rule 2121, Supplementary Material .01(a)(5).

Alpine initially argues that the Hearing Panel erred by including the amount of the market-making fee in its mark-downs. While Alpine does not dispute Enforcement's calculation of the charges comprising its mark-down, it contends that the market-making fee should be excluded because it relates to an "additional service," i.e., "market making," that Alpine began providing to its customers in November 2018. In support of its argument, Alpine cites the "Mark-Up Policy" set forth in Rule 2121's Supplementary Material, which acknowledges that a firm may provide different services and facilities for its customers, and "[i]f not excessive, the cost of providing such services and facilities . . . may properly be considered in determining the fairness of a member's [mark-downs]." FINRA Rule 2121, Supplementary Material .01(b)(7). Alpine asserts that, when the market-making fee is excluded from its mark-downs, the mark-downs range from less than 5% to approximately 12%, which Alpine contends is not excessive for these types of transactions.

The Hearing Panel did not err by including the market-making fee in Alpine's mark-downs for purposes of applying the 5% Policy.[142] Alpine appears to confuse the mark-down with net profit. It is "well-established that the . . . mark-down in a retail securities transaction is the difference between the price at which the firm . . . buys the securities from the customer . . . and the prevailing market price." *J.W. Korth & Co.*, 2022 SEC LEXIS 852, at *2. A firm's costs are not excluded when calculating its mark-down, regardless of whether those costs relate to "additional services" provided by the firm.[143] Indeed, the Commission rejected an argument

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[142] Alpine asserts that the Hearing Panel should not have "lump[ed]" together all its various fees for purposes of determining whether its mark-downs were fair. We find no reason to conclude, based on this record and the arguments the parties presented, that the Hearing Panel erred by considering Alpine's total compensation on principal trades for purposes of determining whether its mark-downs were fair. *See Dist. Bus. Conduct Comm. v. Shamrock Partners, Ltd.*, Complaint No. C9A960002, 1997 NASD Discip. LEXIS 44, at *4 n.3 (NASD NBCC Aug. 5, 1997), *aff'd*, 53 S.E.C. 1008 (1998) (including in the calculation of the firm's total mark-down the commission it charged in a principal transaction); *cf. Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *27 (Apr. 11, 2008) ("For this limited role, a firm is adequately compensated by a markup over its cost.").

[143] Alpine's reliance on Rule 2121's Supplementary Material is misplaced. The Supplementary Material states that the firm's costs of providing additional services should be considered in evaluating the fairness of its mark-downs. It does not state that the firm's costs should be excluded from its mark-downs.

like Alpine's in *DMR Sec., Inc.*, 47 S.E.C. 180 (1979). In that case, the applicant argued that some of its costs should be excluded from its mark-up. *Id.* at 182. The Commission disagreed. The applicants' argument, said the Commission, "betrays a basic misunderstanding of the nature" of mark-ups because a mark-up "is not the equivalent of net profit," but rather "it is the spread between the current inter-dealer market price and the price charged the customer." *Id*. Excluding the firm's costs from the mark-up would allow the firm "to pass along all [its] expenses to the customer, no matter how excessive, and to obtain in addition a guaranteed 5% net profit, whether or not the price charged was reasonably related to the current market price." *Id*. This "would clearly contravene [FINRA Rule 2121] and the Board of Governors interpretation of [it]." *Id.*; *see also Inv. Planning, Inc.*, 51 S.E.C. 592, 597 (1993) (stating that, "in seeking a profit," a firm could not "pass along to the customer their expenses if the total would unreasonably exceed the prevailing wholesale price"). The same reasoning applies here. Alpine cannot simply tack its costs onto its mark-downs. If Alpine "cannot be profitable within the guidelines of [FINRA Rule 2121], the solution is not to violate the [rule]." *Dist. Bus. Conduct Comm. v. Hampton Sec. Inc.*, Complaint No. ATL-992, 1989 NASD Discip. LEXIS 37, at *14 (NASD Bd. of Gov. June 1, 1989). We therefore do not exclude the market-making fee when evaluating Alpine's mark-downs.

Next, Alpine argues that, even when the market-making fee is included, its mark-downs were reasonable under the circumstances of these transactions. Alpine contends that several relevant factors justify its mark-downs. First, Alpine asserts that all the transactions involved thinly traded, "microcap" stocks. Second, Alpine asserts that all the transactions involved low-priced stocks. Third, Alpine asserts that it incurred additional expenses in connection with providing its market-making service. And fourth, Alpine asserts that it fully disclosed its market-making fee to its customers.

After reviewing each of the transactions at issue, and applying all the relevant factors, we find that Alpine's mark-downs are excessive in 224 of the 229 transactions. Alpine fails to justify most of its mark-downs. When a firm charges its customer more than a 5% mark-down, the firm "must be fully prepared to justify its reasons for the higher . . . mark-down with adequate documentation." *Dennis Todd Lloyd Gordon*, 2008 SEC LEXIS 819, at *27 (quoting *NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *7-8 (Apr. 1992)). Alpine does not do so.

Alpine identifies no evidence supporting its assertion that its transaction fees are justified because all the transactions at issue involved thinly traded stocks. In the case of a thinly traded security, "the effort and cost of buying or selling the security, or any other unusual circumstances connected with its acquisition or sale, may have a bearing on the amount of [mark-down] justified." FINRA Rule 2121, Supplementary Material .01(b)(2). Alpine, however, does not cite any evidence showing its cost of buying and selling any of the stocks involved in any of these transactions.[144] We therefore do not consider this a justifying factor for Alpine's mark-downs.

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[144] Nor does Alpine identify any evidence showing that any of the stocks was, in fact, thinly traded. A thinly traded stock is one that is exchanged in low volumes, often with a limited number of interested buyers and sellers. Alpine does not point to any evidence showing the

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Further, Alpine identifies no evidence supporting its assertion that its mark-downs are justified because of the costs it incurred in providing its market-making service to its customers.[145] *See* FINRA Rule 2121, Supplementary Material .01(b)(7). Alpine states that, to provide its market-making service, it retained a "dedicated employee to work trades and make markets for particular trades[.]" In support of this statement, Alpine cites portions of Christopher Frankel's and Randall Jones's testimony. In the cited testimony, however, neither Frankel nor Jones discussed a "dedicated employee," or otherwise addressed the firm's purported market-making costs. We therefore do not consider this a justifying factor.

We find no violation with respect to four small transactions involving low-priced securities.[146] Mark-ups or mark-downs of more than 5% "generally are not justified even in the sale of lower-priced securities." *See Sanders*, 53 S.E.C. at 896; *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *16 (Feb. 13, 2015). A mark-up or mark-down greater than 5% "conceivably may be appropriate in transactions involving low-priced securities, but 'only if the size of the total transaction is small and the total compensation charged is equal to or less than a reasonable minimum ticket charge.'" *Lane*, 2015 SEC LEXIS 558, at *16; *see also* FINRA Rule 2121, Supplementary Material .01(b)(4). Few of the transactions at issue meet that description. Four transactions, specifically, involve relatively small gross amounts of $1,000 or less and total fees of $100 or less.[147] We decline to find any violation as to those four transactions.[148]

Alpine's purported disclosure of the market-making fee does not justify any of its other mark-downs. While pre-transaction disclosure is a factor to be considered in determining the

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trading volume or the number of buyers and sellers for any of the stocks involved in these transactions.

[145] Enforcement argues that "Alpine did not establish that it made a market in any of these stocks[.]" Alpine did not have to establish that fact because the parties stipulated that Alpine charged the market-making fee "where it acted as a principal and a market maker in relation to an order." Enforcement is bound by its stipulation. *See James F. Glaza*, 57 S.E.C. 907, 914 (2004) (stating that "stipulated facts serve important policy interests in the adjudicative process," and "such agreements should not be set aside without a showing of compelling circumstances").

[146] Enforcement's spreadsheet showed that virtually all the transactions involved low-priced securities.

[147] These are Transaction Nos. 3, 4, 6, and 7 on Appendix A-2.

[148] We dismiss the allegation of violation as to these transactions under the facts and circumstances of this case. Our dismissal should not be interpreted as meaning that a ticket charge of up to $100 is reasonable.

fairness of a mark-down, "[d]isclosure itself . . . does not justify a [mark-down] which is unfair or excessive in light of all other relevant circumstances." FINRA Rule 2121, Supplementary Material .01(b)(5). Moreover, Alpine did not fully and fairly disclose the market-making fee portion of its mark-downs. *See Shamrock Partners*, 53 S.E.C. 1008,1014 (1998) (stating that the firm's disclosure of its mark-downs was inadequate because it was not "full and fair"). Alpine's fee schedule states that the market-making fee is 2.5% of the best available price. Alpine, however, does not identify any evidence showing that it disclosed to each customer, before or after a transaction, the best available price or the amount of the market-making fee charged. *See id.* (stating that firm's purported disclosure of its mark-downs was insufficient because there was no evidence that the customer "was informed of or consented to the mark[-]downs"). None of Alpine's customers knew in advance the dollar amount that Alpine would charge for the market-making fee.

Indeed, even after Alpine executed the transactions, the firm's trade confirmations effectively concealed the market-making fee from its customers. Alpine charged the market-making fee as a percentage of the aggregate best available price. The amount remaining after that charge is the principal amount. Alpine's trade confirmations begin with the principal amount, not the best available price. The trade confirmations then show the amounts that Alpine deducted from the principal amount for each of Alpine's fees (but not the amount of the market-making fee, which was calculated based on the undisclosed best available price). Last, the trade confirmations show the net amount Alpine paid to the customer, which equals the principal amount less the fees disclosed on the trade confirmation.

For example, the following information appears on a trade confirmation for one of the transactions at issue:[149]

Quantity	20,000
Price	$.5188[150]
Principal Amount	$10,376.70
Commission	$466.95
Ticket Charge	$95
SEC Fee	$.14
Settlement Fee	$98.57
TAF	$2.38
Settlement Amount	$9,713.66

This trade confirmation suggests that Alpine's mark-down on this transaction is $660.52, or approximately 6% of the principal amount. In reality, Alpine's mark-down is $926.59, which is almost 9% of the best available price. A customer reviewing this trade confirmation would not

[149] This is Transaction No. 191 on Appendix A-2.

[150] According to Enforcement's spreadsheet, the full price per share, after deducting the market-making fee, is $0.518835.

know that Alpine also had charged a $266.07 market-making fee in addition to its other fees.[151] Alpine's less-than-full-and-fair disclosure of its mark-downs is insufficient to justify them.

Alpine also argues that the size of its average mark-down shows that all its mark-downs were fair. According to Alpine, the Hearing Panel's finding that its average mark-down in these transactions was 8.75% "underscores the fact that Alpine's charges generally fell within industry guidance, since a 5% guideline applies to the kind of trading that, unlike Alpine's, does *not* involve layer upon layer of complications involved in sales of thinly traded stock or the legal and compliance activity required for the trading of microcaps." There are several flaws in Alpine's argument. First, Alpine cites no authority for its assertion that the 5% Policy does not apply to transactions involving low-priced, thinly traded, and/or "microcap" stocks. Second, Alpine cites no authority for its assertion that an 8.75% mark-down is within "industry guidance." And third, Alpine's average mark-down on all the transactions is not relevant when evaluating the fairness of its mark-down on any particular transaction because "[t]ransactions occurring over a period of time cannot be lumped together for the purpose of determining whether [mark-downs] or [mark-ups] are fair." *Hamilton Bohner, Inc.*, 50 S.E.C. 125, 128 (1989); *see also W.N. Whelen & Co.*, 50 S.E.C. 282, 285 (1990) ("[T]he price charged in each individual sale to a customer must be fair and reasonable."). Alpine's average mark-down does not justify any of the mark-downs at issue.

Last, Alpine argues that its mark-downs are fair because its customers would have paid a similar 2.5% market-making fee had Alpine routed their orders to outside market makers. This argument has no merit. There is no dispute that Alpine did not route any of the orders at issue to outside market makers and did not pay them to execute these transactions. Alpine cannot justify any part of its mark-downs based on costs the firm did not actually incur.

For these reasons, we find that Alpine violated FINRA Rules 2121 and 2010 by charging unfair mark-downs in 224 of 229 of the principal transactions at issue. We dismiss the allegation of violation with respect to the five other transactions.[152]

2. Enforcement Failed to Prove that Alpine's Compensation Was Excessive in the Agency Transactions

The Hearing Panel found that Alpine charged excessive commissions in 204 agency transactions in which the firm charged its execution fee. We dismiss the allegation of violation

[151] The aggregate best available price (principal amount/.975) is $10,642.77. The market-making fee (2.5% of the best available price) is $266.07. The total mark-down is $926.59 ($266.07 market-making fee + $466.95 commission + $95 ticket charge + $98.57 settlement fee).

[152] In addition to the dismissal of the allegation of violation for the transactions discussed above, *supra* note 147, we dismiss the allegation of violation with respect to one anomalous transaction (Transaction No. 173 on Appendix A-2).

because Enforcement failed to meet its initial burden of establishing that Alpine's commission in any particular transaction exceeded 5%.[153]

At the hearing, Enforcement introduced a summary exhibit that its staff created using Alpine's trade blotter. According to the summary, in 204 transactions, Alpine charged an average commission of 8.82%. Enforcement did not, however, introduce a spreadsheet that showed the relevant details for each of the transactions at issue, as it did with the principal transactions discussed above.

While the summary establishes that Alpine's commissions exceeded 5% in at least some of the agency transactions, it does not establish that Alpine's commission exceeded 5% in all of them, or in any transaction in particular. We cannot find Alpine liable for charging excessive commissions in all 204 transactions based on the size of its average commission. *See Hamilton Bohner*, 50 S.E.C. at 128 (stating that transactions occurring over a period cannot be "lumped together for the purpose of determining whether [mark-downs] or [mark-ups] are fair"). And we cannot find Alpine liable for charging an excessive commission in any particular transaction because the summary does not provide transaction-level detail. Accordingly, we dismiss the allegation of violation.

3. The Unfair Pricing Claims Relating to the "Worthless" Securities Transactions Are Dismissed

The Hearing Panel found that Alpine's purchases of its customers' "worthless" securities positions for one penny violated FINRA Rules 2121 and 2010. We dismiss this claim because it is duplicative of the allegations of violation under the first, second, and third causes of the amended complaint, for which we have found Alpine liable.

We agree with the Hearing Panel that the core problem with these transactions is not that Alpine paid one penny for positions that it deemed "worthless," but that the firm intentionally took its customers' securities for an Alpine proprietary account without its customers' authorization. We already have found Alpine liable for unauthorized trading, misuse of customer assets, and conversion based on this misconduct. These are serious violations that more directly and fully address Alpine's wrongdoing. An additional finding of liability under FINRA Rule 2121, for the same misconduct, would be duplicative and would not warrant a materially different sanction.[154] We therefore dismiss the allegation of violation.

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153 Although commissions of less than 5% may be excessive under some circumstances, Enforcement did not allege or introduce any evidence showing that any of Alpine's commissions of less than 5% were excessive.

154 *Cf. Dep't of Enf't v. Leopold*, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2, at *14-15 (FINRA NAC Feb. 24, 2012) (declining to adjudicate a books-and-records charge arising from the respondent's falsification of documents because "any sanction imposed for [the books-and-records] violation would not be materially different from the suspension []

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D. Alpine Made an Unauthorized Capital Distribution

The Hearing Panel found that Alpine, consistent with the allegations in the sixth cause of Enforcement's amended complaint, made a single unauthorized capital distribution in April 2019, in violation of FINRA Rules 4110(c)(2) and 2010, when it paid $610,372.98 to SCAP 9, its landlord and an affiliated entity operated by John Hurry, for CAM charges.[155] We affirm the Hearing Panel's findings.

FINRA Rule 4110(c)(1)-(2) prohibits carrying or clearing members, without FINRA's prior written authorization, from withdrawing capital, paying a dividend, or effecting any similar transaction reducing the member's equity if the total of these transactions in a rolling 35-calendar-day period, on a net basis, would exceed 10 percent of the member's excess net capital.

Enforcement alleged that Alpine's payment to SCAP 9 was an unauthorized capital distribution exceeding 10 percent of the firm's excess net capital. According to Enforcement's complaint, while Alpine paid the money "in response to SCAP [9's] purported request for payment of so-called" CAM charges, the payment was, in reality, a "disguised" capital distribution. The purpose of this "sham" payment, Enforcement alleged, "was to withdraw capital without FINRA's approval, as part of a coordinated effort to dissipate" the firm's assets.

Alpine denies that the payment to SCAP 9 was a disguised capital distribution. Alpine maintains that the firm's lease required it to pay the CAM charges, and therefore the payment was for an ordinary business expense and "was not a capital withdrawal or other 'sham' payment."

We agree with the Hearing Panel that Alpine's payment to SCAP 9 was an unauthorized capital distribution. As explained below, the record establishes by a preponderance of the evidence that the CAM charges were not a legitimate business expense, but instead were a pretense by which John Hurry attempted to extract capital from Alpine without FINRA's authorization at a time when FINRA was closely scrutinizing the firm's finances. Our determination is informed by the specific circumstances surrounding the payment, which we recount below. *See Donald M. Bickerstaff*, 52 S.E.C. 232, 238 n.16 (1995) (noting that the Supreme Court has stated that "circumstantial evidence can be more than sufficient" to justify a finding in civil actions).

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impose[d] for the falsification of documents, because both violations resulted from identical conduct").

[155] SCAP 9 owned the building in Salt Lake City in which Alpine has its office. SCAP 9 owns no other real estate and has no employees.

1. John Hurry Was Frustrated by FINRA's Scrutiny of Alpine's Requests to Distribute Excess Capital

Alpine historically paid out its profits to the firm's beneficial owners each month through capital distributions to SCA Clearing, Alpine's direct owner. John Hurry testified that the "general rule was to always pay out the earnings primarily because there w[ere] a lot of taxes owed and we [the beneficial owners] wanted a return on investment." Indeed, according to Hurry, Alpine's bylaws required the firm to pay out its earnings each month. When these capital distributions exceeded 10 percent of Alpine's excess net capital, the firm requested FINRA's permission, in accordance with Rule 4110(c)(2). FINRA typically approved Alpine's requests within a few days of receiving them.

In early 2018, Alpine temporarily stopped distributing its profits to SCA Clearing due to the firm's financial problems. In the second and third quarters of 2018, Alpine did not earn a profit. By September 2018, the firm needed additional capital to continue operating. In late 2018, John Hurry, through one of Alpine's affiliates, contributed $1 million of capital to the firm. Alpine returned to profitability in the fourth quarter of 2018, but it did not distribute any profits for the rest of the year.

By the beginning of 2019, John Hurry was eager for Alpine to resume distributing its profits to the firm's owners. He testified that it "looked like they [Alpine] actually were moving ahead in terms of turning the firm around," and "at that point . . . it would be nice to get paid." John Hurry further testified that, according to David Brant, Alpine's CFO, FINRA "had assured [Alpine] that we could pull off [i.e., distribute] the earnings," and "obviously we had been paying those taxes out of pocket," and "we wanted to get some of that money back and a return on our investment, and we had to pay the tax."[156]

Alpine's renewed efforts to distribute its profits, however, were frustrated by FINRA's concerns about the firm's finances. On January 28, 2019, Alpine requested FINRA's permission to distribute $1,773,119 of capital. Alpine represented to FINRA that it was "withdrawing profits earned between March 1, 2018 and November 30, 2018." Jeffrey Fortune, a director of Risk Monitoring and Member Supervision at FINRA, testified that Alpine's request "started a bunch of conversations at FINRA internally." FINRA staff understood that a large part of the profits Alpine sought to distribute had been generated by the $5,000 monthly account fee the firm began charging customers in late 2018. Fortune said there was concern because FINRA staff had been looking at whether the fee was "something that's fair to charge," and if not, Alpine might have to return that revenue to its customers. According to Fortune, "we were definitely concerned that this would be a big money grab where the firm generated tons of cash

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[156] Alpine is an "S corporation." An "S corporation" is not separately taxed at the ordinary corporate tax rate but is generally treated as a "pass through" entity under which income and losses flow directly to the shareholders. *See Fehlhaber v. Commissioner*, 954 F.2d 653, 654 (11th Cir. 1992).

on these types of fees and [was] trying to get it out of the firm as quickly as possible."[157] Before FINRA could act on Alpine's request, on February 1, 2019, Alpine cancelled the request and notified FINRA that it would immediately distribute $380,000 of capital instead, which did not require FINRA's approval because it did not exceed 10 percent of Alpine's excess net capital.

Less than one week later, on February 6, 2019, Alpine again asked FINRA's permission to distribute capital. This time, Alpine sought to distribute $1,393,119, which equaled Alpine's original request of $1,773,119 less the $380,000 the firm had distributed a few days earlier.

Two weeks passed without FINRA's approval. On February 20, 2019, David Brant emailed Fortune and Robert Ishak, a risk monitoring analyst in FINRA's Member Supervision Department, to express Alpine's concern about the delay. Brant wrote, "The firm would like an answer soon," and "Can the firm expect an answer today? If not, when should the firm expect an answer?" Jeffrey Fortune responded by email that day, asking David Brant to explain how much of Alpine's profits were attributable to the $5,000 monthly fee, and how much of that amount was subject to reversal in the event FINRA determined that the fee was unreasonable. Brant replied that the firm had realized $1,235,268 of income from the fee, and that "[t]echnically, 100% of that amount is subject to being reversed, however, it is highly unlikely that anywhere near that amount will be reversed." The next day, Brant sent an email to Robert Ishak and Jeffrey Fortune offering to reduce the amount of the distribution in exchange for FINRA's approval. Brant wrote that he "would still like to get on the phone to discuss" the firm's request to distribute almost $1.4 million in capital, but if that was not possible, he wanted the staff to "please consider approving a distribution of $913,929," which, according to Brant, "haircuts the $1.2 million from the $5,000 account fee by 50%." On February 25, 2019, almost three weeks after Alpine submitted its request, FINRA approved the firm's modified request to distribute $913,929 of capital. As Hurry testified at the hearing, FINRA "only granted a fraction" of the $1,773,119 the firm originally requested.

About two weeks later, Alpine again sought to distribute capital, and FINRA again took time to consider Alpine's request. Alpine initially asserted that, under Rule 4110(c)(2), it could distribute up to $300,000 of its profits immediately without seeking FINRA's authorization. FINRA staff, however, disagreed. Accordingly, Alpine notified FINRA that it sought permission to distribute $300,000 of capital.

By March 19, 2019, FINRA had not approved the request, and Alpine was feeling pressure from its "shareholder" to expedite the distribution.[158] That morning, David Brant emailed Robert Ishak and Jeffrey Fortune, asking "Is there an update you can provide today?"

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[157] Jeffrey Fortune testified that there also was concern among the staff because Alpine already had inquired about withdrawing the capital John Hurry had contributed in late 2018 and because the firm was being sued by the SEC, which could have resulted in an adverse judgment.

[158] As noted above, Alpine's shareholder was SCA Clearing, an entity owned by a series of trusts managed by John and Justine Hurry for the benefit of themselves and their children.

The next day, March 20, 2019, Brant again emailed Ishak and Fortune, this time asking for "a call today to get some clarification on this delay." Later that day, Chris Doubek spoke on the telephone with FINRA staff about Alpine's request, and then sent a follow-up email to Ishak and Fortune summarizing the conversation. Doubek wrote that "we have yet to receive a reason from FINRA staff based on the net capital rules and Alpine's financial condition" for the delay in FINRA's response. Doubek expressed concern that FINRA's delay had "put Alpine and its management team at risk and in conflict with obligations owed to the Shareholder, who has been adversely affected financially by Staff's actions or lack of actions here." The next day, Doubek again emailed Ishak and Fortune and made clear that Alpine was under pressure from its owners to get an answer from FINRA. Doubek wrote that "the shareholder has specifically requested a distribution," and that FINRA's delay in approving the distribution "continues to interfere with the shareholder's other contractual and legal obligations." On March 22, 2019, FINRA approved Alpine's request to distribute $300,000 of capital.

When John Hurry was asked at the hearing whether FINRA's "turnaround time" on Alpine's requests to distribute capital in early 2019 was slower than it had been before, Hurry answered, "I do remember it seemed like it took longer than normal."

2. SCAP 9 Issued an Invoice for the CAM Charges with Little Explanation

During the back-and-forth between Alpine and FINRA over Alpine's efforts to distribute its capital, SCAP 9 issued the invoice for the CAM charges. David Brant received the invoice as an attachment to an email from Neal Duncan, who worked for John Hurry's family office, on March 22, 2019—the same day FINRA approved Alpine's request to distribute $300,000 in capital. In the body of the email, Duncan wrote only, "Here you go." The invoice is one page. Under "description," it states, "CAMs 2018 Expense Not Billed Management Fees, Partnership Tax, Depreciation Expense, and Interest Expense for 2018." Under "amount," it states, "$610,372.98."

From the time its lease began in 2012, Alpine had never received an invoice like this for CAM charges. Alpine's lease with SCAP 9 required the firm to pay its proportionate share of SCAP 9's yearly operating costs, i.e., CAM charges, in monthly installments. The CAM charges included "costs and disbursements of any kind" paid or incurred by SCAP 9 in connection with "any part" of operating the building. In 2018, SCAP 9 typically billed Alpine less than $5,000 per month for CAM charges.

Although the invoice for the CAM charges was extraordinary, SCAP 9 refused to provide Alpine with any explanation for it. David Brant testified that when he received the invoice from Neal Duncan, he asked Duncan to explain it. Duncan said he would get back to him, but he never did. Chris Doubek testified similarly that Alpine "did not get much in the way of support or detail" from SCAP 9 for the CAM charges. Doubek said that he asked Duncan about the invoice, and Duncan told him to talk to Hurry. When Doubek asked John Hurry, Hurry said that if Alpine wanted information justifying the CAM charges, the firm would have to pay for it, and the fee would be "fairly sizeable" because it would take time for SCAP 9 to "produce documentation to support the invoice."

Despite having no supporting information for the charges, Chris Doubek instructed David Brant to pay the invoice on April 3, 2019. At the hearing, Doubek said he decided to pay the charges after doing some internet research, which he said showed that "this is a common practice when you have a lease of this sort." Doubek also admitted, however, that he was "told by some individuals" he spoke with "that it was a significant invoice and generally speaking, it would not be submitted this way and definitely would not be submitted without backup." When Doubek was asked whether John Hurry directed him "to get the invoice paid," he responded, "Yes."

FINRA did not find out about the invoice or Alpine's payment to SCAP 9 until May 6, 2019, when Alpine disclosed the payment on a financial report. When FINRA asked Alpine for documentation to support the payment, Alpine provided only a copy of the invoice.

Chris Doubek testified that when he mentioned to John Hurry that Alpine was getting "pushback" from FINRA about the validity of the invoice, Hurry abruptly ended the conversation, telling Doubek, "If I hear another [f]'ing question about this, you are fired, the firm is shut down. I will throw the firm out of the building. Do not ask."

At the hearing, John Hurry testified that the invoice for the CAM charges was the result of a multi-year accounting error that led to the Hurry family's various real estate entities underbilling Alpine and several other tenants. According to Hurry, in late 2018 or early 2019, a tenant in one of the family's properties moved out, and the staff in Hurry's family office realized that the tenant had "accumulated quite a bit of expenses they had not paid for." John Hurry said this caused him and his staff to look at the leases for its other tenants, and "particularly the Alpine lease." Upon doing so, Hurry testified, they discovered that many of the tenants had been underbilled for years. With respect to Alpine, Hurry said that he and his staff realized that SCAP 9 "had made a significant investment in [Alpine's property] and [the cost] was never amortized back and billed to [Alpine]." According to Hurry, when SCAP 9 purchased the property in 2012, "the only expenses [Hurry's staff] actually knew . . . or spent the time to calculate was the property tax and insurance." Hurry testified that SCAP 9 renovated the building between 2012 and 2015 and should have "amortize[d] some of those costs and outlays back to the tenant." SCAP 9, however, never billed Alpine for the "full expense" due to "some changes in the accounting[.]" According to John Hurry, that "was something that just got missed." Additionally, Hurry said that, since 2012, Alpine's CAM charges had included only property tax and insurance, and Alpine had not paid any "appreciation cost, interest factor cost, management fees, maintenance fees, just pretty much any fee there is." As a result of these errors, as of 2019, Alpine had been underbilled for CAM charges by a total of about $5 million. Hurry said that SCAP 9 invoiced Alpine only for the 2018 charges because Hurry "[d]idn't think it was prudent to bill them for the entire amount."

3. The CAM Charges Were Not a Legitimate Business Expense, and Alpine's Payment to SCAP 9 Was an Unauthorized Capital Distribution

After considering all the evidence, we find that the CAM charges billed on the invoice were not a legitimate business expense, but instead were fabricated by John Hurry to withdraw more than $600,000 of Alpine's capital without FINRA's authorization. Our finding is based on several factors.

First, John Hurry had a motive to bill Alpine for false CAM charges. In early 2019, Hurry was eager for Alpine to distribute its profits to its beneficial owners, which included John Hurry, Justine Hurry, and their children. Hurry was frustrated that FINRA's scrutiny of Alpine's finances was hindering Alpine's efforts to pay out its profits as quickly as it had done in the past. By billing Alpine for false CAM charges, John Hurry could withdraw capital from Alpine without seeking FINRA's permission.

Second, on its face, the invoice for $610,000 in additional CAM charges for one year appears illegitimate. The additional CAM charges for 2018 exceeded Alpine's rent for the entire year, and the charges were more than 10 times what Alpine typically paid for CAM charges in a year.[159] In relation to its rent payment and past CAM charges, the amount billed on the invoice is not believable.[160]

Third, John Hurry's steadfast refusal to provide any justification to Alpine for the charges amplifies our doubts about their validity. Hurry testified that, under the terms of Alpine's lease, SCAP 9 had no obligation to justify the charges, and if Alpine "really felt that strongly about" getting justification, "they had remedies," but he had "litigated this before and [he] never lost." Even assuming Hurry is correct about SCAP 9's legal obligations, his position still is suspect.[161] Hurry testified that his staff already had researched the CAM charges and calculated the amount due from Alpine. It would have been easy to provide those calculations to Alpine. At the very least, Hurry could have told Alpine what he told the Hearing Panel about the charges. His refusal to do either is inculpating.[162]

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[159] In 2018, Alpine paid $574,700 in rent to SCAP 9. As of the date of the invoice, Alpine already had paid almost $60,000 in CAM charges for 2018.

[160] Alpine argues that the amounts Alpine paid for CAM charges in the past were significantly less than the amount billed on the invoice "because the Landlord erroneously under-billed Alpine." Alpine's argument assumes that the amount that SCAP 9 billed on the invoice is legitimate.

[161] While the lease did not specifically state that SCAP 9 must "justify" CAM charges, it required SCAP 9 to provide to Alpine by April 1 of each year an "Operating Cost Report" setting forth the amount of Operating Cost Share Rent and Tax Share rent (i.e., CAM charges) due for the previous fiscal year. In addition, the lease defined "Operating Costs" to refer to certain expenses "paid or incurred" by SCAP 9.

[162] Alpine argues that, while FINRA "may desire to impose obligations on [Hurry and SCAP 9]" to provide justification for CAM charges, FINRA "has no authority to do so and that inability does not render payments under the lease improper or 'shams.'" We do not disagree. Without more, Hurry's and SCAP 9's failure to justify the CAM charges to Alpine does not necessarily render the charges "shams." However, their refusal to provide any justification for the charges casts doubt on the charges' legitimacy.

Fourth, Alpine presented no credible evidence that the CAM charges were legitimate. Alpine did not introduce any documentary evidence supporting the CAM charges. Instead, Alpine relied solely on John Hurry's testimony. Based on our independent review of the record, we find Hurry's testimony on the issue incredible.[163] Hurry claimed that, around the same time Alpine was facing delays in distributing its profits to its owners, he and his staff discovered that they had never billed several of the family's tenants, including Alpine, for millions of dollars in charges. In Alpine's case, Hurry said he and his staff discovered about $5 million in unpaid CAM charges. Putting aside the suspiciously fortuitous timing of this discovery,[164] the story is incredible. John Hurry's staff included lawyers and accountants. Hurry himself is a well-educated and sophisticated entrepreneur. At the hearing, he exhibited command of his businesses generally and of Alpine's operations and finances, specifically. John Hurry's claim that the $5 million in unpaid CAM charges "just got missed" is unbelievable, and in the absence of any corroborating evidence we give it no credit.

Alpine argues that, by finding that its payment on the invoice was a capital distribution, we are invalidating the provision in its lease requiring the firm to pay CAM charges. We disagree. As John Hurry acknowledged at the hearing, Alpine's lease requires the firm to pay only bona fide CAM charges. We find that Enforcement proved the CAM charges on the invoice were not bona fide. By paying the illegitimate invoice, Alpine transferred more than $600,000 in capital to an affiliated entity beyond FINRA's authority, effecting an unauthorized capital distribution.

We therefore affirm the Hearing Panel's finding that Alpine violated FINRA Rules 4110(c)(2) and 2010 by distributing more than 10 percent of its excess net capital without FINRA's authorization.

E. Alpine's Procedural Challenges to the Disciplinary Proceeding Are Without Merit

Alpine challenges the process it received before the Hearing Panel in several respects. First, Alpine contends that it did not receive a fair disciplinary proceeding because the hearing resumed by videoconference after the onset of the COVID-19 pandemic. Second, Alpine claims that FINRA is a state actor that denied the firm constitutional protections. Third, Alpine argues that the Hearing Officer erred in denying the firm's motion to adduce additional evidence

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[163] The Hearing Panel found Hurry's testimony on this issue incredible, but we do not defer to that finding because it is based on fundamental implausibility or objective inconsistency with other record evidence. *See Felix*, 2024 SEC LEXIS 3309, at *14-15. Alpine argues that we should disregard the Hearing Panel's credibility finding because it is based, in part, on an erroneous premise. Because we do not defer to the Hearing Panel's credibility findings on this issue, Alpine's argument is moot.

[164] Alpine argues that the timing of the invoice is not suspicious because it "was dictated by the Landlord's discovery of the underbilling issue in late 2018[.]" Alpine's argument begs the question about the truthfulness of John Hurry's testimony on this issue.

concerning the electronic delivery of customer account statements. Finally, Alpine asserts that the Hearing Panel was biased and made flawed credibility determinations. For the reasons below, we reject Alpine's arguments.

1. Alpine Received a Fair Disciplinary Proceeding

Alpine contends that the Chief Hearing Officer's determination to complete the hearing by videoconference due to the spread of the COVID-19 virus contravened FINRA's rules and rendered the disciplinary proceeding unfair.[165] We reject this contention. Alpine received the process due under FINRA rules and the Exchange Act.

A temporary amendment to FINRA Rule 9261, which expired on April 30, 2023, authorized the Chief Hearing Officer's determination to proceed with the hearing by videoconference. *See Temporary Amendment*, 2020 SEC LEXIS 4034; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Extend the Expiration Date of the Temporary Amendments*, Exchange Act Release No. 96746, 2023 SEC LEXIS 194, at *2 & n.4 (Jan. 25, 2023) (SR-FINRA-2023-001) (extending the Temporary Amendment to April 30, 2023 and noting that the relevant rule provisions would "revert to their original form at the conclusion of the temporary relief period"). The temporary amendment authorized the Chief or Deputy Chief Hearing Officer, "[u]pon consideration of the current public health risks presented by an in-person hearing," to order that a hearing "be conducted, in whole or part, by videoconference." FINRA Rule 9261(b), *as amended by* SR-FINRA-2020-027 & SR-FINRA-2021-019. The amendment "str[uck] an appropriate balance, providing fair process and enabling FINRA to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while taking into consideration the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19." *Temporary Amendment*, 2020 SEC LEXIS 4034, at *17. In particular, the amendment required the Chief or Deputy Chief Hearing Officer to consider case-specific factors, including applicable public health guidance and metrics, the number of participants involved, the risks posed by requiring those participants to travel and stay in hotels, and the length of the hearing. *See id.* at *11-12 (observing that "determining the health and safety risks of a given in-person activity requires a complex facts and circumstances analysis and is a moving target"). In this case, the Chief Hearing Officer properly exercised her discretion based on these factors.[166] *See id.* at *11.

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[165] As discussed above, the Chief Hearing Officer entered three orders addressing the completion of the hearing by videoconference: the initial November 2, 2020 order converting the hearing to videoconference; the March 1, 2021 order declining to reconsider the November 2, 2020 order; and the August 9, 2021 order confirming the November 2, 2020 order. Because the latter two orders confirmed the initial order, we consider all three documents for purposes of our discussion. *See supra* note 14.

[166] Alpine points out that, as of the date the hearing resumed by videoconference in September 2021, FINRA permitted certain arbitration hearings to take place in person. FINRA, *The Neutral Corner Vol. 3 – 2021*, at 10-11 (2021), https://www.finra.org/sites/default/files/2021-09/neutral-corner-volume-3-2021-0930.pdf (stating

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The temporary amendment was consistent with the Exchange Act, which requires FINRA to provide a fair procedure for the discipline of its members. 15 U.S.C. § 78o-3(b)(3). The Commission has acknowledged that "disciplinary proceedings before a self-regulatory organization are civil proceedings that are conducted in an informal manner," and that, in this context, a "formalistic face-to-face evidentiary proceeding" is not required.[167] *Howard Alweil*, 51 S.E.C. 14, 17 (1992). Instead, fairness requires that respondents have an opportunity to present testimony, evidence, and argument. *See id.*; *see also* 15 U.S.C. § 78o-3(h)(1) (providing that a registered securities association that institutes a disciplinary proceeding against a member "shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record"). The record shows that Alpine had the opportunity to do all those things. *Cf. Legaspy v. FINRA*, No. 20-cv-4700, 2020 U.S. Dist. LEXIS 145735, at *11-12 (N.D. Ill. Aug. 13, 2020) ("Remote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses.").[168]

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that, as of August 2, 2021, FINRA would permit arbitration hearings to proceed in person, provided that the participants meet certain vaccination and testing criteria). This is a red herring. Whether arbitration hearings took place in person has no bearing on whether Alpine received a fair disciplinary hearing under the Exchange Act. Moreover, as discussed above, the Chief Hearing Officer properly exercised her discretion based on case-specific factors, regardless of whether other matters proceeded in person. *See Temporary Amendment*, 2020 SEC LEXIS 4034, at *11-12.

[167] Indeed, the Commission has repeatedly found the use of even telephonic testimony to be fair. *See Daniel Joseph Alderman*, 52 S.E.C. 366, 368 n.6 (1995) (noting that the Commission has previously upheld the use of telephone testimony and stating that "forthrightness of manner may be gauged by listening solely to a person's voice"); *Robert E. Gibbs*, 51 S.E.C. 482, 484 n.3 (1993) (citing cases), *aff'd*, No. 93-9555, 1994 U.S. App. LEXIS 10771 (10th Cir. May 13, 1994); *Curtis I. Wilson*, 49 S.E.C. 1020, 1024-25 (Jan. 6, 1989) (rejecting the argument that a hearing was "inherently unfair" because a witness testified by telephone and therefore could neither be adequately cross-examined nor have their demeanor assessed by the panel).

[168] Alpine also characterizes the hearing as unfair because, in its view, Enforcement was able to present its case in person while Alpine was not. Although Enforcement presented more witnesses in person than did Alpine, both parties presented witnesses in person and by videoconference. To minimize the need to recall jointly designated witnesses, the parties agreed that they both would conduct direct and cross-examination when such a witness was called. Thus, both parties had presented the testimony of three jointly designated witnesses when the hearing adjourned in February 2020. In addition, the Hearing Officer permitted Alpine to present one witness out of order.

In total, Enforcement presented the testimony of six witnesses in person and 11 by videoconference, while Alpine presented the testimony of four witnesses in person and eight by videoconference. Under these circumstances, we do not conclude that the disciplinary hearing

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In sum, Alpine received a fair disciplinary process under the Exchange Act. Accordingly, we reject Alpine's argument that it was deprived of a fair hearing.[169]

2. Alpine's Constitutional Claims Lack Merit

In addition to arguing that the hearing it received was unfair, Alpine makes undeveloped claims that the process by which FINRA disciplined the firm was unconstitutional. Alpine's attempts to impose on FINRA constitutional requirements that are reserved for agents or officers of the federal government lack merit.

First, Alpine contends that proceeding by videoconference in this case violated the firm's constitutional rights to "due process of law" and "consideration of the issues by a jury." "A threshold requirement of [Alpine's] constitutional claims," however, "is a demonstration that in denying [the firm's] constitutional rights, [FINRA's] conduct constituted state action." *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999). Alpine does not establish that FINRA's disciplinary action is one of the "few limited circumstances," *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019), in which a private entity's conduct is "fairly attributable to" the government and thus state action subject to constitutional requirements, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). As the Commission has held repeatedly, FINRA is not a state actor, and constitutional due process and trial by jury requirements do not apply in the disciplinary proceedings of private self-regulatory organizations such as FINRA.[170] *See, e.g.,*

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was unfair. *See* 15 U.S.C. §§ 78o-3(b)(8) & (h)(1); *cf. In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 971-73 (D. Minn. Mar. 13, 2020) (concluding, in the case of a trial interrupted by the onset of COVID-19, that it was not unfair to require the defendant to present its remaining witnesses by videoconference).

[169] While Alpine asserts that the temporary amendment violated FINRA's By-Laws, it neither develops this argument nor explains how this purported violation resulted in prejudice. FINRA Rule 9347(a) (providing that a party must support any objection to the Hearing Panel's decision with "concise argument").

[170] The Commission's sound conclusion that FINRA is not a state actor subject to constitutional claims aligns fully with the findings of numerous federal courts. *See, e.g.*, *D.L. Cromwell Invs., Inc., v. NASD*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that the NASD itself is not a government functionary."); *Desiderio v. NASD*, 191 F.3d at 206-07 ("The NASD is private actor, not a state actor."); *Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) ("NASD is a private party and not a governmental agent."); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the NASD, because '[t]he NASD is a private actor, not a state actor.'"); *Kim v. FINRA*, 698 F. Supp 3d. 147, 154 (D.D.C. 2023), *appeal docketed*, No. 23-7136 (D.C. Cir. Oct. 19, 2023) (holding

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Edward Beyn, Exchange Act Release No. 97325, 2023 SEC LEXIS 980, at *40 & n.86 (Apr. 19, 2023) ("Constitutional due process does not apply to FINRA proceedings."), *appeal docketed*, No. 23-6525 (D.C. Cir. May 23, 2023); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *13 (Nov. 8, 2007) ("Fawcett's position [that NASD is a state actor] . . . is directly contrary to established precedent, and we find no basis in this case for departing from that precedent."); *Mark H. Love*, 57 S.E.C. 315, 322 n.13 (2004) ("We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements."); *Turov*, 51 S.E.C. at 238 (holding that a self-regulatory organization's disciplinary proceeding under the Exchange Act does not make it a "governmental agency" for constitutional purposes).

Second, Alpine argues vaguely that the composition of the Hearing Panel violated the "federal separation of powers doctrine." If Alpine means that FINRA disciplinary hearings violate Article II of the Constitution, this claim also lacks merit. FINRA and its hearing officers are not subject to the Constitution's appointment and removal requirements. The Appointments Clause applies only to "Officers of the United States" holding principal offices "established by Law." U.S. Const. art. II, § 2, cl. 2. The Constitution's removal powers are limited likewise to "executive officers," whom the President is "empower[ed] . . . to keep accountable[] by removing them from office." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). Constitutional appointment and removal requirements hence apply only to

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that constitutional challenges to a FINRA disciplinary proceeding were unlikely to succeed on the merits because of the absence of state action).

We are cognizant of the Supreme Court's recent opinion in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), but conclude that it does not support Alpine's argument that FINRA's disciplinary action against the firm deprived it of jury trial rights afforded under the Seventh Amendment of the Constitution. The Court in *Jarkesy* made clear that the issues it confronted concerned "the basic concept of separation of powers that flows from the scheme of a tripartite government" and the ability of Congress to "withdraw from judicial cognizance" a matter that was the subject of a "suit at common law" at the time of the Founding under the Seventh Amendment. *Jarkesy*, 144 S. Ct. at 2131, 2134. The separation-of-powers principles regarding the exercise of the "judicial Power of the United States," U.S. Const. art. III § 1, do not apply to FINRA, a private entity. Disciplining FINRA members or their associated persons for violating the professional norms of the securities industry, a quintessentially self-regulatory action, is not "the stuff of" a suit at common law requiring a jury trial in an Article III court. *See Jarkesy*, 144 S. Ct. at 2132; *see also All. for Fair Bd. Recruitment*, 2024 U.S. App. LEXIS 31475, at *37 ("[T]he J&E provision simply requires [self-regulatory organizations] to promote behavior that is morally right and in conformity with the rules and customs of the securities profession."); *Daniel Turov*, 51 S.E.C. 235, 238 (1992) ("A disciplinary proceeding before a self-regulatory organization is . . . no[t] a 'suit at common law' within the meaning of the Seventh Amendment. The guarantees pertaining to trials by jury . . . are therefore inapposite.").

"'Officers of the United States,' *a class of government officials*" employed by the federal government. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (emphasis added).

Alpine has not established that FINRA is part of the "Government itself" for constitutional purposes. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995); *see also Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 439-40 (5th Cir. 2024) ("*Lebron* is the governing test to determine whether an entity is private or public and, under that test, the Authority is a private entity not subject to Article II's Appointments Clause."). Under the strict framework established in *Lebron*, a corporation is considered "part of the Government" for constitutional purposes when the government "create[d] [the] corporation" for "governmental objectives" and "retains for itself permanent authority to appoint a majority of the directors of that corporation." *Id*. at 397, 400. FINRA, however, is a private self-regulatory organization in the securities industry; it is not a "Government-created, Government-appointed entity." *See Free Enter. Fund*, 561 U.S. at 485, 498 (distinguishing self-regulatory organizations, like FINRA, from the Public Company Accounting Oversight Board, to which the Court applied constitutional requirements). We therefore dismiss Alpine's argument that the Hearing Panel was unconstitutionally composed. *See Silver Leaf Partners, LLC*, Exchange Act Release No. 102538, 2025 SEC LEXIS 649, at *26 (Mar. 7, 2025) ("Silver Leaf has . . . failed to establish that the Appointments Clause applies to FINRA personnel."); *see also Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *43 (Apr. 3, 2020) ("Newport's argument fails because, as we have held previously, the Appointments Clause does not apply to FINRA; accordingly, the manner in which FINRA hires its staff, hearing officers, and NAC members cannot violate the Appointments Clause.").

3. The Additional Evidence Alpine Sought to Adduce Concerning the Delivery of Its Customer Statements Is Irrelevant to Our Discussion

Alpine also contends that the Hearing Officer erred by denying its motion to adduce additional evidence concerning the electronic delivery of its customer statements.[171] The evidence Alpine sought to adduce included spreadsheet pages from its outside statement vendor which, according to Alpine, indicated whether statements were delivered to customers' email addresses and accessed by customers. Alpine asserts that the Hearing Officer erred by excluding this evidence given the Hearing Panel's conclusion that the firm did not provide customers with adequate notice of its new fee schedule.

Even if we were to determine that the Hearing Officer abused her discretion by denying Alpine's motion (which we do not), any such error would be harmless. *See U.S. Assocs., Inc.*, 51 S.E.C. 805, 812 & n.24 (1993) (noting that a finding of harmless error may overcome procedural objections). We have considered, on de novo review, the exhibits Alpine sought to adduce and conclude that they are irrelevant to our discussion. *See Dep't of Enf't v. Darien*, Complaint No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at *21-22 & n.21 (FINRA NAC Dec. 10,

[171] Alpine sought to introduce this evidence in December 2020, after the hearing reconvened remotely for four hearing days during August and September 2020.

2014) (explaining that the NAC's de novo review may cure procedural error). Whether Alpine's customers received electronic delivery of their statements has no bearing on our findings, including the reasonableness of Alpine's fees.[172]

4. Alpine's Assertions that the Hearing Panel Was Biased Are Without Merit

Alpine asserts that the Hearing Panel's decision evidenced improper bias against John Hurry. We reject this argument. The Hearing Panel's adverse decision against Alpine, standing alone, does not demonstrate bias against John Hurry. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *44 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010) ("Adverse rulings, by themselves, generally do not establish improper bias."). Moreover, "bias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case." *Id.* at *44-45 (internal quotation omitted). We find no evidence of such bias here. To the contrary, although we modify the Hearing Panel's findings, we observe that its decision is based on the evidence introduced at the hearing and not information from an extrajudicial source.[173]

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[172] Alpine filed a motion to adduce other additional evidence on appeal, which the Subcommittee denied. We adopt the Subcommittee's ruling as our own. In addition to failing to meet the requirements of FINRA Rule 9346(b), the motion was untimely.

[173] Accordingly, we reject as unsupported Alpine's assertion that the Hearing Panel was biased following the Commission's reversal of the NAC's decision barring John Hurry in a separate disciplinary proceeding, *Scottsdale Cap. Advs. Corp.*, Exchange Act Release No. 93052, 2021 SEC LEXIS 2789 (Sept. 17, 2021). *See Dep't of Enf't v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *34 (FINRA NAC July 21, 2016) (observing that "assertions of bias that are wholly unsubstantiated . . . are an insufficient basis to invalidate" a disciplinary proceeding). While Alpine states that the Hearing Panel was aware of the decision, such awareness does not demonstrate bias. *Cf. Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (explaining that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible"). To the extent Alpine argues that the Hearing Panel would have been motivated to rule against the firm following the outcome of *Scottsdale*, we reject this argument because it is based purely on speculation. *See Weinstock*, 2016 FINRA Discip. LEXIS 34, at *34.

We also reject Alpine's argument that the Hearing Panel's decision demonstrates bias against John Hurry because it frequently references his conduct. These references are based on the evidence. *See Epstein*, 2009 SEC LEXIS 217, at *44-45. Moreover, John Hurry's conduct, like that of Alpine representatives, is relevant to the firm's actions concerning the fees, charges, and transfers of cash and securities at issue in this proceeding. *See Spring Hill Cap. Mkts.*, Initial Decisions Release No. 919, 2015 SEC LEXIS 4895, at *24 (Nov. 30, 2015) (explaining that corporations "are accountable for the actions of their responsible officers" and citing cases); *Newport-Mesa Unified School District*, Exchange Act Release No. 7589, 1998 SEC LEXIS

[Footnote continued on next page]

Furthermore, even if we had determined that evidence of bias was present (which we do not), our de novo review "ensures that the overall disciplinary proceeding . . . was fair and without bias." *Weinstock*, 2016 FINRA Discip. LEXIS 34, at *34.

5. We Reject Alpine's Challenges to the Hearing Panel's Credibility Determinations

We also reject Alpine's challenges to the Hearing Panel's credibility determinations. Alpine specifically challenges the Hearing Panel's determinations that Chris Doubek's and Christopher Frankel's testimony was generally credible, pointing out that both individuals had legal disputes with Alpine and acrimonious relationships with John Hurry. The Hearing Panel acknowledged these circumstances, however, and explained that it nevertheless credited this testimony considering its consistency with the other evidence. Based on our independent review of the record, we agree with these determinations.[174] *Felix*, 2024 SEC LEXIS 3309, at *14-15. Chris Doubek's and Christopher Frankel's testimony generally was consistent with the documentary evidence, the testimony of other members of Alpine's management team, and the state of affairs at Alpine during the relevant timeframe.[175]

We find unpersuasive Alpine's additional arguments that Chris Doubek's and Christopher Frankel's testimony was incredible. *See Felix*, 2024 SEC LEXIS 3309, at *14-15. While Alpine asserts that Chris Doubek "completely changed his testimony" after Alpine

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[Cont'd]

2095, at *20 (Sept. 29, 1998) (explaining that, for purposes of the school district's violations, "the statements and omissions of its representatives may be imputed to [it]") (citing *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972) (explaining that the court would impute an individual's knowledge to corporations he controlled)).

[174] With respect to Chris Doubek, the Hearing Panel also observed that his testimony "appeared forthright and honest." We defer to this aspect of the Hearing Panel's credibility finding because it is based on first-hand impressions of the live testimony. *See Felix*, 2024 SEC LEXIS 3309, at *14-15; *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *12 n.45 (Mar. 31, 2016) (explaining that credibility determinations "based on hearing the witness's testimony and observing demeanor. . . are entitled to considerable deference").

[175] As discussed elsewhere in this decision, the Hearing Panel credited Joseph Walsh's testimony over Chris Doubek's testimony in one respect relevant to the firm's taking of positions valued at less than $1,500 as "worthless," and we agree with that determination. *See supra* note 126; *Felix*, 2024 SEC LEXIS 3309, at *14-15. Otherwise, however, we conclude that Chris Doubek's testimony was credible.

terminated him, this assertion is unsupported by the record.[176] And, with respect to Christopher Frankel, Alpine does not attempt to point to any evidence that is inconsistent with his testimony.[177]

Alpine also asserts that the remote proceeding adversely impacted the panel's ability to assess credibility by "diluting the ability to question [] witness[es]" and "preventing the [p]anel from being able properly to observe [] demeanor."[178] We disagree. As one court has observed, "[t]he near-instantaneous transmission of video testimony through current technology permits the [adjudicator] to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration." *ResCap Liquidating Trust*, 444 F. Supp. 3d at 970-71 (quoting *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 644 (E.D. La. 2006)) (internal alterations omitted) (order to complete trial by videoconference). For this reason, courts have found that video testimony sufficiently enables the cross-examination of witnesses and the making of credibility determinations to preserve the overall integrity of the proceedings. *See Aoki v. Gilbert*, No. 11-cv-02797, 2019 U.S. Dist. LEXIS 44155, at *5 (E.D. Cal. Mar. 18, 2019) (order granting a motion to present testimony by videoconference). Having considered the record in this matter, we do not conclude that the use of videoconference technology prevented the Hearing Panel from assessing credibility. *See Gibbs*, 51 S.E.C. at 484 n.3.

V. Sanctions

The Hearing Panel imposed a unitary sanction on Alpine—an expulsion from FINRA membership—for the firm's conversion and improper use of customer funds and securities, unauthorized securities transactions, unreasonable and discriminatory fees, and unfair pricing

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[176] Alpine terminated Chris Doubek in June 2021, while the hearing was in recess prior to its completion in September 2021. Doubek provided on-the-record ("OTR") testimony in this matter prior to his termination, and testified at the hearing when it resumed in September 2021, following his termination. To support its argument, Alpine points to testimony in which, after being shown the transcript of his prior OTR to refresh his recollection, Chris Doubek agreed with the accuracy of testimony he provided while the firm still employed him. Alpine also points to testimony in which Doubek agreed that, following his termination, he reached out to FINRA to report what he viewed as possible misconduct by John Hurry. Neither example demonstrates that Doubek contradicted prior testimony.

[177] In connection with its challenges to the Hearing Panel's credibility findings, Alpine contends that the Hearing Panel erred by crediting only the inculpatory testimony and failing to credit the exculpatory testimony of several Alpine employees. Based on the examples Alpine provides, we understand its argument to be a challenge to the Hearing Panel's conclusion that certain Alpine fees were unreasonable. We address this determination elsewhere in this decision. *See supra* Part IV.A.

[178] Alpine does not identify instances when the remote proceeding created these problems with witness testimony.

and commissions, as alleged in the amended complaint's first through fifth causes. The Hearing Panel also assessed, but did not impose considering the expulsion, a one-year suspension from membership and a $75,000 fine for Alpine's single unauthorized capital withdrawal, as alleged in the amended complaint's sixth cause.

Although we affirm the Hearing Panel's findings of liability only in part, and assess sanctions beginning from a different starting point, we nevertheless concur with the Hearing Panel's decision that expelling Alpine from FINRA membership is the appropriate remedy to address the widespread and pernicious misconduct that confronts us in this case. Considering our liability findings, we also modify the Hearing Panel's order of restitution and the permanent cease and desist order that it imposed on the firm.

A. Alpine Is Expelled from FINRA Membership for Intentionally Engaging in a Prolonged Pattern of Grave Misconduct

As an initial matter, we have determined to impose a unitary sanction for Alpine's decision to levy an unreasonable and unfairly discriminatory $5,000 monthly account fee, the firm's unauthorized securities transactions, and its improper use and conversion of customer assets.[179] We concur with the Hearing Panel's assessment that these violations of FINRA rules were closely interrelated in this case and worthy of a single expulsion.[180]

The relevant Sanction Guidelines ("Guidelines") for the FINRA rule violations that inform this decision are as follows. First, there are no specific guidelines for imposing service charges or fees that are unreasonable or unfairly discriminatory. The Hearing Panel therefore analogized this violation to the charging of unfair prices and commissions under FINRA Rule 2121. We agree with this decision.[181] The guidelines for pricing violations provide, for intentional or reckless misconduct, that we consider suspending a member for up to two years, or when aggravating factors predominate, an expulsion of the firm.[182]

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[179] *See FINRA Sanction Guidelines*, at 4 (2021) (General Principles Applicable to All Sanction Determinations, No. 4), https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

[180] We disagree, however, with the Hearing Panel's determination that Alpine's unfair pricing of securities transactions (cause four) was so closely interrelated with the misconduct alleged in causes one, two, three, and five that a unitary sanction for this cause was warranted. Deviating from the Hearing Panel's decision, we thus assess sanctions independently for Alpine's pricing securities unfairly.

[181] *See Guidelines*, at 1 (Overview) ("For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.").

[182] *Id.* at 92.

Second, the guidelines for unauthorized trading recommend that we consider suspending a firm with respect to any or all relevant activities or functions for up to two years.[183] These guidelines include several relevant principal considerations, including whether the respondent acted in bad faith, the number of customers affected, the number of unauthorized transactions, and whether the unauthorized transactions were made in furtherance of another violation, for example the improper use or conversion of customer assets.[184] We conclude that, when such considerations are aggravating, it is appropriate that we consider an expulsion of the firm.[185]

Finally, the guidelines for the improper use or conversion of customer funds or securities recommend that we bar the respondent, except in those cases in which an improper use of customer assets resulted from a misunderstanding of a customer's instructions or other mitigation exists.[186]

With these guidelines serving as direction, we conclude that expelling Alpine from FINRA membership is the only appropriate remedy for the firm's grave misconduct. Alpine's unreasonable $5,000 monthly account fee, unauthorized trading, and improper use and conversion of customer assets include FINRA rule violations that the securities industry recognizes as among the worst misconduct in which a securities industry professional or broker-dealer may engage. *See, e.g.*, *Lane*, 2015 SEC LEXIS 558, at *44 (finding that unfair pricing is a serious breach of a broker's obligation to deal fairly with customers); *Dep't of Enf't v. Wilson*, Complaint No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *25 (FINRA NAC Dec. 28, 2011) ("Unauthorized trades are a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade."); *Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *52-53 ("Applicants' initial conversion of customer property [was] a blatant violation of NASD rules."); *Dep't of Enf't v. Mullins,* Complaint Nos. 20070094345, 20070111775, 2009 FINRA Discip. LEXIS 33, at *56 (FINRA OHO Aug. 25, 2009) ("It is well-established that misuse of customer funds is a serious matter that goes to the heart of the relationship between a broker and a customer and undermines the integrity of the securities industry."); *Dep't of Enf't v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *28 (FINRA NAC July 16, 2015) ("Conversion is extremely serious misconduct and is one of the gravest violations that a securities industry professional can commit."). Accordingly, such misconduct is regularly or presumptively met with a bar or an expulsion from FINRA membership. *See, e.g.*, *Lane*, 2015 SEC LEXIS 558, at *45 (finding respondent's actions posed "too great a risk to the markets and investors" to allow him to remain in the

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[183] *Id.* at 100.

[184] *See id.*

[185] *See id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 1) ("Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue. To meet this standard, certain cases may necessitate the imposition of sanctions in excess of the upper sanction guideline.").

[186] *Id.* at 36.

securities industry); *Wilson*, 2011 FINRA Discip. LEXIS 67, at *53 ("The imposition of a bar is necessary here to protect the investing public."); *Mullins*, 2009 FINRA Discip. LEXIS 33, at *56 (barring respondent for the misuse and conversion of customer assets); *Grivas*, 2015 FINRA Discip. LEXIS 16, at *25 ("The Guidelines for conversion are expressed in decidedly stark terms; a bar is the standard sanction regardless of the amount converted.").

Numerous aggravating factors support our decision to expel Alpine. These factors include the fact that Alpine engaged in a pattern of intentional misconduct over a prolonged period.[187] The firm deliberately began charging customers the $5,000 monthly account fee in late 2018 for the express purpose of coercing the closure of customer accounts. Once Alpine obtained this leverage over its customers, and using a succession of unjustifiable excuses, it set about taking customer funds and securities without customer consent over a period of more than six months to rid the firm of those customers' accounts and to make money for the firm.

We further find it aggravating that Alpine's actions resulted in injury to the firm's customers, and that the number, size, and character of Alpine's unauthorized transactions confirm the need for the most severe sanction.[188] Alpine's customers, whose accounts were largely small or traded infrequently, were burdened with an unconscionable $5,000 monthly account fee to the tune of more than $23,700,000 collectively, and Alpine used this fee as justification to take more than $2.8 million in cash and securities from customer accounts, before taking as "worthless" or "abandoned" thousands of securities positions worth more than $50 million for accounts that Alpine controlled.

Next, we find it aggravating that Alpine engaged in these evident acts of self-help in furtherance of its own interests and bottom line only.[189] In this respect, we find the record clear that Alpine imposed the $5,000 monthly account fee, and unilaterally took customer funds and securities, not in furtherance of any services that the firm provided its customers, or because the firm believed in good faith that such actions were consistent with its customer agreements, but instead in an effort to rid itself of what Alpine determined had become an expensive and unprofitable line of business in which it no longer wished to participate, namely the clearing of low-priced, microcap securities traded in the over-the-counter markets for retail accounts.

Finally, we find it aggravating that Alpine has not taken any meaningful responsibility for its actions.[190] Instead, Alpine wrongly persists in asserting that the firm's customers are at fault in this case for not responding to the firm's unreasonable $5,000 monthly account fee in the way that Alpine "intended and anticipated," i.e., by closing their accounts and moving their securities to another broker-dealer. *See Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 SEC

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[187] *See Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 13).

[188] *See id.* (Principal Considerations in Determining Sanctions, Nos. 11, 17).

[189] *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 16).

[190] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 2).

LEXIS 3773, at *18 (Sept. 30, 2016) (respondent's "refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future").

In sum, we conclude that expelling Alpine from FINRA membership is the only appropriately remedial response to the firm's imposing an unreasonable and unfairly discriminatory $5,000 monthly account fee, its engaging in unauthorized transactions, and its improper use and conversion of customer funds and assets—a sanction that we find is crucial to protect the investing public. *See Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *53-54 ("A bar and expulsion are severe sanctions. Applicants' demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions."); *see also John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *7 (Aug. 23, 2019) ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors."), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020).

In reaching this conclusion, we do not find any mitigating factors that would warrant a lesser sanction in this case. Although Alpine claims as mitigation the fact that it, eventually, reversed the $5,000 monthly account fee and reversed most of the transactions that resulted in its taking millions of dollars in cash and securities from customer accounts, we note that it did so largely, if not exclusively, after concentrated regulatory scrutiny and pressure.[191] Under such circumstances, we decline to assign Alpine's attempts at corrective action any mitigating effect. *See Mullins*, 2012 SEC LEXIS 464, at *50 ("Although J. Mullins ultimately returned the funds he converted from the Foundation, the fact that this reimbursement was delayed by more than a year and prompted by regulatory interest all but eliminates any mitigative effect [the] reimbursement has on his sanction.").

B. Alpine Is Expelled Independently for Unfairly Pricing Hundreds of Securities Transactions

As we describe above, we have decided to assess sanctions for Alpine's unfair pricing and excessive mark-downs on hundreds of principal transactions involving securities independent of the sanction that we assess for the firm's decision to levy an unreasonable and unfairly discriminatory $5,000 monthly account fee, its unauthorized securities transactions, and its improper use and conversion of customer assets.[192] The guidelines for the unfair pricing of securities transactions provide, for intentional or reckless misconduct, that we consider suspending a member for up to two years, or when aggravating factors predominate, an

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[191] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 3).

[192] The Guidelines instruct FINRA adjudicators to tailor sanctions to respond to the conduct at issue. *See Guidelines*, at 3 (General Principles Applicable to All Sanction Determinations, No. 3). We find it appropriate in this case to treat Alpine's violation of FINRA's fair pricing rule individually such that a separate and independent sanction is necessary to respond to the conduct at issue. *See id*. at 4 (General Principles Applicable to All Sanction Determinations, No. 3).

expulsion of the firm.[193] We conclude that aggravating factors predominate in this case. Accordingly, to protect the investing public, we impose an independent expulsion from membership for Alpine's violation of FINRA Rules 2121 and 2010 under cause four of the amended complaint.

First, we find that Alpine's conduct was, at a minimum, reckless. Alpine intentionally, at John Hurry's direction, adopted and charged the 2.5% market-making/execution fee on all customer transactions. In so doing, Alpine knew or must have known, given the nature of the low-priced, microcap securities trading that it cleared for its customers, that this would result in customers often paying mark-downs on principal trades that well exceeded 5% when added to the other commissions, fees, and charges that the firm imposed. *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (recklessness includes "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known . . . or is so obvious that the actor must have been aware of it").

Second, Alpine engaged in a pattern of misconduct over a period lasting nearly a year.[194] Alpine charged the market-making element of the fee on all principal transactions cleared for its retail brokerage customers from November 1, 2018, to September 24, 2019. Those customers paid total market-making fees during that period of more than $45,000, and the total mark-down on hundreds of transactions nearly uniformly exceeded 5%, with many trade executions resulting in those customers paying mark-downs of more than 10, 15, or even 25% of the best available price. The number of harmed customers and the harm they suffered is thus aggravating.[195]

Third, we find that Alpine's misconduct resulted in the firm's recognizable financial gain and represented, in effect, another form of self-help that the firm utilized in its efforts to improve its finances.[196] As Christopher Frankel testified, John Hurry viewed the market-making/execution fee as simply an additional source of order-flow revenue that Alpine could extract from its customers. Alpine designed and imposed the fee as a one-size-fits-all fee that it applied uniformly in principal trades, regardless of whether Alpine acted in a principal or riskless principal capacity when executing those trades. In this respect, Alpine imposed the market-making element of the fee without consideration of the securities being traded, the market conditions that existed at the time of any particular transaction, or the actual expense that Alpine incurred to clear a specific trade. *Cf.* FINRA Rule 2121. Rather, it was another effort by the

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[193] *See Guidelines*, at 92. These guidelines further recommend that we impose a fine that includes, if restitution is not ordered, the gross amount of the excessive mark-downs. *Id.*

[194] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[195] *See id.* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 11, 17); *see also id.* at 92 (Principal Considerations in Determining Sanctions, No. 3).

[196] *See id*. at 8 (Principal Considerations in Determining Sanctions, No. 16).

firm to serve its bottom line in disregard of its regulatory obligations to its customers.[197] *See Dep't of Enf't v. Andrew Gonchar*, Complaint No. CAF040058, 2008 FINRA Discip. LEXIS 31, at *54 (FINRA NAC Aug. 26, 2008) ("Respondents placed their own interests . . . before those of their customers."), *aff'd*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797 (Aug. 14, 2009).

Because we find that aggravating factors predominate and no mitigating factors are present, we expel Alpine from FINRA membership for its numerous violations of FINRA Rules 2121 and 2010.[198] Engaging in unfair pricing of securities transactions is a serious breach of a broker-dealer's duty of fair dealing with its customers. *See Lane*, 2015 SEC LEXIS 558, at *44. Alpine's misconduct here, which resulted in significant mark-downs and revenue for the firm, was egregious and is evidence Alpine's fundamental lack of understanding of its duties as a broker-dealer. Expelling the firm is therefore necessary to protect the investing public.[199] *See Gonchar*, 2009 SEC LEXIS 2797, at *55 ("Applicants' actions pose too great a risk to the markets and investors to allow Applicants to remain in the securities industry."); *Sanders*, 53 S.E.C. at 908 ("Sanders' disregard for regulatory requirements in this case augurs poorly for his fitness generally to remain in the industry."); *see also Saad*, 2019 SEC LEXIS 2216, at *7 ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors.").

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[197] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 16).

[198] In addition, as we discuss below, *infra* Part V.D., Alpine's disciplinary history provides robust support of an expulsion in this case.

[199] The Hearing Panel assessed, but did not impose given its decision to expel the firm, a one-year suspension and a $75,000 fine for Alpine's single unauthorized capital withdrawal. Because there are no guidelines for this specific violation, the Hearing Panel applied by analogy the guidelines for net capital violations, which recommended a fine of $1,000 to $77,000, and in egregious cases, a suspension of up to two years or an expulsion. *See Guidelines*, at 28. The Hearing Panel found that aggravating factors supported the sanctions it assessed. These include that Alpine acted intentionally and attempted to conceal its unauthorized capital withdrawal by paying a sham invoice. *See id.* at 7-8 (Principal Consideration in Determining Sanctions, Nos. 10, 13).

We find no error in the Hearing Panel's assessment of sanctions for Alpine's single unauthorized capital withdrawal, and we would under the facts presented also impose a one-year suspension of Alpine's membership and a $75,000 fine absent the expulsions we impose for Alpine's other FINRA rule violations. "The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors." *Blaise D'Antoni & Assoc., Inc. v. SEC.*, 289 F.2d 276, 277 (5th Cir. 1961). "[A]ccurate and current records are essential to enable a broker-dealer to determine compliance with the net capital and other requirements." *Fox Sec. Co.*, 45 S.E.C. 377, 384 (1973). Alpine's efforts to evade restrictions on the withdrawal of capital from a member broker-dealer by paying an invoice that it must have known was not legitimate was thus egregious and worthy of the serious sanction that the Hearing Panel assessed.

C. Evidence Exists of Alpine's Ongoing Threat to the Investing Public

We consider the misstatements Alpine made in its August 2019 accounting concerning its compliance with the temporary cease and desist order to be a serious aggravating factor that further supports expelling the firm from FINRA membership. These misstatements call into question any assurances the firm provides against ongoing or future violations. *Cf. John A. Carley*, Exchange Act Release No. 57246, 2008 SEC LEXIS 222, at *59 (Jan. 31, 2008) (considering "the sincerity of the defendant's assurances against future violations" as a factor in determining sanctions under Exchange Act §15(b)(6)). Alpine's untrue statements concerning its reversal of unauthorized "worthless" securities transactions and refunds of cash taken to cover the $5,000 monthly fee had the obvious effect of misleading FINRA to believe that the firm had returned customers' securities and cash when, in fact, it had not done so. Thus, the misstatements effectively concealed ongoing misconduct that impacted customer assets.[200]

Moreover, Alpine's failure to comply with the order's requirement that it provide a "full accounting" of securities transferred from customer accounts as "worthless" and cash transferred from customer accounts to cover the $5,000 fee demonstrates that more severe remedial measures are necessary in this case. It was not until FINRA served the firm with two FINRA Rule 8210 requests and a motion to compel a response that Alpine completed the actions it previously represented it had finalized. The fact that this degree of regulatory pressure was required to secure the firm's compliance with the temporary cease and desist order casts doubt on the firm's future compliance with regulatory obligations. *Cf. Chris G. Gunderson*, Exchange Act Release No. 61234, 2009 SEC LEXIS 4322, at *25 (Dec. 23, 2009) (observing that the respondent's continued violation of federal securities laws, "in defiance of a district court's permanent injunction and penny stock bar," demonstrated a strong likelihood of future violations) (order permanently disqualifying attorney from practicing before the Commission); *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *41 (Dec. 21, 2007) (observing that the respondent's "misconduct in the face of [a] cease-and-desist order" targeting similar misconduct "demonstrate[d] the likelihood of future violations and the necessity of imposing a bar"); *Madden v. Grain Elevator, Flour & Feed Mill Workers*, 334 F.2d 1014,

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[200] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 10) (whether the respondent concealed misconduct); *id.* (Principal Considerations in Determining Sanctions, No. 11) (whether the respondent's misconduct resulted in investor harm); *Order Granting Approval to the Proposed Rule Change to Establish a Two-Year Pilot Program Relating to the Issuance of Temporary Cease and Desist Orders* (hereinafter "*Issuance of Temporary Cease and Desist Orders*"), Exchange Act Release No. 47925, 68 Fed. Reg. 33548, 33553 (June 4, 2003) (SR-NASD-98-80) (explaining that "[t]emporary cease and desist proceedings are designed to . . . stop ongoing violations that are likely to result in a significant dissipation or conversion of assets or other significant harm to investors"); *see also Dep't of Enf't v. Ahmed*, Complaint No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *121 (FINRA NAC Sept. 25, 2015) (explaining that evidence of continued misconduct is a "powerful" aggravating factor), *aff'd*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078 (Sept. 28, 2017).

1022 (7th Cir. 1964) (explaining that the "natural result" of a party's failure to comply with injunctions "was more coercive orders").

Alpine's apparent intent to evade compliance with other provisions of the temporary cease and desist order serves as further aggravation here. Alpine's September 2019 fee schedule, which would have charged at least some customers the $5,000 monthly account fee by splitting it into separate fees, flouted the order's requirement that it cease and desist from charging the $5,000 fee.[201] And Alpine's December 2019 determination to close customer accounts by, among other things, transferring customer securities to unclaimed property accounts for their states was inconsistent with the order's requirement that the firm cease and desist from transferring securities from customer accounts on the ground that they were deemed "abandoned." Alpine's plans to evade the order in this manner demonstrated the firm's intent to continue with its misconduct, as well as a troubling disregard for its regulatory obligations and the protection of its customers and their assets.[202] *See Issuance of Temporary Cease and Desist Orders*, 68 Fed. Reg. at 33553 (explaining that "[t]emporary cease and desist proceedings are designed to . . . stop ongoing violations that are likely to result in a significant dissipation or conversion of assets or other significant harm to investors"). Indeed, the firm's determinations to skirt the order confirm that it was concerned primarily with maintaining leverage over its customers and quickly closing accounts, and not with meeting its regulatory obligations.[203]

Alpine's plans to evade the temporary cease and desist order also undermine its assertion that expulsion is not necessary to protect investors because the firm has new management. The

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[201] As noted above, the fee schedule prescribed that all customers would pay a monthly $3,500 minimum ticket charge and "OTC Deposit Related Fee" and a monthly $100 account fee. Some customers would pay an additional monthly $400 inactivity fee and $1,000 monthly dormant account fee.

[202] *Cf. Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 7, 11, 13-14); *cf. also Dep't of Enf't v. Mantei*, Complaint No. 2015045257501, 2023 FINRA Discip. LEXIS 10, at *55 (FINRA NAC May 30, 2023) (finding it aggravating that the respondent circumvented a policy designed to protect customers), *appeal docketed*, SEC Admin. Proc. No. 3-21516 (June 27, 2023).

[203] In this respect, we consider Chris Doubek's testimony that Alpine intentionally delayed meeting its obligation under the temporary cease and desist order to reverse all debits caused by the $5,000 monthly fee in open customer accounts because it wished to maintain leverage over its customers. We acknowledge that the temporary cease and desist order did not include a deadline by which Alpine was required to reverse debits caused by the $5,000 monthly fee, and we do not treat these delays, in and of themselves, as aggravating for purposes of imposing sanctions in this case. Nevertheless, we view Chris Doubek's testimony that the firm desired to maintain leverage over its customers as further evidence that, following the entry of the temporary cease and desist order, the firm continued to prioritize its objectives over its regulatory obligations.

firm sought to implement these plans at John Hurry's direction, and Hurry remains the firm's sole indirect shareholder with authority to determine the composition of its board of directors and ultimate authority over its management.[204] As a result, the fact that Alpine employs a new CEO and CCO offers scant reassurance that the firm will prioritize its regulatory obligations moving forward.[205] *Cf. Dep't of Enf't v. Dakota Sec. Int'l, Inc.*, Complaint No. 2016047565702, 2022 FINRA Discip. LEXIS 2, at *29 (FINRA NAC Mar. 16, 2022) (finding it necessary to expel the firm where it "exhibited a troubling pattern of non-compliance with its supervisory obligations" under Zipper's leadership, and there was a "substantial likelihood" he would continue to be involved in the firm's management), *aff'd*, Exchange Act Release No. 100777, 2024 SEC LEXIS 1988 (Aug. 20, 2024).

For these reasons, we conclude that Alpine's misrepresentations and attempts to evade compliance with the temporary cease and desist order aggravate its misconduct.[206]

D. Alpine's Disciplinary History Supports Our Decision to Expel the Firm

The Guidelines instruct us to "always consider a respondent's relevant disciplinary history in determining sanctions" and that we "should ordinarily impose progressively escalating

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[204] Specifically, John Hurry directed the firm to charge the $5,000 monthly fee by splitting it into separate fees, and he participated in drafting the December 2019 letter addressing the transfer of customers' securities to unclaimed property accounts to further his goal of forcing account closures.

[205] Our conclusion in this respect is reinforced by the testimony reflecting that Hurry exercised control over the firm's management and operations during the relevant period. The record offers us little reason to believe this circumstance has changed.

[206] In reaching this conclusion, we do not consider, as the Hearing Panel did, Alpine's implementation of a "DTC custody fee" or its decision to charge customers retroactive fees from its former fee schedule. The temporary cease and desist order did not expressly address these matters, and Enforcement did not establish that this conduct otherwise fell within the scope of the order.

We also do not consider Alpine's determination to publish on its website a September 2021 fee schedule listing four monthly fees that add up to $5,000, as the firm's current CEO indicated that the schedule remained under evaluation, was not final, and was not being applied to customers. The temporary cease and desist order required Alpine to cease and desist from charging the $5,000 fee, but the record does not show that Alpine intended to charge the fees on its September 2021 schedule prior to the resolution of this litigation. For this reason, the September 2021 fee schedule differs from the September 2019 schedule, which Alpine intended to apply to customers prior to FINRA's intervention.

sanctions on recidivists."[207] Alpine's relevant disciplinary history includes the following actions, which underline our decision to expel the firm from FINRA membership.[208]

1. A Federal Court Imposed a Permanent Injunction on Alpine

As we note above, the Commission filed a civil enforcement action against Alpine in the United States District Court for the Southern District of New York on June 5, 2017. In its complaint, the Commission claimed that Alpine, between the years 2011 and 2015, failed repeatedly to comply with the Bank Secrecy Act's reporting requirements for filing SARs, and the firm consequently violated reporting, recordkeeping, and record retention obligations under Section 17(a) of the Exchange Act and Exchange Act Rule 17a-8.

Specifically, the Commission alleged that Alpine cleared thousands of deposits of low-priced and microcap securities, most involving Scottsdale as the introducing broker, which were used as part of various stock manipulations and other schemes. Alpine's compliance program, however, did not cause the filing of SARs in the manner required by the Bank Secrecy Act, and the firm routinely and systematically failed to report suspicious activity in its SARs filings. The Commission alleged that Alpine's deficient SAR filings facilitated the evasion by illicit actors of regulatory scrutiny and provided those actors with access to the securities markets that they might otherwise have been denied.

As invited by the district court, the Commission moved for partial summary judgment based on exemplar SARs in each of four categories that it alleged violated Exchange Rule 17a-8. *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 781 (S.D.N.Y. 2018). On March 30, 2018, the district court granted the Commission's motion in part. *Id.*

Relying on guidance given in the district court's March 2018 opinion, the Commission subsequently moved for summary judgment as to Alpine's liability for individual violations of Exchange Act Rule 17a-8. *SEC v. Alpine Sec. Corp.*, 354 F. Supp. 3d 396, 405 (S.D.N.Y. 2018). On December 11, 2018, the district court granted the Commission summary judgment in part as to liability on thousands of violations. *Id.* at 445. The district court concluded that Alpine violated Section 17(a) of the Exchange Act and Exchange Act Rule 17a-8 repeatedly by filing required SARs with deficient narratives, failing to file SARs for groups of suspicious liquidation transactions, and failing to maintain and produce SAR support files. *Id.*

Thereafter, on September 12, 2019, the district court granted the Commission's motion for remedies. *SEC v. Alpine Sec. Corp.*, 413 F. Supp. 3d 235 (S.D.N.Y. 2019). The court held that Alpine's violations were "systemic and enduring, occurring over a course of years involving

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[207] *See* Guidelines, at 2 (General Principles Applicable to All Sanction Determinations, No. 2); *see also id.* at 7 (Principal Considerations in Determining Sanctions, No. 1).

[208] When considering Alpine's relevant disciplinary history, we have examined only final actions entered against the firm since SCA Clearing acquired it in 2011.

conduct that was plainly in violation of federal law reporting requirements," and that the firm acted "knowingly and with disregard for its obligations under the law." *Id.* at 245-46. Moreover, the district court found that Alpine's "contempt for the SAR reporting regime increased the risk to investors that they would suffer substantial losses," and the court's opinion noted the firm's "lack of remorse and denial of wrongdoing has persisted" throughout the proceeding. *Id.* at 246, 248. The district court thus stated that "it is easy to find that Alpine's misconduct was egregious." "It has not just been found liable," the court noted, "it has been found liable for illegal conduct on a massive scale." *Id.* at 245. Given "[t]he breadth and regularity of Alpine's violations of Rule 17a-8," the district court concluded that "a substantial civil penalty" was warranted. *Id.*

Accordingly, the district court ordered Alpine to pay a civil penalty of $12 million. *Id.* at 250. The district court also permanently restrained and enjoined Alpine from violating Section 17(a) of the Exchange Act and Exchange Act Rule 17a-8, concluding that "Alpine's persistent refusal to admit wrongdoing and its record of noncompliance with SAR reporting obligations demonstrate a substantial likelihood that Alpine will continue to violate federal securities laws in the future. Given its function as a broker-dealer, Alpine remains in a position where future violations could be anticipated."[209] *Id.* at 251.

2. Relevant FINRA Action Shows that Pressure Is Necessary to Ensure Alpine Follows Through on Its Regulatory Obligations

After the district court entered its judgment imposing civil penalties of $12 million against Alpine, the firm did not accrue the judgment as a liability in its Statement of Financial Condition, nor did it subtract the amount of the judgment from its net capital computation. *See Dep't of Enf't v. Alpine Sec. Corp.*, Expedited Proceeding No. FPI210010, 2022 FINRA Discip. LEXIS 4, at *4 (FINRA OHO Apr. 7, 2022). Alpine advised FINRA that it would not accrue the liability because it had assigned the liability to another entity, SC Advisors, LLC ("SCA"), a company related to Alpine. *Id.* at *5.

After further communications with FINRA, Alpine provided an accounting analysis in which it accrued the amount of the judgment as a liability for purposes of its net worth, but only in the amount of $6 million (50 percent of the judgment) because the firm was still pursuing its appellate remedies. *Id.* at *6-7. In the net capital portion of its analysis, Alpine included the claimed $6 million value of the agreement with SCA, in a line item for non-allowable assets. *Id.* at *7. Nevertheless, in a separate line item designated as "[Exchange Act Rule] 15c3-1(c)(2)(i)(F) Third Party Assignment Treatment," Alpine added $6 million back into its net capital computation. *Id.* at *5.

[209] On December 4, 2020, the Second Circuit affirmed the district court's decision to grant summary judgment to the Commission as to Alpine's liability based on 2,720 violations of the reporting, recordkeeping, and record retention requirements of Exchange Act Section 17(a) and Exchange Act Rule 17a-8. *See SEC v. Alpine Sec. Corp.*, 982 F.3d 68, 85 (2d Cir. 2020). The Second Circuit also affirmed the judgment entered against Alpine by the district court. *Id.* at 86.

On July 23, 2021, FINRA's Department of Member Supervision issued to Alpine a FINRA Rule 4140 request for an audited report of its Statement of Financial Condition and net capital computation as of June 30, 2021. *Id.* at *7-8. On August 16, 2021, Alpine's auditing firm provided a report titled "Independent Accountant's Report on Applying Agreed Upon Procedures." *Id.* at *8. In the report, the auditing firm found that Alpine should accrue the full amount of the $12 million judgment as a liability in its Statement of Financial Condition. *Id.* at *8. With respect to Alpine's net capital computation, the auditing firm found that, in computing its net capital, Alpine could exclude the $12 million judgment from its liabilities because SCA had agreed to make these payments. *Id.* at *9.

This report did not satisfy Alpine's obligation to provide an audited report under FINRA Rule 4140 because it did not apply auditing principles. *Id.* at *7 n.30. Accordingly, on September 14, 2021, after Alpine failed to produce the audited report, FINRA staff served a notice that the firm would be suspended under FINRA Rule 9552 unless it produced the audited report by October 8, 2021. *Id.* at *1. Alpine produced an audited report on October 7, 2021. *Id.* at *9-10. The report reflected that, in its Statement of Financial Condition, Alpine accrued the unpaid amount of the judgment (at the time, $11 million) as a liability under Generally Accepted Accounting Principles ("GAAP"). *Id.* at *10. Alpine's net capital computation, however, did not include the judgment as a liability. *Id.* The audited report stated that the firm did not apply "the judgment amount against its net capital calculations because it ha[d] obtained an indemnification of the liability from a third party." *Id.* at *11.

FINRA staff believed that the report's treatment of the judgment for purposes of Alpine's net capital computation had the effect of materially overstating the firm's net capital. *Id.* Accordingly, FINRA staff asked Alpine to provide the formal basis used by the auditing firm to support its opinion. *Id.* at *11-12. Alpine provided documentation from the auditing firm, which reflected that the treatment of the judgment for net capital purposes was based on the presumption that the agreement was legally binding, and that Alpine would receive payments from SCA as payments became due to the SEC. *Id.* at *12. In an audit memorandum, however, the auditing firm stated that the liability represented by the judgment could not be transferred to SCA until the Commission agreed to such a transfer. *Id.*

FINRA staff determined that the audit documentation was not a sufficient basis to support the report's treatment of the judgment. *Id.* at *13. Thus, on October 28, 2021, FINRA staff sent Alpine a letter advising that the firm would be suspended under FINRA Rule 9552(a) if it did not submit a corrected report by November 1, 2021. *Id.* The letter explained that Alpine's audited report was inaccurate because its use of the SCA agreement to offset the judgment for net capital purposes resulted in a material overstatement of the firm's net capital. The letter advised that, to avoid suspension, Alpine should submit an audited report that "(i) corrects the inaccurate net capital addback in the firm's computation of net capital, and (ii) includes the reissuance of the auditor's opinion on the financial report inclusive of the revised computation of net capital."

Alpine did not submit a corrected report. *Id.* at *14. Instead, it requested a hearing. On April 7, 2022, after conducting a hearing, the Hearing Panel issued a decision suspending Alpine.

The Hearing Panel determined that Alpine's accounting of the judgment and the agreement in its audited report resulted in a material overstatement of the firm's net capital. *Id.* at *13. Because the October 7, 2021, audited report submitted by Alpine included a materially inaccurate net capital calculation, the Hearing Panel determined that FINRA staff properly rejected the report under FINRA's By-Laws. *Id.* at *20. And, because Alpine did not submit an accurate audited report, the Hearing Panel concluded that the firm violated FINRA Rule 4140. *Id.* For this violation, the Hearing Panel suspended Alpine from FINRA membership, "until [the firm] files an audit report accurately calculating the firm's net capital in compliance with Exchange Act Rule 15c3-1."[210] *Id.* at *21.

We find that Alpine's disciplinary history weighs heavily in favor of severe sanctions and is a key reason that we have decided to expel the firm. The evidence shows that Alpine is subject to a permanent injunction for serious violations of the federal securities laws, and FINRA's relevant action against the firm demonstrates that it has been necessary for FINRA to exert regulatory pressure to secure the firm's compliance with FINRA rules. The Guidelines incorporate the fundamental notion that "[an] important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists . . . up to and including . . . expelling firms."[211] Alpine's disciplinary history signals an increasingly apparent disregard for fundamental regulatory requirements imposed under FINRA rules and the federal securities laws. *See Dep't of Enf't v. Fox Fin. Mgmt. Corp.*, Complaint No. 2012030724101, 2017 FINRA Discip. LEXIS 3, at *22 (FINRA NAC Jan. 6, 2017) ("The sanctions imposed previously on Fox and Rooney serve, in part, to frame our assessment of the sanctions imposed on them in this matter."). We find that this history provides a compelling reason to expel Alpine from FINRA membership and that expulsion is vitally necessary to address the risks that it poses to the investing public. *See Dep't of Enf. v. Newport Coast Sec., Inc.*, Complaint No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *179 (FINRA NAC May 23, 2018) ("Newport's and Leone's disciplinary histories . . . provide further evidence that serious sanctions are necessary to confront the risks posed to the investing public by these two respondents."), *aff'd*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *43 (Apr. 3, 2020).

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[210] Alpine thereafter filed an application for review with the Commission. *See Alpine Sec. Corp.*, Exchange Act Release No. 97347, 2023 SEC LEXIS 1007 (Apr. 21, 2023). While Alpine's application was pending, however, Alpine filed with FINRA an audited report that cured the defects that FINRA previously identified, and at Alpine's request, FINRA terminated the firm's suspension on April 13, 2022. *Id.* at *1-3. Because there was no longer a sanction in effect for the Commission to review, the Commission dismissed the application for review for lack of jurisdiction under Section 19(d) of the Exchange Act. *Id.*

[211] *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2).

E. Alpine Is Ordered to Pay Restitution

The Hearing Panel found that Alpine should pay restitution totaling $2,310,234 to its customers, which included $735,410 to customers who paid the $5,000 monthly account fee, $1,491,625 to customers who paid the illiquidity and volatility fee, and $83,199 to customers who paid excessive mark-downs or commissions on their securities transactions. We modify the Hearing Panel's findings and order Alpine to pay restitution totaling $802,678.77.[212]

Restitution is appropriate "when an identifiable person . . . has suffered a quantifiable loss proximately caused by a respondent's misconduct." *Dep't of Enf't v. Reyes*, Complaint No. 2016051493704, 2021 FINRA Discip. LEXIS 29, at *70 (FINRA NAC Oct. 7, 2021). "An order requiring restitution . . . seeks primarily to return customers to their prior positions by restoring the funds of which they were wrongfully deprived." *See Newport Coast Sec., Inc.*, 2020 SEC LEXIS 917, at *37 (*quoting Kenneth C. Krull*, 53 S.E.C. 1101, 1109-10 (1998)).

We agree with the Hearing Panel's determination that Alpine proximately caused the losses suffered by the firm's customers who paid excessive mark-downs on principal transactions, but we modify to $67,268.77 the amount of restitution the firm must pay to those customers. The appropriate measure of restitution for this misconduct is the difference between the excessive mark-down each customer paid and a reasonable mark-down under the circumstances.[213] *See Mkt. Surv. Comm. v. Hibbard, Brown & Co.*, Complaint No. CMS-930037, 1994 NASD Discip. LEXIS 222, at *51 (NASD NBCC July 18, 1994) ("[W]e are satisfied that the amount paid by the customers in excess of fair and reasonable mark-ups is the amount ordered in restitution[.]"); *Dep't of Enf't v. Sandlapper Sec., LLC*, Complaint No. 2014041860801, 2020 FINRA Discip. LEXIS 30, at *65 n.35 (FINRA NAC June 23, 2020) (stating that restitution was calculated to allow the respondents a reasonable mark-up). We find that, in this case, a 5% mark-down is reasonable for each of the transactions at issue.[214] *See Dep't of Enf't v. Wood (Arthur W.) Co.*, Complaint No. 201102544501, 2017 FINRA Discip. LEXIS 30, at *43 (FINRA NAC Mar. 15, 2017) (ordering respondent to pay restitution in the amount by which its commissions exceeded 5%). Accordingly, Alpine must pay restitution to each customer equal to the difference between the excessive mark-down the customer paid and a reasonable mark-down, as shown on Appendix B.

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[212] As discussed above, we reverse the Hearing Panel's finding of liability as to the illiquidity and volatility fee and the allegedly excessive commissions paid on agency transactions executed for Alpine's customers. Accordingly, no restitution is due for those violations.

[213] The Hearing Panel incorrectly ordered Alpine to pay restitution to these customers equal to the amount each customer paid for the 2.5% market-making fee, as requested by Enforcement, rather than the difference between the excessive mark-down the customer paid and a reasonable mark-down.

[214] Neither party proposed a reasonable mark-down for purposes of calculating the amount of restitution due.

We also agree with the Hearing Panel's determination that Alpine proximately caused $735,410 in losses suffered by the firm's customers who paid all or part of Alpine's $5,000 monthly fee, and that the firm should pay that amount in restitution to those customers. According to Enforcement, Alpine posted debits for the $5,000 monthly account fee to 4,605 customer accounts and deducted more than $1.7 million from customer accounts as payment for those debits. By the time of the hearing, the firm had fully reversed most of the debits and returned most of the cash it had taken to pay them. Alpine had not, however, fully reversed the debits in 852 accounts, and had not returned to those customers $735,410 it had taken from their accounts in full or partial payment of the fee.[215] Accordingly, Alpine must pay restitution to each of those customers equal to the amount taken from their accounts as payment for the $5,000 monthly fee, as shown on Appendix C.

Awarding $802,678.77 in restitution for customers' quantifiable losses is appropriate under the facts of this case.[216] *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *37 (June 2, 2016) ("We find that Butler's misconduct in converting LW's funds was a proximate cause of her loss . . . ."); *Shamrock Partners*, 53 S.E.C. at 1016 ("Restitution is an appropriate sanction in a markup or markdown case, and we believe it is appropriate here to make the customer whole.").

F. Alpine Is Ordered to Comply with Modified Permanent Cease and Desist Requirements

The Hearing Panel's cease and desist order stated that Alpine shall:

1. Cease and desist from violating FINRA Rules 2150 and 2010. Specifically, Alpine (and any successor) is ordered to cease and desist from converting or misusing customer funds or securities, including, but not limited to, by:

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[215] Alpine argues that the Hearing Panel "ignored approximately $200,000 in subsequent reimbursements" that Alpine paid to its customers, and that "the NAC should ensure that Alpine [is] required to reimburse only those customers who had not already had the fee at issue reversed" by the time of the hearing. To the extent Alpine provides to Enforcement satisfactory proof of these additional refunds for the monthly account fee, Enforcement shall credit those refunds against this restitution order. *See Reyes*, 2021 FINRA Discip. LEXIS 29, at *71 n.90 (stating that the burden of proving an offset for restitution lies with the respondent).

[216] We order that Alpine pay restitution to customers in the amounts set forth in Appendix B and Appendix C. We also order that Alpine pay prejudgment interest on these sums at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a) from the dates of Alpine's violative conduct. *See Guidelines*, at 11.

a. selling, journaling, or otherwise transferring securities from customer accounts on the ground that Alpine (and any successor) has deemed such securities to be "worthless;"

b. selling, journaling, or otherwise transferring securities from customer accounts on the ground that Alpine (and any successor) has deemed such securities or accounts to be "abandoned;" or

c. transferring cash from customer accounts, or selling, journaling, or otherwise transferring securities from customer accounts, in order to satisfy debits resulting from excessive, unreasonable, or discriminatory fees.

2. Cease and desist from violating FINRA Rule 2010. Specifically, Alpine (and any successor) is ordered to cease and desist from effecting unauthorized transactions in customer accounts.

3. Cease and desist from violating FINRA Rules 2121, 2122, and 2010. Specifically, Alpine (and any successor) is ordered to cease and desist from charging unreasonable or discriminatory fees and from charging unfair prices and commissions, including, but not limited to, by charging:

   a. a $5,000 monthly account fee, whether as a single fee or combination of fees and charges;

   b. a $1,500 recertification fee;

   c. a 1% per day illiquidity and volatility fee; or

   d. a 2.5% market-making and/or execution fee.

4. Cease and desist from violating FINRA Rules 4110 and 2010. Specifically, Alpine (and any successor) is ordered to cease and desist from making unauthorized capital withdrawals or similar distributions, including, but not limited to, through transactions with affiliates, whenever such withdrawals or similar distributions, within a 35-day rolling calendar period, would exceed 10% of Alpine excess net capital.

5. Cease and desist from dissipating or converting the funds or assets of any customers, or causing other harm to investors. Specifically, Alpine (and any successor) is ordered to:

   a. Cease and desist from transferring, or agreeing to transfer, any customer debit balance or the right to collect on any customer debit balance to any other person or entity without the prior written authorization of FINRA; and

b. Deposit $2,310,234 into an escrow account within 10 days of the date of the Decision.

The NAC, after conducting appeal proceedings, may affirm, modify, reverse, or reduce any sanction imposed by the Hearing Panel, including the terms of any permanent cease and desist order imposed by a Hearing Panel's decision. FINRA Rule 9348. We affirm, in part, and modify the permanent cease and desist order that the Hearing Panel imposed when it rendered a decision in this case.

First, considering our decision to reverse the Hearing Panel's findings that Alpine violated FINRA Rules 2122 and 2010 by charging the illiquidity and volatility fee and the $1,500 securities certificate withdrawal fee, we strike the requirements stated in paragraphs 3.b. and 3.c. of the Hearing Panel's order that Alpine cease and desist from violating FINRA rules as to these fees.

Second, because we have modified the Hearing Panel's order of restitution, we also modify the requirement stated in paragraph 5.b. of the Hearing Panel's cease and desist order that Alpine deposit $2,310,234 in an escrow account. We instead require that Alpine maintain in an escrow account a deposit of $802,678.77, the amount of restitution that we have ordered that Alpine pay its customers in this decision.

All other provisions of the Hearing Panel's cease and desist order, unless modified above, shall remain in effect with the issuance of this decision.[217]

G. <u>Wind-Down Plan Pending Expulsion</u>

As discussed below, *see infra* note 218, the expulsions imposed in this decision shall not become effective until 90 days after the time for Alpine to appeal this decision to the Commission has expired and no appeal is taken or, if an appeal is taken, after the Commission issues a final order on the merits of Alpine's appeal that sustains FINRA's expulsion of the firm from FINRA membership. During the 90-day period before the expulsions become effective (the "Wind-Down Period"), the firm will not conduct a securities business except as set forth below, and it must continue to comply fully with applicable requirements under the Exchange Act and Exchange Act rules and FINRA rules, including but not limited to Exchange Act Rules 15c3-1, 15c3-3, 17a-3, and 17a-4.

The Chief Executive Officer of Alpine, Raymond Jerry Maratea ("Maratea"), in addition to his other pre-existing duties and obligations, is responsible for ensuring that the firm complies with all these terms and conditions. Maratea may designate in writing individuals who are responsible for ensuring that the firm complies with specific terms and conditions. Maratea is responsible for reasonably supervising all individuals to whom he has delegated responsibility for ensuring that the firm complies with these terms and conditions.

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[217] Alpine's motion to eliminate the escrow provision of the order is accordingly denied.

During the Wind-Down Period, in addition to the conditions and restrictions imposed pursuant to the permanent cease and desist order set forth herein, Alpine must:

1. Within 5 business days after the Wind-Down Period begins, submit to FINRA a written communication plan that details the means and methods by which the firm will inform customers and proprietary accounts of broker-dealers ("PAB accounts") that the firm is being expelled from FINRA membership and has been ordered to wind down its business as a broker-dealer. The communication plan shall summarize for account holders the firm's plans for liquidation and explain to account holders their options, which may include to transfer their accounts to another broker-dealer, to request payment of any free credit balances and the transfer of fully paid securities into the account holder's name, or to liquidate holdings and send proceeds to the account holder, where applicable. The Firm must begin implementing the communication plan, which shall be subject to FINRA approval, within 5 business days of receiving such approval from FINRA.

2. In accordance with FINRA Rule 11870, or where not applicable, within 24 hours of receipt of a customer's request, comply with such request to transfer cash, securities, and other assets from the customer's account at Alpine to the customer's account at another broker-dealer, other custodian, or to physical form or bank check for delivery directly to the customer, or as otherwise instructed by the customer;

3. Provide to FINRA in writing, within 5 business days after the Wind-Down Period begins, the following information as of the first day of the Wind-Down Period:

    i. A listing of all individuals associated with Alpine or otherwise employed by the firm and their roles and responsibilities, as well as the supervisor of each person who carries out these terms and conditions during the Wind-Down Period;

    ii. a listing of all customer and PAB accounts, their account holdings and balances, and customer and PAB account contact information; thereafter, provide daily a report of all customer and PAB accounts with activity on the prior day that identifies funds and securities that have been deposited, withdrawn, transferred, liquidated, or otherwise removed from each such account, and all the funds and securities that remain in each such account; and

    iii. a description of all mission critical systems (as defined in FINRA Rule 4370(g)), including but not limited to recordkeeping systems and contracts with storage providers, and a contact person for each.

4. Provide to FINRA in writing, within 10 business days after the Wind-Down Period begins, the following information as of the first day of the Wind-Down Period:

    i. the firm's balance sheet, trial balance, net capital, and reserve formula computations; the firm's stock record; and all reports used to comply with possession or control requirements. Thereafter, Alpine must provide daily, for the prior business day, a balance sheet, net capital, and reserve formula computation; all reports used to comply with possession or control requirements; and all receipts and deliveries or similar transfers of funds and securities from and to the firm, identifying from whom such funds or securities were received and to whom they were delivered;

    ii. all firm proprietary accounts, bank accounts, Exchange Act Rule 15c3-3 reserve bank accounts, all bank sweep arrangements, all securities custodial accounts, and any other accounts at third parties where either customer or firm funds or securities are held. Alpine must provide the most recent statements for all such accounts and a listing of all activity in each such account since the date of the most recent statement and identify any account that is subject to a lien and the identity of the lienholder. Thereafter, Alpine must provide a daily statement of all activity and the balance in each such account;

    iii. all outstanding firm receivables and firm payables, and the date due to be received or paid; all open or unsettled trades and P&S Blotters; all open securities borrow, loan, reverse repurchase, and repurchase transactions; all customer bank loans and customer collateral pledge arrangements; all open fails to deliver and fails to receive; all open derivative contracts; and all pending contractual commitments. Thereafter, Alpine must provide a daily update, via a statement, ledger, or other record, as applicable, of all activity as of the prior date and, as applicable, the balance in each such account;

    iv. all pending or settled, but unpaid, customer arbitrations; and

    v. all unresolved or pending customer complaints.

5. Notify FINRA immediately in writing of any customer complaints received, whether received by Alpine orally or in writing; and

6. Cooperate with FINRA staff to effectuate these terms and conditions, promptly respond to all requests for information related to the firm's wind-down, and take all necessary steps to effectuate these terms and conditions and the wind-down of the firm.

VI. Conclusion

Alpine implemented an unreasonable and unfairly discriminatory $5,000 monthly account fee, in violation of FINRA Rules 2122 and 2010; engaged in unauthorized transactions, in violation of FINRA Rule 2010; and improperly used and converted customer assets, in violation of FINRA Rules 2150 and 2010. For this misconduct, we expel Alpine from FINRA membership.[218] Alpine also unfairly priced hundreds of securities transactions acting as principal, in violation of FINRA Rules 2121 and 2010. We expel Alpine independently for this egregious misconduct. Finally, Alpine effected one unauthorized withdrawal of the firm's capital, in violation of FINRA Rules 4110(c)(2) and 2010. For this violation, we assess a one-year suspension of Alpine's membership and a $75,000 fine, but do not impose these sanctions considering our decision to expel the firm. We order that Alpine pay restitution of $802,678.77 to its customers.

The firm is also hereby ordered to pay hearing costs of $41,653.18, and we impose appeal costs of $2,128.52.

On behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell, Vice President and
Deputy Corporate Secretary

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[218] The expulsions that we impose herein shall not become effective until 90 days after the time for Alpine to appeal this decision to the Commission has expired and no appeal is taken or, if an appeal is taken, 90 days after the Commission issues a final order on the merits of Alpine's appeal that sustains FINRA's expulsion of the firm from FINRA membership. The Wind-Down Period discussed above, *supra* part V.G., thus will not commence until either the time for Alpine to appeal this decision to the Commission has expired and no appeal is taken or, if an appeal is taken, after the Commission issues a final order on the merits of Alpine's appeal that sustains FINRA's expulsion of the firm from FINRA membership.