BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Paul E. Taboada Old Brookville, NY, Respondent.	DECISION Complaint No. 2012034719701 Dated: July 24, 2017

Respondent misappropriated investor funds and securities, misused customer funds and securities, provided false and misleading information and failed to disclose information to investors, and provided false and misleading documents and testimony to FINRA. Held, findings and sanctions affirmed.

For the Complainant: Leo Orenstein, Esq., Gary Carlton, Esq., and Michael Smith, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: David Schrader, Esq.

Decision

Paul Taboada appeals a March 18, 2016 Extended Hearing Panel decision pursuant to FINRA Rule 9311. The Extended Hearing Panel found that Taboada misappropriated investor funds and securities in violation of FINRA Rule 2010; misused customer funds and securities, in violation of FINRA Rules 2150 and 2010; provided false and misleading information and failed to disclose information to investors regarding expenses, in violation of FINRA Rule 2010; and provided false and misleading documents and testimony to FINRA, in violation of FINRA Rules 8210 and 2010.

Specifically, in March 2011, Taboada commenced a private offering of interests in a limited liability company, managed solely by him, to buy pre-IPO Facebook shares for investors, some of whom were customers of a broker-dealer owned by Taboada. As manager of the limited liability company, Taboada alone was responsible for allocating assets, liabilities, and Facebook shares among the investors. Taboada's broker-dealer acted as the placement agent and received

placement fees and "sales concessions" for sales of the interests. The Extended Hearing Panel found that Taboada's mismanagement of the limited liability company, and his actions in contravention of the offering documents, harmed investors. Taboada's faulty share allocation resulted in several investors receiving too few shares of Facebook. Taboada failed to disclose to some investors that his broker-dealer was receiving a sales concession fee, and he improperly charged to other investors a "carried interest fee." Furthermore, Taboada impermissibly used surpluses in the accounts of some investors to cover the deficits in others. Finally, during FINRA's investigation, Taboada provided to FINRA a fabricated invoice and failed to testify truthfully about it.

For the misconduct, the Extended Hearing Panel barred Taboada from associating with any FINRA member firm in any capacity and ordered him to pay hearing costs of $14,078.07. After an independent review of the record, we affirm the Extended Hearing Panel's findings and sanctions.

I. Factual Background

A. Taboada's Relevant Employment History

Taboada entered the securities business in February 1990. From October 2005 to September 2010, Taboada was registered with Charles Morgan Securities, Inc. ("Charles Morgan"),[1] where he was registered as a general securities representative, general securities principal, operations professional, and investment banking representative. Taboada also served as the Chairman and Chief Executive Officer of Charles Morgan.

Taboada was the owner of Charles Morgan from May 2006 through February 9, 2012. From February 9, 2012 to its withdrawal of membership later that year, Charles Morgan was majority owned by CMS Global Securities, Inc., which in turn was majority owned by Taboada. During its last several years, Charles Morgan experienced financial difficulties, resulting in problems meeting its net capital requirements and negative balance sheets.

After Charles Morgan ceased operations, Taboada joined Blackwall Capital Markets, Inc. ("Blackwall"), a FINRA member broker-dealer. He remained at Blackwall until May 2014. Taboada is not currently in the industry.

B. CMS FB, LLC

CMS FB, LLC ("CMS") was a special purpose entity created by Taboada to pool investor funds to invest in, acquire, hold, and/or sell shares of Facebook, Inc. in advance of Facebook's initial public offering ("IPO"). Taboada retained a law firm to represent him in connection with

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[1] Charles Morgan was a FINRA-registered broker-dealer from May 2006 to November 2012. It filed a Form BDW to withdraw from FINRA membership in September 2012, which was granted in November 2012.

the formation of CMS. CMS and a related entity, CMS FB Management Associates ("CMS Management") were formed as limited liability companies in March 2011. CMS was managed by CMS Management, and Taboada was the sole manager. Taboada originally managed CMS from Charles Morgan's office, and after Charles Morgan ceased operations Taboada managed CMS from Blackwall.[2]

C. CMS's Offering Memorandum

CMS's offering memorandum included a letter to investors, description of the offering, summary of CMS's operating agreement, the operating agreement itself, and the subscription agreement (collectively the "Offering Memorandum"). The Offering Memorandum detailed how CMS would be organized and how it would operate as a special purpose entity.

The Offering Memorandum stated that CMS was a "series limited liability company,"[3] and that each series would be "treated for most purposes as if it were a separate limited liability company." Each series would have its own investors, books and records, assets, and own its own Facebook shares. Furthermore, the Offering Memorandum stated that each CMS series would have its own expenses and would maintain a separate capital account for each investor in each series. The capital account would equal the investor's capital contribution less his or her share of expenses apportioned to the series. Any expenses that were specific to a particular series would be allocated to that series. On the other hand, expenses that could not be specifically allocated to a specific series would be shared among all the series. Any distribution of a particular series' assets would be done pro rata, based on the investors' ownership interests in the series. To the extent there was a surplus of capital in any of the investor's accounts when CMS wound down, the Offering Memorandum required that Taboada return those funds to the investor.

D. Felix Investments, LLC

CMS purchased Facebook shares as either direct or indirect purchases. In the direct purchases, CMS purchased Facebook shares from a shareholder. In the indirect purchase, CMS purchased an ownership interest in another entity that held or had the right to acquire Facebook shares. All of CMS's indirect purchases were through entities affiliated with Felix Investments, LLC ("Felix"), a former FINRA-member broker-dealer which managed and controlled several special purpose entities that held or had the right to acquire Facebook shares.

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[2] Blackwall employees assisted Taboada in the distribution of Facebook shares as well as providing documents and other information to accountants working on reports related to share distribution.

[3] A "series limited liability company" is a form of limited liability company in which the articles of formation specifically allow for segregation of membership interests, assets, and operations into each independent series. It can also provide liability protection for each series, as each is in essence protected from liabilities arising from the others.

E. CMS's Placement Agreement

In March 2011, CMS and Charles Morgan, through Taboada, entered into a placement agreement, under which CMS agreed to pay Charles Morgan a placement fee of 2.5 percent of the aggregate purchase price of securities sold to each CMS investor between March 22 and July 10, 2011.

CMS and Charles Morgan then entered into a revised placement agreement on November 7, 2011, under which CMS agreed to increase its payment to Charles Morgan to 10 percent of the aggregate purchase price of securities sold to each CMS investor between November 7, 2011 and April 10, 2012. All told, CMS paid Charles Morgan $408,666 in placement fees.

F. Sales Concessions

In addition to the placement fees, Charles Morgan also received "sales concessions" on CMS's indirect purchases of Facebook shares, some of which were not disclosed to investors. On or around March 11, 2011, Charles Morgan, through Taboada, entered into a Selected Dealer Agreement with Felix ("March 2011 Dealer Agreement"). Under the March 2011 Dealer Agreement, Felix agreed to pay Charles Morgan one-half of the commission Felix received as a result of an investment that was referred by Charles Morgan.

On December 20, 2011 and again on April 25, 2012 Charles Morgan entered into a Master Selected Dealers Agreement with Felix. The terms of these agreements were identical to those in the March 2011 Dealer Agreement (that Felix would pay Charles Morgan one-half of the commission Felix received as a result of a Charles Morgan-referred investment). Charles Morgan received a total of $92,721 in sales concessions.

G. CMS Series of Facebook Investors

Between March 2011 and February 2012, seven series of investors were formed as CMS accepted capital contributions for the purposes of purchasing Facebook shares. All told, CMS accepted $6,051,738 from more than 100 investors, 37 of which were either customers of Charles Morgan or Blackwall.

1. First Series

The First Series had eight investors, six of whom were customers of Charles Morgan or Blackwall. The First Series investors contributed $914,942 in capital to CMS in March and April 2011. CMS, through Taboada, paid $863,500 to purchase interests in Facie Libre Associates II, LLC ("Libre II"), an entity affiliated with Felix, for the First Series. CMS paid Felix a five percent commission on the transaction, and Felix paid half of that amount to Charles Morgan as a sales concession. Supplement 1 to the March 2011 Offering Memorandum disclosed the sales concessions Charles Morgan received on CMS's investment in Libre II.

2. Second Series

The Second Series had 15 investors, 14 of whom were customers of Charles Morgan or Blackwall. The Second Series investors contributed $1,465,870.50 in capital to CMS between April and June 2011. CMS paid $1,378,226 to purchase interests in Facie Libre Associates I, LLC ("Libre I") and Libre II for the Second Series. CMS paid Felix a five percent commission on the transaction, and Felix paid half of that amount to Charles Morgan as a sales concession. The sales concessions Charles Morgan received on CMS's investment in Libre II were disclosed to investors.

3. Third Series

The Third Series had six investors, four of whom were customers of Charles Morgan or Blackwall. The Third Series investors contributed $254,150 in capital to CMS in June and July 2011. CMS paid $247,296.25 to purchase an interest in Libre II for the Third Series. CMS also paid Felix a five percent commission on the transaction, and Felix paid half of that amount to Charles Morgan as a sales concession. The sales concessions Charles Morgan received on CMS's investment in the Libre II were disclosed to investors.

4. Fourth Series

The Fourth Series had 10 investors, five of whom were customers of Charles Morgan or Blackwall. The Fourth Series investors contributed $627,000 in capital to CMS between November 2011 and January 2012. CMS paid $572,428.87 to purchase an interest in Felix Multi-Opportunity II, LLC ("Opportunity"), another Felix-affiliated entity.

As with the previous three offerings, and pursuant to the terms of the Offering Memorandum, Felix was entitled to a five percent commission on the Fourth Series' investment in Opportunity. In a series of emails, however, Taboada asked Felix to double its commission on the transaction, to which Felix agreed.[4] As a result, CMS paid Felix a 10 percent commission on

[4] On February 1, 2012, Felix sent an email to Taboada stating that Felix had received "about 564k" from CMS for the Opportunity investment, and that the commission on the transaction would be "5% and that it is split with Felix. Like in the past."

Taboada responded the same day, emailing Felix that he "thought in the [Opportunity] that the commission we split is 10 percent."

In reply, Felix restated that it had charged five percent commission on all of its past transactions, but in this transaction it was willing to charge 10 percent if that was what Taboada wanted: "Paul in the past it was 5% split between brokers I believe[.] If you want to do 10% 5/5 that's not an issue. . ."

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this transaction, for a total of $57,242.89, and Felix in turn paid half of that amount—$28,624.44—to Charles Morgan as a sales concession. Because of Felix's increased commission, CMS received fewer Facebook shares from the Opportunity investment to distribute to its investors.

Taboada did not disclose to the Fourth Series investors that Charles Morgan received a sales concession on their investment in Opportunity.[5]

5. Fifth and Sixth Series

The Fifth Series had 63 investors, seven of whom were customers of Charles Morgan or Blackwall. The Fifth Series investors contributed $2,259,795.50 in capital to CMS in January and February 2012. CMS paid $2,010,000 to purchase 60,000 Facebook shares directly from a shareholder at $33.50 per share. Because this was a direct purchase, CMS did not pay a commission on this transaction and Charles Morgan did not receive a sales concession.

The Sixth Series had four investors, one whom was a customer of Charles Morgan. The Sixth Series investors contributed $454,980 in capital to CMS in February 2012. CMS paid $406,250 to purchase 10,350 Facebook shares directly from a shareholder at $39.25 per share. Again, this was a direct purchase—CMS did not pay a commission on the transaction and Charles Morgan did not receive a sales concession.

6. Seventh Series

The Seventh Series had one investor. That investor contributed $75,000 in capital to CMS in February 2012. CMS paid $75,000 to purchase an interest in NYPA II Fund, LLC ("NYPA") for the Seventh Series investor. CMS also paid Felix a five percent commission on the transaction, and Felix paid half of that amount to Charles Morgan as a sales concession. As with Opportunity (Fourth Series), Taboada did not disclose Charles Morgan's sales concession on this transaction to the CMS investor.

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The following day, Felix emailed Taboada asking Taboada to "please confirm for the current closing on roughly $564,000 in the [Opportunity] for Facebook that CMS FB, LLC is ok with the 10% fee. Which is split between brokers."

[5] As discussed for the first three series, Supplement 1 to the March 2011 Offering Memorandum disclosed the sales concessions Charles Morgan received on CMS's investment in Libre II. No sales concession disclosures were made concerning the investments in Opportunity (Fourth Series).

H. Taboada's Use of Investor Funds

After the Seventh Series was formed, CMS stopped accepting new investors and purchasing Facebook shares.[6] All that remained for Taboada to do was to pay any additional expenses incurred by CMS, distribute the Facebook shares and any surplus cash to the investors as dictated by the terms of the offering documents, and wind down the company. Facebook shares were subject to a six-month post-IPO lockup, which expired in November 2012. The Facebook securities CMS acquired were held in a brokerage account at Blackwall until Taboada distributed them to investors in December 2012.

The allocation of expenses among CMS's investors was governed by the Offering Memorandum. Any expenses attributable to a particular series (a "series-specific-expense") had to be allocated to that series, and among its investors, pro rata based on the investor's ownership interest in the series. The Offering Memorandum stated that the purchases of Facebook shares would be accounted for on a series by series basis:

> The Interests will be issued in Series; and profits, losses, costs and expenses, the purchase and sale prices of Facebook Securities and related items, will be accounted for separately for each Series. Each Series will have its own books and records.

While the Offering Memorandum allowed Taboada some discretion to allocate expenses not specifically attributable to a particular series, such as general expenses, Taboada represented to CMS investors and testified at the hearing that he did not exercise discretion, but rather allocated CMS's general expenses pro rata among all of CMS's investors. As discussed below, Taboada did not adhere to the Offering Memorandum. He did not create and maintain a separate capital account for each investor in each series. Instead, Taboada used excess capital from the First and Second Series investors for expenses associated with the Third through Seventh Series. Taboada also withheld additional shares from some investors by charging them an unauthorized "carried interest" fee on their investments in CMS.

1. Proper Allocation of Facebook Shares

At the hearing, the Department of Enforcement's expert witness, BD, provided testimony regarding how to determine the proper allocation of CMS's expenses. BD showed what the aggregate capital accounts for investors in each series should have looked like had the expenses been allocated as directed by the Offering Memorandum. The Extended Hearing Panel adopted BD's calculations, as do we.[7]

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[6] Facebook went public in May 2012.

[7] Taboada also presented expert testimony from AR, a certified public accountant. AR opined that Taboada properly allocated the CMS expenses and, when the reimbursement checks are taken into account, he also properly distributed the Facebook shares. The Extended Hearing

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As shown by BD's calculations, and as discussed in greater detail below, Taboada did not allocate shares in accordance with the Offering Memorandum, resulting in many CMS investors receiving too few shares. Notably, many First and Second Series investors did not receive the pro rata share of their respective series' Facebook shares, nor any additional shares to compensate them for the excess capital that Taboada failed to return to them. Taboada misallocated the shares because he failed to follow the Offering Memorandum and instead relied on the erroneous calculations contained in his Share Calculation Spreadsheet ("Spreadsheet")—calculations that he knew or should have known were incorrect.

2. Inaccurate Share Calculation Spreadsheet

Beginning in late October 2012, prior to the distribution of Facebook shares, Taboada and YS, his accountant, worked together to create the Spreadsheet. The Spreadsheet purported to show how CMS's expenses had been allocated among investors but was in fact inaccurate. Taboada's testimony, as well as documentary evidence demonstrates that Taboada was very involved in creating and revising the Spreadsheet. Taboada and YS exchanged numerous emails about the Spreadsheet; created multiple versions of the Spreadsheet; and met in person several times to discuss the Spreadsheet. During those meetings, Taboada gave YS specific information about what information should be included in the Spreadsheet and how it should be presented.

The Spreadsheet eliminated the surpluses and deficits among investors' capital accounts by misrepresenting the Facebook transactions. The Spreadsheet represented that $878,237 of the First Series investors' capital was used to purchase Facebook shares. In reality, the First Series investors paid only $863,500 to purchase interests in Libre II, which included all amounts paid to Felix. The Spreadsheet also represented that $1,407,064 of the Second Series investors' capital was used to purchase Facebook shares, when in fact Second Series investors paid only $1,378,226 to purchase interests in Libre I and Libre II. Together, these misrepresentations in the Spreadsheet made it appear that First and Second Series investors paid a total of $43,575 more than they actually had, which effectively eliminated their capital surpluses.

To close the loop, Taboada and his accountant YS also misrepresented CMS's other transactions to make it appear that the Third through Seventh Series investors paid $43,575 less than they actually had, which eliminated their capital deficits. Because the Spreadsheet eliminated all surpluses and deficits, the Spreadsheet did not disclose accurately each investor's surplus or deficit.

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Panel found that, in forming his opinions, AR did not review any source materials and simply relied on an erroneous Share Distribution Report prepared by one of Taboada's accountants in 2014 (*see* Part I.I, *infra*). The Extended Hearing Panel found AR's testimony unreliable and rejected it. We agree.

The Spreadsheet also misrepresented the amount of commissions that the Fourth Series investors paid to Felix on their investment in Opportunity. The Spreadsheet represented that Fourth Series investors had paid Felix $28,621, representing a five percent sales concession, but the concession was actually $57,242.89, representing a 10 percent commission for Felix.

Taboada and YS also attempted to estimate the number of shares CMS would receive and allocate those estimated shares among investors. However, their methodology was not reliable. First, the Spreadsheet did not accurately reflect CMS's actual Facebook transactions because, as previously stated, Taboada and YS had eliminated all surpluses and deficits from investors' capital accounts. Second, the share prices in the Spreadsheet were not accurate with respect to CMS's indirect purchases of Facebook securities from the Felix entities.[8]

Taboada had no basis to believe that the Spreadsheet accurately calculated the number of Facebook shares CMS would receive or properly allocated those shares among its investors. In fact, Taboada was at least partially responsible for the continued inaccuracy of the Spreadsheet. On December 11, the same day he began distributing shares, Felix told Taboada the exact number of shares CMS would receive from its investments in the Felix entities and identified how many shares CMS would receive from each series' investments. Specifically, Felix sent Taboada an email stating that CMS would receive a total of 93,796 shares from its investments in the Felix entities, which was 2,287 fewer shares than Taboada and YS had calculated. Taboada acknowledged that, as of December 11, with the actual share totals from Felix, he had no reason to continue using the erroneous estimated allocations from the Spreadsheet. Nevertheless, he continued distributing shares using the Spreadsheet.

On December 17, Felix informed Taboada that CMS would be receiving additional shares from its investments in the Felix entities. Felix stated that the shares Felix had held back to cover transfer fees would be credited to CMS's account no later than January 15, 2013. Based on these emails, Taboada was aware that CMS would be receiving additional Facebook shares, but he did not tell YS about those shares to enable him to incorporate them into the Spreadsheet's share allocation.

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[8] According to the Spreadsheet, CMS purchased Facebook shares from the Felix entities at $31 per share for First Series investors, $30.44 per share for Second Series investors, $31 per share for Third Series investors, $32 per share for the Fourth Series investors, and $37.50 per share for the Seventh Series investor. However, Felix did not promise to deliver shares to CMS at any particular price. Around April 2011, Felix warned Taboada that the number of shares CMS would receive from its investments in the Felix entities could not be determined (and thus the final price per share could not be known) until the final accounting for each entity was complete. Felix also told Taboada that the Felix entities would incur internal expenses, which would be passed on to CMS and reduce the number of shares delivered to CMS for its investments.

On December 18, YS sent Taboada an updated spreadsheet ("Revised Spreadsheet"). The Revised Spreadsheet was identical to the original Spreadsheet, except that it added a new column titled "Actual Shares." This column allocated shares to each series based on the share totals Felix provided to Taboada on December 11. However, the Revised Spreadsheet was still inaccurate because it continued to misrepresent CMS's expenses by eliminating the surpluses and deficits (as the original Spreadsheet had), and failed to account for the additional shares CMS would receive from Felix as stated in Felix's December 17 email to Taboada.

Taboada knew that the share allocations in the "Actual Shares" column were more accurate (but still not completely accurate) than the share allocation numbers on the original Spreadsheet, yet, even after receiving the Revised Spreadsheet, Taboada continued to rely on the inaccurate share allocation numbers from the original Spreadsheet when distributing Facebook shares to some CMS investors. When deciding how many Facebook shares to distribute to a particular investor, in most instances, Taboada chose to provide the lesser number of shares to the investor. Taboada admitted that he knew he was distributing too few shares to some investors. He testified that he believed he had to short these investors because he already had distributed too many shares to other investors, and thus might not have enough shares to go around. Taboada maintained that he had no choice but to rely on the share allocations in the original Spreadsheet because FINRA was pressuring him to distribute CMS's Facebook shares.[9]

3. Taboada Withholds Shares By Imposing "Carried Interest Fee"

By the end of April 2013, Taboada had not distributed any Facebook shares to five investors. CMS owed these investors more than 14,500 Facebook shares, based on the Revised Spreadsheet. However, CMS had only 13,466 Facebook shares remaining at that time. In July and August 2013, Taboada purchased an additional 900 shares of Facebook stock using outside funds, which still left a shortage of more than 100 shares. To close the gap between the number of Facebook shares CMS had available and the number it owed to investors, Taboada imposed a "carried interest" charge on four of the five investors who had not yet received any shares. Taboada determined that these investors owed more than $6,300 in "carried interest," and then withheld more than 150 shares from them to pay the fee.

The Offering Memorandum did not authorize Taboada to impose a carried interest charge on these investors. At the hearing, Taboada admitted that he made the decision to impose the carried interest charge and that it was not authorized under the Offering Memorandum.

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[9] The Extended Hearing Panel found Taboada's assertion not credible. Blackwall's Chief Compliance Officer ("CCO") testified that he was anxious for Taboada to distribute CMS's Facebook shares because investors were complaining, not because FINRA was pressuring Blackwall for their distribution.

4. Taboada's Misrepresentations to Investors and His Failure to Notify Investors or Take Corrective Action

Although Taboada knew that he had distributed too few shares to some investors, he failed to notify those investors that they were owed additional shares. Nor did Taboada take timely corrective action. By mid-December 2012, several investors had contacted Taboada to complain about their Facebook share distribution. Taboada testified that while he had "detailed conversations" with some of the investors who called him to complain about the share distribution, he took no affirmative measures to notify other investors that they were owed additional shares.

To those investors who reached out to Taboada to complain, he falsely represented to them that his accountant was reviewing the share distribution and that investors would be made whole based on the accountant's report.[10] By mid-December 2012, he also sent emails to complaining investors assuring them that they would receive a full accounting of CMS. For example, in an email to investor RL on December 13, 2012, Taboada represented that RL would get a "complete accounting of the LLC and all pertinent documents for the LLC including an accounting of the transaction[s], bank statements, escrow statements etc."

Rather than sending RL a complete accounting, however, on January 4, 2013, Taboada sent him the inaccurate Revised Spreadsheet, which misrepresented CMS's expenses.[11] When RL questioned the accuracy of the Revised Spreadsheet, Taboada promised him an audit report showing the details of CMS's Facebook transactions. Contrary to Taboada's representations, at that time there was no accountant reviewing the share distribution or auditing the details of CMS's Facebook transactions.

I. Taboada's Reliance on JL's Unreliable Share Distribution Report

In early 2014, Taboada's counsel retained an accountant, JL, on behalf of CMS.[12] JL testified that he was not specifically retained to review the share distribution, but actually was

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[10] Taboada did not hire an accountant to resolve the share distribution issues until the following year.

[11] In addition to RL, Taboada sent the Spreadsheet or the Revised Spreadsheet to several other investors.

[12] Taboada had originally hired JL to audit CMS in March 2013. At that time, JL's assignment was limited to auditing CMS's annual financial statements and preparing partnership income tax returns, not reviewing the share distribution. JL issued his audit of CMS's financial statements in June 2013. JL testified at the hearing that an investor reviewing his June 2013 audit would have no way of knowing whether he or she received the correct number of Facebook shares. On the contrary, JL testified that, between March and June 2013 when he was

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asked "to recomputate, based upon certain "Agreed Upon Procedures," what the capital accounts may have been if we looked and recalculated from day one." JL repeatedly stressed that he did not recreate CMS's books and records as part of his work. He explained that his report (the "Share Distribution Report") "wasn't meant to be exact," and was based largely on assumptions and estimates rather than actual numbers.

The Share Distribution Report contained errors that rendered it unreliable. First, the Report inaccurately allocated a five percent Felix commission expense to the Fourth Series, but, as discussed above, the Fourth Series actually paid Felix a 10 percent commission. JL testified that he was not aware the Fourth Series had paid a 10 percent commission and acknowledged that his failure to allocate the entire 10 percent commission to the Fourth Series rendered his share allocations unreliable for all of the other investors. JL also acknowledged that the expenses that he failed to allocate to the Fourth Series investors were allocated to investors in other series, thereby reducing the number of shares allocated to those investors.

JL was also not aware that NYPA (Seventh Series) was a Felix entity, and that CMS had paid a commission to Felix on that transaction. Accordingly, JL did not allocate any Felix commission expense to the Seventh Series, which meant that the expense was allocated to investors in other series, thereby reducing the number of shares allocated to them.

J. FINRA's Investigation and Taboada's False Rent Invoice and Testimony

FINRA's Department of Enforcement began its investigation into Taboada's management of CMS in December 2012. On February 4, 2013, Enforcement sent Taboada a request for documents and information pursuant to FINRA Rule 8210. In its request, Enforcement asked Taboada to provide all invoices from Charles Morgan to CMS.

The day his response was due, on March 22, 2013, Taboada generated a backdated invoice from Charles Morgan to CMS to support an October 2012 payment to Charles Morgan. The invoice was dated "January 2011" and indicated that Charles Morgan was charging CMS $5,000 per year for the use of Charles Morgan's office space.[13] That evening, Taboada emailed his responses to the FINRA Rule 8210 requests and mailed the supporting documentation, including the invoice.

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conducting his audit, Taboada did not tell him that there were issues with CMS's Facebook share distribution.

[13] The invoice was issued to CMS, but CMS did not exist in January 2011, and there is no evidence that it existed prior to March 2011.

Subsequent to his response to the FINRA Rule 8210 request, in April 2013, Taboada provided sworn testimony to Enforcement during an on-the-record ("OTR") interview. During the OTR, Enforcement questioned Taboada about the January 2011 invoice and Taboada testified that he had created the invoice in January 2011. At a later OTR, and at the hearing, Taboada admitted that, contrary to his sworn investigative testimony in April 2013, he actually created the invoice in March 2013. Taboada maintained at the hearing and on appeal, however, that neither the invoice nor his investigative testimony was false because the invoice he created in March 2013 was merely a re-creation of an original invoice that existed but could not be located.

K. Taboada's Post-Complaint Attempts to Reimburse Investors

Taboada first received notice of possible charges from Enforcement on January 31, 2014. On May 6, 2014, Enforcement filed the complaint in the instant action. Almost a week after the filing of the complaint, on May 12, 2014, Taboada mailed checks to some CMS investors in an attempt to compensate them for the Facebook shares that Taboada had improperly withheld. The amounts of the checks were taken from JL's Share Distribution Report, which was inaccurate and unreliable. Moreover, Taboada sent checks to some investors for less than JL had determined was owed, and several investors could not be located to provide them with the funds.

II. Procedural History

Enforcement filed a four-cause complaint against Taboada alleging that he misappropriated investor funds and securities in violation of FINRA Rule 2010; misused customer funds and securities in violation of FINRA Rules 2150 and 2010; provided false and misleading information, and failed to disclose information to investors regarding expenses, in violation of FINRA Rule 2010; and provided false and misleading documents and testimony to FINRA, in violation of FINRA Rules 8210 and 2010. A seven-day hearing was held in September and October 2015. The Extended Hearing Panel issued its decision on March 18, 2016, finding that Taboada engaged in the alleged misconduct.[14] The Extended Hearing Panel barred Taboada from associating with any member for his misconduct. This appeal followed.

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[14] The Extended Hearing Panel made numerous credibility determinations concerning Taboada. In all instances, the Extended Hearing Panel found his testimony to be not credible. Specifically, the Extended Hearing Panel rejected Taboada's attempt to shift all blame for the inaccurate Spreadsheets to YS, his testimony that he was forced to distribute Facebook shares based on faulty allocation information because he was being pressured by FINRA and Blackwall, and his testimony that he had hired accountants in late 2012 to review the allocation of Facebook shares. The Extended Hearing Panel also found Taboada's testimony concerning the fabrication of the invoice that he produced to FINRA as well as Taboada's testimony regarding his blamelessness for the increase in commissions to 10 percent for the Fourth Series incredible. We adopt the Extended Hearing Panel's credibility determinations, finding no evidence to the contrary in the record. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 & n.6 (2002) (explaining

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III. Discussion

A. FINRA Has Jurisdiction Over Taboada

As an initial matter, Taboada maintains, as he has throughout the pendency of these proceedings, that FINRA lacks jurisdiction over him. He argues that FINRA lacks subject matter jurisdiction to regulate the internal affairs of a non-member hedge fund. He believes that FINRA's rules, particularly FINRA Rule 2010, were not meant to apply to each and every financial service that a member might provide, and that Taboada's alleged misconduct is outside the purview of the securities activities which FINRA oversees.

Taboada's arguments miss the mark. FINRA Rule 2010 requires that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[15] This rule is designed to enable FINRA "to regulate the ethical standards of its members and encompasses business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security." *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *10 (March 29, 2016) (internal quotations omitted).[16]

In determining whether conduct violates FINRA Rule 2010, a central inquiry is whether the wrongdoing reflects on the associated person's "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public." *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *40 (NAC July 18, 2014) (quoting *Dep't of Enforcement v. Davenport*, No. C05010017,

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that a Hearing Panel's determination is entitled to deference absent substantial evidence to the contrary).

[15] FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

[16] After the issuance of the Extended Hearing Panel Decision, the Commission affirmed the NAC's decision in *Dep't of Enforcement v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16 (FINRA NAC July 16, 2015) (holding that the respondent's conversion of investment fund monies in violation of FINRA Rule 2010 need not bear a close relationship to the associated person's firm or firm customers), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016). On appeal, Taboada acknowledged that the decision is dispositive regarding the matter of FINRA's jurisdiction over him, but maintains that the NAC, and the Commission, decided the case incorrectly.

2003 NASD Discip. LEXIS 4, at *9-10 (FINRA NAC May 7, 2003)), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 34 (Sept. 24, 2015), *appeal docketed*, No. 05-1234 (11th Cir. Nov. 19, 2015). The rule encompasses "a wide variety of conduct that may operate as an injustice to investors or other participants" in the securities markets. *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013) (quoting *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997)); *see also Grivas*, 2016 SEC LEXIS at *16-17 (respondent converted funds invested in limited liability corporation of which he was manager); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *10-13 (Dec. 4, 2015) (respondent converted insurance premiums and used money to pay personal and business expenses), *aff'd*, 663 F.App'x 353 (5th Cir. 2016); *Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *22 (FINRA NAC Feb. 24, 2011), *aff'd in part*, *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012) (respondent converted wine and gift certificates); *Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *15-20 (FINRA NAC Dec. 29, 2015) (respondent converted funds entrusted to him for investment in a purported loan-pooling business and used money for, among other things, mortgage payments), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

Not only does Taboada's misconduct in general reflect an inability to comply with the regulatory requirements of the securities business and fulfill his duties in handling other people's money, but his misconduct was also specifically business and securities related, and thus clearly within FINRA's jurisdiction. Taboada formed CMS while he was registered at Charles Morgan. Taboada hired Charles Morgan to serve as CMS's placement agent, and brokers at Charles Morgan solicited investors for CMS, including many Charles Morgan customers. Charles Morgan received more than $500,000 in placement fees and sales concessions as a result of its relationship with CMS. The Facebook shares CMS acquired were held in a brokerage account at Blackwall until Taboada distributed them to investors with assistance from Blackwall employees. Taboada violated the terms of the Offering Memorandum when he used surplus capital in two series to pay for expenses in later series instead of reimbursing the investors and charging certain investors a "carried interest fee." These facts establish that Taboada's misconduct was unethical and demonstrates his unfitness to handle other people's money, falling squarely within FINRA's jurisdiction and subjecting him to liability under FINRA Rule 2010.

B. Taboada Violated FINRA Rule 2010 by Misappropriating CMS's Investor's Funds and Securities

The Extended Hearing Panel found that Taboada misappropriated funds and securities from CMS investors by failing to return excess capital to First and Second Series investors and by failing to distribute to certain investors all the Facebook shares to which they were entitled. We agree.

Misappropriation is the "unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which [it is] intended." *Dep't of Enforcement v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *34 n.33 (FINRA NAC Oct. 3, 2011).

Taboada maintains that he did not misappropriate investor funds. He argues that it was within his discretion as the manager of CMS Management to allocate the expenses among the different series of investors. He further maintains that to the extent there were any calculation errors, it was merely a "misallocation" that does not rise to the level of a regulatory event, and, in any event, such errors were solely the fault of the accountants involved. These arguments fail.

Contrary to Taboada's assertions, he did not merely misallocate assets, nor did he have the discretion to apply expenses among the series as he saw fit. Rather, he acted in contravention of the terms of the Offering Memorandum by using funds contributed by First and Second Series investors to buy securities for investors of other series. He also made improper use of investor funds when he caused Felix to double its commission on the Fourth series, resulting in a higher sales concession for Charles Morgan and less money to purchase Facebook shares. He also misappropriated investor funds when he inappropriately charged a "carried interest fee" as a pretext for withholding Facebook shares from some investors.

Moreover, Taboada's claim that he should be absolved of liability because of his reliance on faulty accounting is factually incorrect. The record is replete with information that Taboada was actively involved in creating and revising YS's Spreadsheet, that Taboada failed to provide YS with relevant information to correct the Spreadsheet (such as the 10 percent sales concession), and that Taboada still continued to rely on the Spreadsheet, even disseminating it to investors, when he knew or should have known it was inaccurate.

C. Taboada Violated FINRA Rules 2150 and 2010 by Improperly Using Customer Funds and Securities

The Extended Hearing Panel also found that Taboada improperly used customer funds in violation of FINRA Rules 2150 and 2010. We affirm the Extended Hearing Panel's findings.

FINRA Rule 2150(a) states that "no member or person associated with a member shall make improper use of a customer's securities or funds."[17] A registered person misuses customer funds when he or she fails to apply the funds or securities, or uses them for some purpose other than as directed by the customer. *Mielke*, 2014 FINRA Discip. LEXIS 24, at *43.

Taboada argues that the Extended Hearing Panel erred in holding that he violated FINRA Rule 2150 because the rule applies only to "customers of a member firm while in the course of that member firm's business," and that simply "because some investors in the hedge fund are

[17] It is well settled that a violation of another FINRA rule is a violation of FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

also customers of Charles Morgan Securities" doesn't make them "customers" for purposes of FINRA Rule 2150.[18]

Taboada is incorrect. Thirty-seven investors, including First and Second Series investors, were customers of Charles Morgan and/or Blackwall. There is no dispute that these individuals were actual customers of either or both firms. They bought their CMS interests through Taboada, a registered representative of both firms. Charles Morgan served as exclusive placement agent in the offering and was repeatedly identified in the offering documents as an affiliate of CMS, and received placement fees from the customers (through CMS) on their purchases of CMS interests.

Taboada also contends, as he did below, that the funds that he allegedly misused did not belong to the customers but rather were the property of CMS once the investors had purchased their membership interests. We agree with the Extended Hearing Panel that the decision in *Grivas* is instructive as to whether the funds belonged to Taboada's customers or to CMS. Like Taboada, the respondent in *Grivas* managed a special purpose entity organized as a limited liability company and was charged with misappropriating funds from investors. The respondent argued that he could not have misappropriated funds from investors because the funds at issue were the limited liability company's property. The hearing panel rejected the argument, describing it as "a technical distinction without a difference in the context of this case." *Dep't of Enforcement v. Grivas*, Complaint No. 2012032997201, 2014 FINRA Discip. LEXIS 12, at *28 (FINRA Hearing Panel Feb. 14, 2014), *aff'd*, 2015 FINRA Discip. LEXIS 16 (FINRA NAC July 16, 2015), *aff'd***,** Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (March 29, 2016). We agree with the Extended Hearing Panel that the same rationale applies here: "[t]he gravamen of Enforcement's complaint is that Taboada took monies invested in [CMS] and used those monies for an unauthorized purpose."

Taboada's customers' investments were improperly used when Taboada took the capital surplus from the first two series to use for later series, improperly increased the commission on the Fourth Series, and charged the carried interest fee. Taboada's conduct violated FINRA Rules 2150 and 2010.[19]

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[18] The case law upon which Taboada relies to support his argument concerns whether an individual is a customer of a firm for purposes of determining whether the dispute was subject to arbitration. By way of example, Taboada relies on *Morgan Keegen & Co, Inc. v. Silverman*, 706 F.3d 562 (4th Cir. 2013). There, investors, who bought shares of exchange-listed Morgan Keegan bond funds through an unrelated third party broker, sought to arbitrate claims against Morgan Keegan. The court held that they were not customers because they did not have a contractual relationship with Morgan Keegan, and did not purchase from Morgan Keegan. Here, by contrast, the customers actually did have a contractual relationship with Charles Morgan and Blackwell, thereby undermining Taboada's argument.

[19] While Cause One (Misappropriation of Investor Funds and Securities) and Cause Two (Improper Use of Customer Funds and Securities) involve the same misconduct, Cause One

[Footnote continued on next page]

D. Taboada Violated FINRA Rule 2010 by Causing Felix to Double Its Commission on CMS's Fourth Series; Failing to Disclose Charles Morgan's Sales Concessions; and Providing False and Misleading Information to Investors

The third cause of action alleges that Taboada engaged in additional misconduct in violation of FINRA Rule 2010 in his dealings with CMS's investors. Like the Extended Hearing Panel, we find that Taboada's conduct as alleged in the complaint violated FINRA Rule 2010.

1. Taboada Caused Felix to Double its Commission

First, Taboada caused Felix to double its commissions on the Fourth Series, causing harm to investors, in violation of FINRA Rule 2010. The record reflects that Taboada asked Felix to double its commission on the Fourth Series' investment, which increased the amount of Charles Morgan's sales concession on the transaction and caused harm to investors. Taboada asserts that he did not cause Felix to double its commission because he did not have the authority to direct Felix to increase the commission and instead only inquired about the commission amounts. Taboada's assertions are contradicted by the record, which establishes that Taboada not only initiated the idea, but reaffirmed to Felix that he wanted CMS pay double the usual commission.

Taboada also asserts that "these types of fees were disclosed to investors" and were to offset additional costs incurred by CMS. Even though Taboada did disclose to some investors that CMS would be receiving sales concessions in one fund, he did not disclose the increase in the sales commissions to Felix and in fact actively hid that fact from investors when he disseminated the spreadsheets. By increasing the fees without disclosing to investors, Taboada violated FINRA Rule 2010.

2. Taboada Failed To Disclose Sales Concessions to Fourth and Seventh Series Investors

Taboada did not disclose to investors in the Fourth or Seventh Series the sales concessions Charles Morgan received on their investments. Taboada argues that Supplement 1 to the CMS Offering Memorandum clearly informed investors that Charles Morgan would be receiving sales concessions. Again, this argument fails in the face of the facts. Supplement 1 refers only to the purchases of interests in Libre II, and the interests Taboada bought from Felix for the Fourth and Seventh Series were from Opportunity and NYPA, respectively, not Libre II. Thus Taboada never disclosed the sales concessions to these investors, thereby violating FINRA Rule 2010.

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applies to all the investors who were harmed, while Cause Two is limited to Taboada's customers.

3. Taboada Provided False and Misleading Information to Investors

Finally, Taboada violated FINRA Rule 2010 when he distributed to several CMS investors the Spreadsheet and the Revised Spreadsheet, both of which were incorrect and misleading. Neither spreadsheet disclosed the carried interest fees, that there was a capital surplus in the First and Second Series or deficits in the other series or that the surplus was used to pay the expenses for the Fourth and Seventh Series. Furthermore, neither spreadsheet showed that the Fourth Series paid a 10 percent commission to Felix, but rather falsely represented that those investors paid only a five percent commission. Taboada's use of these inaccurate spreadsheets violates FINRA Rule 2010.

E. Taboada Violated FINRA Rule 8210 and 2010 By Providing False Documents and Information to FINRA

The Extended Hearing Panel found that Taboada violated FINRA Rules 8210 and 2010 by providing false documents and testimony to FINRA. We affirm.

FINRA Rule 8210 requires a registered person to respond fully, completely, and truthfully to a request for information from FINRA, and providing false documents and testimony violates the rule. *See Dep't of Enforcement v. Wiley*, Complaint No. 2011028061001, 2015 FINRA Discip. LEXIS 21, at *16-17 (FINRA NAC Feb. 27, 2015). Providing false and misleading information to FINRA staff during an investigation "mislead[s] [FINRA] and can conceal wrongdoing" and thereby "subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008) (citing *Michael A. Rooms*, 58 S.E.C. 220, 229 (2005), *aff'd*, 444 F.3d 1208 (10th Cir. 2006)) (internal quotes omitted).

Taboada contends that he did not produce a false document and his testimony was not false because the invoice he created in March 2013 was a re-creation of the original, and he did not intend to mislead FINRA. He further attempts to shift the blame to Enforcement, maintaining that they could have found a copy of the original invoice if they had conducted a thorough review of his computer files, and that there was no "legal significance" of the invoice to Enforcement's investigation.

We, like the Extended Hearing Panel, find that Taboada's "re-creation" arguments are not credible. We note that scienter is not an element of a FINRA Rule 8210 violation. *See David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *20 (July 27, 2015). Furthermore, it is not Enforcement's job to prove that the invoice did or did not exist—it was Taboada's responsibility to produce the invoice, or explain why he could not.[20] In response

[20] In fact, in response to other FINRA Rule 8210 requests, Taboada admitted that he did not have the information FINRA was looking for. For example, in a response to another FINRA Rule 8210 request, Taboada wrote that he was unable to locate an invoice from YS, but that he

[Footnote continued on next page]

to a FINRA Rule 8210 request, Taboada produced an invoice to FINRA that purported to be from January 11, 2011, and testified under oath that it was in fact created in January 2011. In fact, as Taboada later admitted, the invoice had been created on March 22, 2013. Taboada fabricated an invoice to make it appear to FINRA that it had been issued two years earlier.

Finally, whether Taboada believes that the information sought by FINRA is of regulatory significance is irrelevant. Taboada was obligated to respond completely and truthfully. Because FINRA lacks subpoena power, it must rely upon FINRA Rule 8210 "to police the activities of its members and associated persons." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998). Members and associated persons must cooperate fully in providing requested information. *See Michael David Borth*, 51 S.E.C. 178, 180 (1992). Taboada, "may not ignore [FINRA] inquiries . . . nor take it upon [himself] to determine whether information is material to [a FINRA] investigation of their conduct." *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009).

We conclude, like the Extended Hearing Panel, that Taboada's misconduct violated FINRA Rules 8210 and 2010.

IV. Sanctions

The Extended Hearing Panel imposed a unitary bar for Taboada's violations as set forth in the first three causes of action and imposed a separate bar for his violation of FINRA Rules 8210 and 2010. We find the sanctions imposed by the Extended Hearing Panel for these violations appropriately remedial and we affirm the Extended Hearing Panel's sanctions determination.[21]

A. Taboada's Misappropriation of Investor Funds and Securities, Misuse of Customer Funds and Securities, and Providing of False and Misleading Information to Investors Warrants a Bar

The Extended Hearing Panel aggregated the sanctions for the first three causes of action, finding that a bar is the appropriate sanction for that portion of Taboada's misconduct.[22] We

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would continue to look for it. We agree with the Extended Hearing Panel that, unlike the missing YS invoice, Taboada's response regarding the January 2011 suggests that the rent invoice never really existed.

[21] We considered, but found that the record did not support, an order of disgorgement.

[22] *See FINRA Sanction Guidelines* 4 (2017) (General Principles Applicable to All Sanction Determinations, No. 4), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter Guidelines].

agree that aggregation is appropriate for Taboada's misappropriation of investor funds and securities, misuse of customer funds and securities, and providing false and misleading information, and failing to disclose information to investors. The violations described in the first three causes of action resulted from Taboada's systemic mismanagement of CMS's investors' funds, and his attempts to hide his mismanagement from investors.

For Taboada's misuse of customer funds and improper use of funds (causes one and two), the Guidelines recommend the imposition of a fine of $2,500 to $73,000 and consideration of a bar.[23] Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, the adjudicator is directed to consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution.[24]

For the third cause of action, in the absence of a specific Guideline, the Extended Hearing Panel relied on the Guidelines for "Excessive Commissions" and "Misrepresentations and Material Omissions."[25] We agree that these Guidelines are appropriately analogous. The Guidelines for Excessive Commissions recommend a fine in the range of $5,000 to $73,000.[26] Where aggravating factors predominate, the Guidelines recommend consideration of a bar.[27] For negligent "Misrepresentations and Material Omissions," the Guidelines recommend a fine of $2,500 to $73,000, and a suspension of up to two years.[28] For intentional or reckless "Misrepresentations and Material Omissions," the Guidelines recommend a fine of $10,000 to $146,000 and recommend strongly considering a bar. However, if mitigating factors predominate, an adjudicator should consider suspending the respondent for a period of six months to two years.

We also have considered the Principal Considerations in Determining Sanctions.[29] Upon consideration, we find that there are numerous aggravating factors associated with Taboada's misconduct that lead us to conclude that a bar is appropriate. We find it aggravating that

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23 *Guidelines*, at 36.

24 *Id.*

25 *Id.* at 89, 91.

26 *Id.* at 91.

27 *Id.*

28 *Id.* at 89.

29 *Id.* at 7-8.

Taboada's misconduct harmed investors.[30] He misappropriated funds from investors in the First and Second Series and misappropriated Facebook shares from several other CMS investors under the guise of carried interest fees. Taboada's misconduct also resulted in monetary gain for Taboada and Charles Morgan, the firmed he owned.[31] Taboada's decision to impose a higher sales concession on the investors in the Fourth Series resulted in a financial benefit to his Firm.

We also find that Taboada's misconduct was intentional.[32] For example, Taboada admitted that he made the decision to impose the unauthorized carried interest charge and improperly withheld more than 150 Facebook shares from four investors, knowing that such a fee was not permissible. Taboada also intentionally misallocated CMS's expenses so that First and Second Series investors' capital surplus would cover the deficits of the later series. When choosing between the "actual shares" numbers in the Revised Spreadsheet and share numbers from the original Spreadsheet, Taboada usually picked the lesser number of shares to distribute. Taboada admitted that, by early 2013, he knew that he had not distributed enough Facebook shares to many investors, but did nothing about it for over a year (until after Enforcement filed its complaint). Taboada also attempted to conceal his misconduct by circulating to concerned investors what he knew to be inaccurate spreadsheets.[33] Finally, Taboada continues to fail to take responsibility for his misconduct and blame others, such the accountants, Blackwall, and even FINRA for the problems he encountered managing the investments.[34]

B. Taboada's Arguments for Mitigation Fail

Taboada argues that several factors are present that mitigate against a bar.[35] We disagree. Taboada maintains that none of the investors suffered harm, and that in fact Taboada did not profit from this transaction because he used his own funds to remedy the accounting error. First,

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30 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 11).

31 *Id*. at 8 (Principal Considerations in Determining Sanctions, No. 17).

32 *Id*. (Principal Considerations in Determining Sanctions, No. 13).

33 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 10).

34 *Id*. (Principal Considerations in Determining Sanctions, No. 2).

35 Taboada also relies on several Letters of Acceptance, Waiver and Consent in his argument for reduced sanctions. However, "comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary proceedings." *Kent Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 863, at *33 (Feb. 20, 2014) (internal quotation marks omitted). Therefore, Taboada's sanction comparison argument holds no weight.

Taboada's representations are incorrect—investors were harmed and he and his firm did benefit from his misconduct. In any event, even if Taboada's assertions were true, the absence of investor harm or personal gain is not mitigating. *Dep't of Enforcement v. Geary*, Complaint No. 20090204658, 2016 FINRA Discip. LEXIS 31, at *35 (FINRA NAC July 20, 2016), *aff'd*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995 (Mar. 28, 2017), *appeal docketed*, No. 17-9522 (10th Cir. May 24, 2017).

Taboada also argues that it is mitigating that all of the investors were sophisticated and accredited. Regardless of whether the investors were sophisticated or accredited, that does not excuse Taboada's violation of the terms of the Offering Memorandum and the misappropriation of funds. Furthermore, Taboada maintains that the "number, size, and character" of the alleged misappropriation at issue was extremely small when compared to the overall investments made in CMS.[36] While the total amount misappropriated may seem relatively small when compared to the amounts invested in all seven series, it is in fact significant when noted that the funds and shares misappropriated affected only a portion of the investors and invested funds. Taboada also restates that his reliance on his accountants should be mitigating. For the reasons we previously discussed, we find that they are not. Finally, Taboada's distribution of cash to some investors in May 2014 is not mitigating. His attempted corrective action (and even then not all the investors were repaid) occurred *after* FINRA had notified Taboada of its intent to bring charges against Taboada and after FINRA filed its complaint, giving it no mitigative value.

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In light of these numerous aggravating factors, and considering that there are no mitigating factors present, we bar Taboada in all capacities for misappropriating investor funds and securities, misusing customer funds and securities, and providing false and misleading information, and failing to disclose information to, investors.

C. Taboada's FINRA Rules 8210 and 2010 Violations Warrant a Bar

The Extended Hearing Panel barred Taboada for his violations of FINRA Rules 8210 and 2010. We affirm this sanction.

For failing to respond or to respond truthfully, the Guidelines recommend a fine of $25,000 to $73,000 and state that a bar is the standard sanction.[37] "The failure to respond truthfully to a FINRA Rule 8210 request is as serious and harmful as a complete failure to respond, and comparable sanctions are appropriate." *Dep't of Enforcement v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *31 (FINRA NAC Mar. 9, 2015).

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[36] *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, No. 17).

[37] *Guidelines*, at 33.

In determining the appropriate sanction, the Guidelines identify as a principal consideration the importance of the information requested as viewed from FINRA's perspective.[38] Here, Taboada intentionally provided false documents and testimony to FINRA regarding a payment he had made from CMS to Charles Morgan, companies he both owned and managed. This information was important because FINRA was investigating Taboada's management of CMS, including his payment of CMS's expenses. Taboada was aware of the nature of FINRA's investigation when he provided the false document and testimony, and providing false information was an attempt to impede that investigation. Taboada's lack of veracity both in his document production and testimony warrants a bar.

V. Conclusion

Accordingly, we find that Taboada violated FINRA Rule 2010 by misappropriating investor funds and securities; FINRA Rules 2150 and 2010 by misusing customer funds and securities; FINRA Rule 2010 by providing false and misleading information, and failing to disclose information, to investors regarding expenses such as commissions and sales concessions; and FINRA Rules 8210 and 2010 by providing false and misleading testimony and documents to FINRA.

For his misappropriation of investor funds and securities, misuse of customer funds and securities, and providing false and misleading information, and failing to disclose information to investors, Taboada is barred from associating with any member firm in all capacities. For providing false and misleading information to FINRA, Taboada is likewise barred from associating with any member firm in all capacities. In addition, we affirm the order that Taboada pay $14,078.07 in hearing costs, and we impose appeal costs of $1,796.88.[39]

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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38 *Id*.

39 The bars are effective as of the date of this decision.