

BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
STATE OF CALIFORNIA

In the Matter of:

COMMISSIONER OF FINANCIAL PROTECTION
AND INNOVATION,

Complainant,

v.

Maccio Financial, LLC and Michelle Maccio

Respondent.

Agency No. 169793

OAH No. 2020120824


DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Financial Protection and Innovation (formerly the Department of Business Oversight) as its Decision in the above-entitled matter, with technical or other minor changes as shown on the attached Errata Sheet. The attached Errata Sheet is incorporated by reference pursuant to Government Code section 11517(c)(2)(C).

This Decision shall become effective on January 13, 2022.

IT IS SO ORDERED THIS 14th day of December, 2021.




Clothilde V. Hewlett
Commissioner of
Financial Protection and Innovation

**BEFORE THE
DEPARTMENT OF FINANCIAL PROTECTION AND
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STATE OF CALIFORNIA**

In the Matter of:

THE COMMISSIONER OF FINANCIAL

PROTECTION AND INNOVATION, Complainant,

vs.

**MACCIO FINANCIAL, LLC and MICHELLE MACCIO,
Respondents.**

Agency Case No. 169793

OAH No. 2020120824

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference from May 17 to May 19, 2021, in Los Angeles, California.

Alex Calero, Senior Counsel, represented Manuel P. Alvarez (complainant), Commissioner (Commissioner) of the Department of Financial Protection and Innovation (Department).

Michelle Maccio (respondent Maccio), sole member of Maccio Financial, LLC (Maccio Financial), represented herself and Maccio Financial (collectively, respondents).

Oral and documentary evidence was received. The record remained open until June 18, 2021, for complainant to submit a closing brief and until July 16, 2021, for respondents to submit their closing brief. Complainant was granted leave until July 30, 2021, to submit a reply brief. Complainant timely filed his closing brief, which was marked for identification as Exhibit 56. On July 19, 2021, the parties stipulated to an extension of the briefing schedule to July 21, 2021, for respondents to submit their closing brief, and to August 4, 2021, for complainant to submit his reply brief. Respondents timely filed their closing brief, which was marked as Exhibit A. On August 4, 2021, complainant requested a further extension of the deadline for submission of his reply brief due to problems with uploading the document with the OAH Secure e-File Transfer system. Consequently, the ALJ extended complainant's deadline for submission of his reply brief to August 11, 2021. Complainant timely filed his reply brief on August 5, 2021 (marked for identification as Exhibit 57), and the ALJ closed the record on the same date.

PROCEDURAL MATTERS

At the hearing, complainant moved for the matter to proceed as a default against Maccio Financial, on the grounds that respondent Maccio, as a non-attorney officer and manager of Maccio Financial, cannot represent the corporate entity in court. In support of his motion for default against Maccio Financial, complainant cited *Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729-730, and *Clean Air Transport Systems v. San Mateo County Transit District* (1988) 198 Cal.App.3d 576, 578-579. (Ex. 56, pp. 20-21.)

However, neither case cited by complainant is applicable here. In *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal. App.4th 1094, 1103 (*Caressa Camille*), the Court of Appeal held that a non-attorney may represent a corporation in a license revocation proceeding because an administrative tribunal is not a “court of record” as defined in the State Constitution. Therefore, the general common law rule requiring corporations to be represented by licensed attorneys does not apply to proceedings before administrative agencies and their tribunals. (*Ibid.*) Moreover, the court in *Davis Test Only Smog Testing v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2017) 15 Cal.App.5th 1009, 1015-1016, upheld *Caressa Camille* and found no violation of a corporate licensee’s due process rights in allowing a former officer to represent the corporation at the administrative hearing.

Given the foregoing, complainant’s motion for the matter to proceed as a default against Maccio Financial is denied. Respondent Maccio may properly represent Maccio Financial as its non-attorney officer and manager.

FACTUAL FINDINGS

Jurisdictional Matters

1. The Department is the agency responsible for enforcing the California Corporate Securities Law, Corporations Code section 25000 et seq.,¹ and the

¹ All further references are to the Corporations Code, unless otherwise indicated.

regulations promulgated at California Code of Regulations, title 10,² section 260.000 et seq.

2. On December 27, 2018, the Commissioner certified Maccio Financial as an investment adviser, CRD No. 169793, pursuant to section 25230. Maccio Financial is an investment adviser business located in Los Angeles, California. At all relevant times, respondent Maccio was the control person, chief compliance officer, and manager of Maccio Financial.

3. On March 16, 2021, pursuant to sections 25232, 25232.1, and 25252, complainant issued a Notice of Intent to Issue Orders (1) revoking the investment adviser certificate of Maccio Financial, (2) barring respondent Maccio from the financial industry, and (3) requesting ancillary relief. On March 9, 2021, complainant filed an Amended Accusation and Claim for Ancillary Relief³ in support of the Notice of Intent to Issue Orders.

4. Respondents timely filed a Notice of Defense and a Request for Hearing. This hearing ensued.

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² All further references are to title 10 of the California Code of Regulations and are designated as "CCR."

³ The original Accusation was not submitted as a jurisdictional document in the matter.

Background

5. Respondent Maccio first registered as an investment adviser with Financial Industry Regulatory Authority (FINRA)⁴ in July 2007 after passing the Series 7 Exam (general series representative). She subsequently passed the Series 66 Exam (uniform combined state law) in August 2007 and the Series 24 Exam (general securities principal) in 2012. Respondent Maccio began her career in the financial industry in Connecticut. In November 2013, she moved to the United States Virgin Islands (US Virgin Islands) and became registered as an investment adviser in that territory. Respondent Maccio is Maccio Financials' control person, chief compliance officer, and manager. She is also Maccio Financial's sole investment adviser representative.

6. On December 27, 2018, Maccio Financial was certified as an investment adviser in California. Maccio Financial provided portfolio management services for individuals and pooled investment vehicles, also known as funds. These funds included Winter City Trust, LP, Boston Digital Fund, LP, and Maccio Investments, LP (Maccio Investments). At all relevant times, Maccio Financial had discretionary authority over client money and securities, and it had custody of client money and securities. Between October 2018 and September 2020, Maccio Financial held in its custody \$8.2 million in cash and securities for 12 clients. On December 23, 2020, respondent Maccio filed a request with the Department to terminate Maccio Financial's investment adviser registration.

⁴ FINRA is a self-regulatory organization administering many of the exams that must be passed to become a licensed financial professional.

The United States Virgin Islands Disciplinary Action

THE ORDER AGAINST RESPONDENTS

7. Before its registration as an investment adviser in California in December 2018, Maccio Financial was an investment adviser registered in the US Virgin Islands. Respondent Maccio, as the sole principal of Maccio Financial, was also registered to transact securities in the US Virgin Islands.

8. On September 21, 2018, the US Virgin Islands issued an order (Virgin Islands Order), revoking Maccio Financial's investment adviser registration and respondent Maccio's investment adviser representative registration. The Virgin Islands Order also ordered respondents to cease and desist from engaging in any activity as an investment adviser in the US Virgin Islands. (Ex. 15, p. 116.) The Virgin Islands Order was based on respondents' violation of the following statutes and regulations:

- Failure to submit a certified balance sheet and income statement for Maccio Financial for the period ending on December 3, 2017, in violation of Virgin Islands Code, title 9, Ch. 23, section 641, subdivisions (a) and (b);
- Failure to submit an original authenticated bond from an insurer, in violation of Virgin Islands Code, title 9, Ch. 23, section 641, subdivision (e);
- Failure to inform the Division of Banking, Insurance and Financial Regulation (Division) of the US Virgin Islands regarding contractor/solicitor in her employ, in violation of Virgin Islands Code, title 9, Ch. 23, sections 633, subdivision (d), and 634, subdivision (a);

- Operating a hedge fund as a foreign limited partnership in the US Virgin Islands without registration with the Office of the Lieutenant Governor, in violation of Virgin Islands Code, title 26, Ch. 3, section 522;
- Failure to provide books and records for inspection by the Division, in violation of Virgin Islands Code, title 9, Ch. 23, section 641, subdivision (d);
- Failure to provide clients with copies of the Subscription and Limited Partnership Agreements and other disclosure documents, in violation of section 206 of the Investment Adviser Act of 1940 (Advisers Act); and
- Breach of fiduciary duty by waiving the \$10,000 minimum investment in the hedge fund for a few individuals, in violation of section 206 of the Advisers Act.

(Ex. 15, pp. 114-116.)

9. The Virgin Islands Order contains a notice which provides that respondents may request a hearing in writing stating the grounds to set aside or modify the order. (Ex. 15, p. 117.) A hearing on the matter is to be scheduled within 15 days after receipt of a request for hearing, and failure to request hearing within 30 days after the date of the service of the US Virgin Islands Order will result in the order becoming final. (*Ibid.*)

10. On October 10, 2018, respondents were served with the Virgin Islands Order. Respondents requested a hearing appealing the order. Although the record did not establish what occurred during the appeal process, the Virgin Islands Order became final on October 7, 2020.

RESPONDENTS' FORM ADV

11. On October 10, 2018, respondent Maccio, on behalf of Maccio Financial, filed with the Department a Form ADV, the uniform form used by investment advisers to register with both the Securities and Exchange Commission (SEC) and state securities authorities. The Form ADV consists of two parts. Part 1 of the Form ADV requires disclosure information about the investment adviser's business, ownership, clients, employees, business practices, affiliations, and any disciplinary events of the adviser or its employees. It is organized in a question-and-answer, check-the-box format. Part 2 of the Form ADV is organized in a narrative format and requires investment advisers to prepare brochures that include plain English disclosures of the adviser's business practices, fees, conflicts of interest, and disciplinary information. Investment advisers must file an initial Form ADV within 30 days of conducting business in the state, update the Form ADV annually, and whenever material events occur, including any disciplinary action. Form ADV's are filed online with the Investment Advisor Registration Depository (IARD).

12. Part 1 of Form ADV includes an "Item 11 Disclosure Information" section. Question D of Item 11 asks the following questions:

Has any other federal regulatory agency, any state regulatory agency, or any foreign financial regulatory authority:

[¶]. . . [¶]

(2) ever found you or any advisory affiliate to have been involved in a violation of investment-related regulations or statutes?

(3) ever found you or any advisory affiliate to have been a cause of an investment-related business having its authorization to do business, denied, suspended, revoked, or restricted?

(4) in the past ten years, entered an order against you or any advisory affiliate in connection with an investment-related activity?

(5) ever denied, suspended, or revoked your or any advisory affiliate's registration or license, or otherwise prevented you or any advisory affiliate, by order, from associating with an investment-related business or restricted your or any advisory affiliate's activity?

(Ex. 17, pp.154-155.)

13. When respondent Maccio filed Part of 1 of the initial Form ADV on behalf of Maccio Financial on October 10, 2018, she responded "No" to Questions D(2) to D(5) of Item 11. In December 2018, respondent Maccio filed Part 2 of the initial Form ADV, on behalf of Maccio Financial. In this December 2018 filing of Part 2 of Form ADV, she disclosed that the US Virgin Islands issued a "temporary order" (respondent Maccio's terms) revoking respondent Maccio's investment adviser representative registration and Maccio Financial's investment adviser registration. Subsequently, on January 11, 2019, and May 30, 2019, respondent Maccio filed two additional Form ADV's on behalf of Maccio Financial. However, she did not disclose the Virgin Islands Order, and she responded "No" to Questions D(2) to D(5) of Item 11 on Part 1 of each of these Form ADV's.

14. On June 8, 2020, Jennifer Van (Van), the Department's Corporation Examiner, wrote an email to respondent Maccio requesting clarification regarding the US Virgin Islands Order that respondent Maccio disclosed in Part 2 of the Form ADV. (Ex. 21, p. 251-252.) Van also requested that respondent Maccio provide a status update of respondents' appeal of the US Virgin Islands Order, submit any relevant orders for the Department's review, and amend Part 1, Item 11 of the Form ADV to reflect the disciplinary action. (*Id.* at p. 252.) After several exchanges of emails in which respondent Maccio referred Van to her attorney, respondent Maccio did not provide the requested information to Van. In her last email to Van dated June 4, 2020, respondent Maccio asked for more time to respond, claiming that she "was never afforded an opportunity for a hearing per the territory guidelines here [US Virgin Islands]." (*Id.* at p. 249.)

15. Respondent Maccio never amended Part 1 of the Form ADV to indicate the existence of the Virgin Islands Order, as instructed by Van. On September 30, 2020, after Van made her aware of the requirement to disclose the Virgin Islands Order, respondent Maccio filed another Form ADV on behalf of Maccio Financial. In Part 1 of this Form ADV, respondent Maccio once again did not disclose the Virgin Islands Order and answered "No" to Questions D(2) to D(5) of Item 11. (Ex. 24, p. 359-360.)

RESPONDENT MACCIO'S TESTIMONY REGARDING THE VIRGIN ISLANDS ORDER

16. At the hearing, respondent Maccio provided various explanations for her failure to disclose the Virgin Islands Order in Part 1 of the Form ADV. Respondent Maccio averred that she did not disclose the Virgin Islands Order because she considered it as temporary in nature until her appeal rights were exhausted, and the order was finalized on October 7, 2020. Respondent Maccio also expressed her belief

that she had disclosed the Virgin Islands Order to the Department because Part 2 of the Form ADV discussed the “temporary order.” However, respondent Maccio did not provide any explanation as to why she did not amend Part 1 of the Form ADV or disclose the Virgin Islands Order in her September 30, 2020 filing of Part 1 of the Form ADV, despite Van’s instruction to do so on June 8, 2020.

17. Additionally, respondent Maccio’s reference to a “temporary order” in Part 2 of the ADV does absolve respondents of their obligation to disclose the Virgin Islands Order in Part 1 of the Form ADV. The language of the questions on Item 11 is broad. For example, Question D(2) of Item 11 asks whether the applicant has ever been “involved in a violation of investment-related regulations or statutes.” Even if respondent Maccio believed that the Virgin Islands Order was temporary in nature, the issuance of such an order involved the violation of investment-related regulations and statutes, and thus should have been disclosed in Part 1 of the Form ADV. Under these circumstances, respondents’ responses on Questions D(2) to D(5) of Item 11 and the omission of the Virgin Islands Order on Part 1 of the Form ADV were false and misleading.

The Department’s Examination of Respondents’ Investment Adviser Business

FAILURE TO SUBMIT DOCUMENTS FOR EXAMINATION/FAILURE TO MAINTAIN BOOKS AND RECORDS

18. On September 2, 2020, Cathy Huang (Huang), a Senior Financial Institutional Examiner at the Department, was assigned to conduct an examination of respondents’ investment adviser business. Huang has worked for the Department for

four years. She has a bachelor's degree in accounting, and she also has work experience as a California tax auditor.

19. In an email dated September 2, 2020, Huang gave respondents an Examination Request List (Ex. 31), specifying documents which respondent Maccio was required to make available on the first day of her examination. (Ex. 30, p. 431.) This examination was initially scheduled for September 28, 2020, but later rescheduled for September 30, 2020.

20. At the examination, respondent Maccio provided some of the documents on the Examination Request List. However, respondent Maccio also admitted that Maccio Financial does not maintain several books and records on the Examination Request List, including the following:

- Balance sheets as of July 2020;
- Income statements for the period of July 2020 (year to date);
- General ledger for the period of July 2020 (year to date);
- Monthly bank statements and reconciliations of all business accounts for July 2020;
- Monthly brokerage statements and reconciliations of all business accounts for July 2020;
- Minimum financial requirement computations for July 2020;
- Audited financial statements for 2019 for Maccio Investments, Boston Digital Fund LP, and Winter City Trust LP; and

- Account statements sent to investors of Maccio Investments as of July 31, 2020.

21. In October 2020, Huang made multiple requests, by email and by telephone, for respondent Maccio to provide the missing documents. Huang also extended the deadline for respondent Maccio to submit the documents several times. However, by November 6, 2020, respondent Maccio had not submitted any of the missing documents listed above for examination.

22. On November 6, 2020, Kit Chao (Chao), the Department's Corporations Examiner Supervisor, wrote a final demand letter to request the outstanding documents. Chao stated, in relevant part:

This is our final demand to provide documentation.
Failure to provide complete documents and full and
complete response to this letter by November 20, 2020
may result in further enforcement referral being
brought under California's "Corporate Securities Law of
1968" (Corporation Code section 25000, et seq.),
including, but not limited to Corporations Code sections
25232, 25232.1 and 25251.

(Ex. 33, p. 450, bold and underline in original.)

23. Despite this final demand letter, as of the date of the hearing, respondent Maccio had not produced to the Department the missing documents listed above for examination.

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FAILURE TO FILE ANNUAL FINANCIAL REPORTS

24. After Maccio Financial was licensed by the Commissioner on December 27, 2018, Van, the Department's Corporation Examiner, sent respondents an email entitled "Information for Newly Licensed Investment Advisers" on behalf of the Commissioner. (Ex. 14.) In this email, Van advised respondents, in relevant part:

If you are subject to the minimum financial requirements (CCR Section 260.237.2), you must file with the Commissioner, not more than 90 days after your year-end, an annual financial report that reflects your financial condition. The annual financial report is to contain a Statement of Financial Condition prepared in accordance with generally accepted accounting principles and computations of the minimum financial requirements required under CCR Section 260.237.2. You may use the Minimum Financial Requirements Worksheet for the computations of the minimum financial requirements. . . .

If you have held or accepted custody of funds and/or securities for or owe money or securities to customers or clients during the period covered, you must file audited financial statements prepared by an independent certified public accountant or independent public accountant. . . .

(Ex. 18, p. 257.)

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25. Because Maccio Financial had custody and discretionary authority over client money and securities, it was required to file annual financial reports with the Department within 90 days after Maccio Financial's fiscal year's end in December. However, Maccio Financial did not file any annual financial reports with the Department. At the hearing, respondent Maccio claimed that she was unaware of the requirement to file annual financial reports with the Department and that she assumed her attorneys would file the annual financial reports on her behalf.

Respondents' Management of Maccio Investments

BACKGROUND ON MACCIO INVESTMENTS

26. One of the private funds for which Maccio Financial provided portfolio management services was Maccio Investments, a Delaware limited partnership. Maccio Investment's general partner was Maccio Trading, LLC (Maccio Trading), a limited liability company controlled by respondent Maccio. According to Maccio Investment's Confidential Offering Memorandum (Offering Memorandum) dated January 2017, Maccio Trading, as the general partner, is accountable to the limited partners as a fiduciary. (Ex. 23, pp. 181-182.) In addition, respondent Maccio, doing business as Maccio Financial, was Maccio Investments' investment manager. Through these relationships, respondents managed and controlled Maccio Investments, had discretionary authority over its investors' money and securities, and had custody over its investors' money and securities.

27. At all relevant times, Maccio Investments' auditor, who inspected and verified its financial records, was Richey May & Co., LLP (Richey May). (Ex. 17, p. 145.) The fund's prime broker, who assisted the fund in placing securities transactions, was Interactive Broker Corporation (Interactive Broker). (*Id.* at p. 146.) Interactive Broker

also acted as the fund's custodian, responsible for holding and safeguarding the fund's securities and money. (*Ibid.*) Theorem Fund Services (Theorem Fund) was the fund's administrator, who prepared its books and records.

28. At all relevant times, Maccio Investments had \$4.2 million in gross assets, consisting of the following: (1) stocks, short calls, and options; (2) cryptocurrency; (3) a side pocket⁵ which contained a villa and a Jeep used as rental property in the US Virgin Islands; and (4) a promissory note dated February 1, 2018 (Promissory Note).

THE PROMISSORY NOTE

29. Pursuant to the February 1, 2018 Promissory Note, respondent Maccio promised to pay Maccio Investments the principal sum of up to \$500,000, plus interest equal to two times the Prime Rate,⁶ as published by the Wall Street Journal (WSJ). (Ex. 34, p. 419.) Respondent Maccio, as an individual, signed the Promissory Note as the maker, and respondent Maccio, as the general partner of Maccio Investments, signed the Promissory Note as the noteholder. (*Id.* at p. 423.) The terms of the Promissory Note included that the entire outstanding principal amount with interest shall be paid no later than 36 months from the effective date of the note, on February 1, 2021. (*Ibid.*) The investors of Maccio Investments, whose money respondent Maccio

⁵ A side pocket is a type of account utilized in hedge funds to segregate riskier or illiquid assets.

⁶ The WSJ defines the prime rates as the base rate on corporate loans posted by at least 70 percent of the 10 largest U.S. banks. (Ex. 49, p. 3949.)

borrowed pursuant to the Promissory Note, were not broker-dealers, affiliates of respondents, or financial institutions.

30. By respondent Maccio's admission at the hearing, the Promissory Note was created to cover her personal expenses. In September 2017, respondent Maccio was undergoing a divorce, which resulted in financial setbacks for her. In addition, a hurricane damaged her home in the US Virgin Islands while respondent Maccio was in Boston with her 12-year-old son. Respondent Maccio was unable to return to her home in the US Virgin Islands, and she was in need of cash. Respondent Maccio admitted that she began borrowing money by making withdrawals from the Interactive Broker account for Maccio Investments in September 2017, although she did not draft the Promissory Note until February 1, 2018.

31. By June 2019, however, respondent Maccio was having trouble making payments on the Promissory Note. On June 10, 2019, she asked Maccio Investments' administrator, Theorem Funds, to suspend interest payments for August 2019. Theorem Funds rejected this request because it was without approval from the fund's auditor and legal counsel. Moreover, respondent Maccio had withdrawn from Maccio Investments an amount far exceeding the initial \$500,000 principal sum on the Promissory Note. A June 24, 2019 email from Liz Wright (Wright), the Director of the Head of Operations at Theorem Fund, stated:

In producing the GAAP financials this year, we realized that the fund's promissory note balance has vastly exceeded the allowable \$500,000 maximum. In fact, it is almost twice that amount, it is almost \$1 million by January 2019 and it appears that there are several large withdrawals through March as well. We will need another promissory note

drafted to cover this additional amount over the allowable \$500k. Can you have that drafted?

(Ex. 38, p. 432.)

32. There is no evidence that respondent Maccio drafted a second promissory note to cover her withdrawals from the Maccio Investments account in excess of the \$500,000 maximum on the Promissory Note. From December 31, 2018, to December 31, 2019, respondent Maccio continued to withdraw money from the Maccio Investments account pursuant to the Promissory Note. (Exs. 41, 43-47, 50.)

33. Using financial documents⁷ obtained through a subpoena on Theorem Fund, Huang, the Department's Senior Financial Institutional Examiner, calculated the principal balance of the Promissory Note, as well the interest owed on the balance based on an interest rate of two times the WSJ Prime Rate. Huang's analysis showed that as of March 31, 2021, the estimated Promissory Note principal balance was \$1,342,086.12; interest receivable balance was \$270,422.61; and total Promissory Note principal and interest receivable was \$1,612,508.73. (Ex. 41.) As of the date of the

⁷ These financial documents include the following: (1) Maccio Investment's balance sheet as of July 31, 2019 (Ex. 50); (2) Excel spreadsheets showing respondent Maccio's withdrawals from Maccio Investments account pursuant to the Promissory Note for the months of August 2019 to November 2019 (Exs. 43-46); and a bank statement from People's Bank annotated by respondent Maccio showing respondent Maccio's withdrawals from Maccio Investments account pursuant to the Promissory Note (Ex. 47).

hearing, respondent Maccio has not repaid any of the money she withdrew from the Maccio Investments account pursuant to the Promissory Note.

34. Additionally, respondents did not disclose to potential investors of Maccio Investments that respondent Maccio could borrow money from the fund for her personal expenses. The January 2017 Offering Memorandum for Maccio Investments listed several investment strategies, including investing in options and short sales, as potential risk factors for investors. However, nowhere does the Offering Memorandum indicate that respondent Maccio may draft a promissory note and borrow money from the fund's investors.

35. At the hearing, respondent Maccio provided various explanations for borrowing money from the Maccio Investment account. She claimed that the Promissory Note is a form of investment for the investors and that she promised to pay interest at twice the Prime Rate to avoid any appearance of impropriety. Respondent Maccio insisted that the Promissory Note was not illegal or fraudulent. Nevertheless, she conceded that entering into the Promissory Note was not "the best decision" and may have been "unethical" (her terms).

36. Respondent Maccio also asserted that potential investors of Maccio Investments were alerted to the possibility that she could borrow from the fund. She pointed to a section of the Offering Memorandum that states, "[Maccio Investments'] investment strategy focuses on writing covered call options and out-of-the-money put options, as well as other strategies." (Ex. 23, p. 175.) Respondent Maccio contended that the words, "other strategies," encompassed promissory notes allowing her to borrow money from the fund. Respondent Maccio's testimony on this issue is not credible, given that the strategies discussed in the Offering Memorandum are clearly

for investment purposes, not for the purpose of covering respondent Maccio's personal expenses.

THE CEASE AND DESIST ORDER RELATED TO THE PROMISSORY NOTE

37. On November 9, 2020, the Commissioner issued a Cease and Desist Order to respondents relating to the Promissory Note. Because respondent Maccio had withdrawn over \$1 million from Maccio Investments' account pursuant to the Promissory Note, the Commissioner found respondents in violation of section 25238 and CCR section 260.238, subdivision (f). The Cease and Desist Order required respondents to "desist and refrain from engaging in activities that do not promote fair, equitable or ethical principles by borrowing money or securities from a client unless the client is a broker dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds or securities." (Ex. 2, p. 3963.)

FAILURE TO PROVIDE ACCOUNT STATEMENTS AND AUDITED FINANCIAL STATEMENTS TO CLIENTS

38. At the hearing, respondent Maccio admitted that quarterly account statements have not been provided to investors of Maccio Investments since July 2019. She further admitted that audited financial statements for 2019 were not provided to Maccio Investment investors.

39. Respondent Maccio blamed Maccio Investments' administrator, Theorem Fund, and its auditor, Richey May, for the failure to provide quarterly account statements and audited financial statements to investors. Respondent Maccio reported that she provided Theorem Funds all the information they requested to complete the quarterly account statements. Respondent Maccio claimed that Theorem Fund terminated its role as Maccio Investments' administrator on June 23, 2020, even

though they were paid through August 2020. According to respondent Maccio, she attempted to find an alternate fund administrator, but she had trouble finding another administrator who can “clean up the books” (her words). Respondent Maccio stated that Richey May terminated its relationship with Maccio Investments as well. Respondent Maccio asserted that in July or August 2020, she obtained an engagement letter with another auditor, but that auditor was unable to perform an audit without proper investment statements calculated by a proper administrator.

40. Respondent Maccio’s stated reasons for failing to provide investors of Maccio Investments with quarterly account statements and the 2019 audited financial statements are not credible. Although respondent Maccio testified that she provided all the information Theorem Fund needed, she did not provide any corroborating evidence to support this assertion. Additionally, respondent’s Maccio’s testimony is contradicted by email exchanges showing Theorem Fund’s multiple attempts to obtain financial information from respondent Maccio in August 2020. Specifically, in an email dated August 19, 2020, Wright gave respondent Maccio a list of items that required a response from respondent Maccio. (Ex. 39, p. 439.) In an email dated August 20, 2020, Wright again provided a list of items for respondent Maccio to provide a response. (*Id.* at p. 437.) Wright wrote, “These are not issues that have suddenly arisen, but open items for which we have been trying to obtain support and confirmation for a very long time. Our intention is not to delay the delivery of statements for your funds, but to ensure we obtain the necessary support for the transactions we have discussed.” (*Ibid.*) In another email dated August 24, 2020, Wright wrote again, “Can you please also provide us with the final, signed audited financials that were issued by Richey May for 2018 for Maccio Investments? I believe they were completed a few weeks back but I don’t see that we received them.” (*Ibid.*)

UNDOCUMENTED WITHDRAWALS FROM THE MACCIO INVESTMENTS ACCOUNT

41. Huang, the Department's Senior Financial Institutional Examiner, also examined respondent Maccio's withdrawals and deposits into the Maccio Investments' account with its prime broker, Interactive Brokers. She obtained Activity Statements from Interactive Brokers from January 2017 through August 2020 (Ex. 52), and she attempted to match the profit and loss for the Maccio Investments' account with the fund's balance sheets and income ledgers. However, respondent Maccio did not provide Huang with the fund's balance sheets and income ledgers for the period of August 31, 2019, to August 31, 2020. Although respondent Maccio gave Huang Excel spreadsheets showing partial redemption to certain investors, Huang found these spreadsheets to be unreliable as they were not supported by documentation showing that the investors received the redemption. Without reliable information on respondent Maccio's withdrawals from the Maccio Investments' account for the period of August 31, 2019, to August 31, 2020, Huang determined that respondent Maccio withdrew \$1,640,166.36 from the account without documentation during that period.

42. At the hearing, respondent Maccio asserted that Huang's accounting of \$1,640,166.36 in undocumented withdrawals is unreliable upon because it does not reflect redemptions by investors, fund expenses, and payment for cryptocurrency. Upon further questioning, Huang conceded that the \$1,640,166.36 of undocumented withdrawals may consist of redemptions by investors, withdrawals on the Promissory Note, and/or payment for fund and accounting expenses.

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TESTIMONY OF MACCIO INVESTMENTS' INVESTORS

43. J.C.,⁸ an 81-year-old investor with Maccio Investments, testified at the hearing. J.C., a high school graduate, is a retiree living on fixed income. She met respondent Maccio in September or October of 2009. At that time, J.C. was unfamiliar with financial management because her husband, who had handled their household finances, had passed away. After speaking to respondent Maccio, J.C. invested approximately \$125,000 in Maccio Investments. The last time J.C. received a statement from Maccio Investments was June 30, 2019, and she has no idea what has happened to her investment. Since November 2020, respondent Maccio has not responded to any of J.C.'s messages requesting information about her investment. J.C. averred that when she invested in Maccio Investments, she did not know any her money would be loaned to respondent Maccio for her personal expenses.

44. R.G., a 69-year-old investor with Maccio Investments, also testified at the hearing. R.G., a retiree after having worked in a factory for 46 years, has little experience in investing. He invested a total of \$224,000 in Maccio Investments. He last received quarterly statements from Maccio Investments sometime in 2018. R.G. testified that he does not know how respondent Maccio invested, and he does not know anything about the Promissory Note. Sometime in 2019, R.G. requested Maccio Investments to redeem his investment. Although respondent Maccio told R.G. that the redemption process takes 90 days, she has not refunded his money. Since the end of 2019, respondent Maccio has refused to respond to R.G.'s requests to redeem his investment.

⁸ Initials are used to protect the privacy of Maccio Investments' investors.

The Order to Discontinue Violations

45. On September 14, 2020, the Commissioner issued an Order to Discontinue Violations to Maccio Financial. In this Order to Discontinue Violations, the Commissioner found that Maccio Financial was “conducting securities or investment advisory business in an unsafe, injurious, or unauthorized manner as to render further operations hazardous to the public.” (Ex. 27, p. 2.) In addition, the Commissioner found that Maccio Financial violated the following provisions: (1) section 25241 and CCR 260.241.4, subdivisions (a) and (d), by failing to maintain updated information in Form ADV with the IARD; (2) section 25241 and CCR section 260.241.4, subdivision (e), by failing to timely file an annual updating amendment to Form ADV with IARD; and (3) section 25235 and CCR section 260.237, subdivisions (a) and (b), by failing to ensure that clients received account statements periodically and audited financial statements annually. (*Id.* at p. 1-2.)

46. The Order to Discontinue Violations required Maccio Financial to discontinue the violation of the statutes and regulations described above and to “[d]iscontinue receiving or dispersing client money for the purpose of investing client money in Maccio Investments, LP a pooled investment vehicle (or funds), managed by Maccio Financial, LLC, unless and until the fund honors requests from clients to liquidate and return client money which was invested in the fund.” (Ex. 27, p. 2.)

47. Maccio Financial was served with the Order to Discontinue Violations on September 14, 2020. Maccio Financial timely requested a hearing on the Order to Discontinue Violations, but it later withdrew its request for a hearing. The Order to Discontinue Violations is now final.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The burden of proof in this matter is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

Authority to Take Disciplinary Action

2. Section 25232 provides, in pertinent part, that the commissioner may revoke the certificate of an investment adviser if the Commissioner finds that revocation is in the public interest and that the investment adviser, or any employee of the investment adviser, has done any of the following:

(a) Has willfully made or caused to be made in any application for a certificate or any report filed with the commissioner under this division, or in any proceeding before the commissioner, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has willfully omitted to state in the application or report any material fact which is required to be stated therein.

[¶] [¶]

(d) Is or has been subject to (1) any order of the Securities and Exchange Commission or the securities administrator of any other state denying or revoking or suspending his or her registration as an investment adviser, or investment adviser representative. . . (3) any other order of the commission or any administrator, association, or exchange referred to in this subdivision which is or has been necessary for the protection of any investor.

(e) Has willfully violated any provision of . . . Title 4 (commencing with Section 25000)[the Corporate Securities Law] . . . or of any rule or regulation under any of those statutes, or any order of the commissioner which is or has been necessary for the protection of any investor. . . .

[¶] . . . [¶]

(h) Has violated any provision of this division or the rules thereunder or, in the case of an applicant only, any similar regulatory scheme of the State of California or a foreign jurisdiction.

3. The Commissioner may bar a person from any position of employment, management or control of any investment adviser, any officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person, if it is in the public interest and that person has committed any act or omission in section 25232, subdivisions (a) and (e), or is subject to any order specified in section 25232, subdivision (d). (§ 25232.1.)

4. At the hearing, respondent Maccio contended that the word "willful" as it is used in section 25232, requires knowledge that one's action is wrong or illegal. However, the word willfulness, as it is used in both civil and penal contexts, does not require scienter. Penal Code section 7 states that "[t]he word 'willfully', when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or to make the omission in question." (See also *Commissioner v. Maspero*, Decision and Order (2003) OAH Case No. 2002090534 [designated as a Precedential Decision by the Department under Government Code section 11425.60].) Moreover, in *ACCO Engineered Systems, Inc. v. Contractors' State License Bd.* (2018) 30 Cal.App.5th 80, 87, the Court of Appeal, in interpreting a license discipline statute, held that "willful" requires only showing of a general intent to commit an act, not a specific intent to violate the law. Similarly, in the context of section 25232, willfulness does not require a guilty intent on the part of the perpetrator.

Causes to Revoke Maccio Financial's Investment Adviser Certificate and to Bar Respondent Maccio

WILLFUL FAILURE TO DISCLOSE THE VIRGIN ISLANDS ORDER

5. Complainant established that respondents willfully failed to disclose the Virgin Islands Order in Part 1 of the Form ADV. (Factual Findings 7 to 17.) Respondent Maccio's responses to Questions D(2) to D(5) of Item 11 of Part 1 of the Form ADV are false and misleading statements, and the omission of the Virgin Islands Order is a material fact which is required to be stated in the application. The Virgin Islands Order is material because had the order been disclosed, it would form the basis for the denial of Maccio Financial's investment adviser certificate. Respondent Maccio's failure to disclose the Virgin Islands Order is also willful, as Van made her aware of the

requirement to disclose the order on June 8, 2020. However, despite Van's instructions, respondent Maccio did not amend Part 1 of the Form ADV to reflect the existence of Virgin Islands Order, and she further failed to disclose the order in a subsequent, September 30, 2020 filing of Part 1 of the Form ADV. Therefore, cause exists to revoke Maccio Financial's investment adviser certificate and to bar respondent Maccio, pursuant to sections 25232, subdivision (a), and 25232.1.

SUBJECT TO ORDERS OF SECURITIES ADMINISTRATORS

6. Complainant established that respondents are subject to the Virgin Islands Order and the Department's Order to Discontinue Violations. (Factual Findings 7 to 10; 45 to 47.) The Virgin Islands Order is an order of a securities administrator within the meaning of section 25232, subdivision (d)(1), and it was final on October 7, 2020. The Order to Discontinue Violations is an order of an administrator issued for the protection for the public within the meaning of section 25232, subdivision (d)(3), and it is now final. Therefore, cause exists to revoke Maccio Financial's investment adviser certificate and to bar respondent Maccio, pursuant to sections 25232, subdivisions (d)(1) and (d)(3), and 25232.1.

WILLFUL VIOLATIONS OF THE CORPORATE SECURITIES LAW AND THE REGULATIONS PROMULGATED THEREUNDER

Willful Failure to Update Part 1 of Form ADV

7. Complainant established that respondents willfully failed to update Part 1 of Form ADV promptly. (Factual Findings 7 to 17.) Section 25241 and CCR section 260.241.4 requires a licensed investment adviser, upon any change in the information contained in the Form ADV, to file promptly an amendment. Respondents did not file

any amendments to Part 1 of the Form ADV to reflect the existence of the Virgin Islands Order, even after Van instructed respondent Maccio to do so on June 8, 2020. Under these circumstance, respondents' failure to update Part 1 of the Form ADV is willful. Therefore, cause exists to revoke Maccio Financial's investment adviser certificate and to bar respondent Maccio, pursuant to sections 25232, subdivision (e), and 25232.1, in conjunction with section 25241 and CCR section 260.241.4.

Willful Borrowing of Money from Clients

8. Complainant established that respondents willfully borrowed money from clients. (Factual Findings 29 to 36.) Section 25238, in conjunction with CCR section 260.238, subdivision (f),⁹ prohibits licensed investment advisers from engaging in activities that do not promote "fair, equitable or ethical principles," including borrowing money from a client, unless the client is a broker dealer, an affiliate of the adviser, or a financial institution. The word "client," as it is used in CCR section 260.238,

⁹ CCR section 260.238 provides, in relevant part:

The following activities do not promote "fair, equitable or ethical principles," as that phrase is used in Section 25238 of the Code:

[¶] [¶]

(f) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the adviser, or a financial institution engaged in the business of loaning funds or securities.

subdivision (f), is deemed to include Maccio Investments' investors from whom respondent Maccio borrowed money, for the reasons set forth below.

9. First, respondents exerted broad control over Maccio Investments. Maccio Financial provided portfolio management services for Maccio Investments. Maccio Investment's general partner was Maccio Trading, which is controlled by respondent Maccio. According to the January 2017 Offering Memorandum, Maccio Trading, as the general partner, also owed a fiduciary duty to the limited partners, or the investors of Maccio Investments. In addition, respondent Maccio, doing business as Maccio Financial, was Maccio Investments' investment manager. Through these relationships, respondents managed and controlled Maccio Investments, had discretionary authority over client money and securities, and had custody over client money and securities.

10. Second, the Corporate Securities Law is a remedial statute designed to protect the public. (See *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688; *People v. Figueroa* (1986) 41 Cal.3d 714, 735-36.) As a remedial statute, the Corporate Securities Law and the regulations promulgated thereunder are to be liberally construed. (See *Alford v. Pierno*, supra, 27 Cal.App.3d 682, 688. ["[Remedial statutes] are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished."].) The purpose of the Corporate Securities Law is to promote fair, equitable, and ethical principles by prohibiting certain arrangements, such as borrowing money from people to whom a fiduciary duty is owed, which could create a conflict of interest between an adviser and people whose money she manages. In light of the remedial nature of the Corporate Securities Law, the term "client" in CCR section 260.238 is to be construed liberally to achieve that purpose.

11. By virtue of respondents' relationship to the investors of Maccio Investments, respondents owed a fiduciary duty to those investors, and they are, therefore, deemed to be respondents' clients. By withdrawing money from Maccio Investments' account pursuant to the Promissory Note to pay for her own personal expenses, respondent Maccio borrowed money from clients who are not broker dealers, affiliates of the adviser, or financial institutions. Respondent Maccio also admitted at the hearing that entering into the Promissory Note was unethical. Under these circumstances, respondent Maccio's borrowing of money from clients is willful. Therefore, cause exists to revoke Maccio Financial's investment adviser certificate and to bar respondent Maccio, pursuant to sections 25232, subdivision (e), and 25232.1, in conjunction with section 25238 and CCR section 260.238, subdivision (f).

Willful Engagement in a Fraud or Deceit on Clients

12. Complainant established that respondents willfully engaged in a fraud or deceit on clients. (Factual Findings 29 to 36.) Section 25235, subdivision (b), provides that it is unlawful for an investment adviser, directly or indirectly, in this state "[t]o engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client."

13. Section 25235 is the California equivalent to section 206 of the Advisers Act and contains almost the same language. (See § 25235; 15 U.S.C. § 80b-6.) Violations of an investment adviser's fiduciary duty to clients are enforceable under section 206 of the Advisers Act. (See *Transamerica Mortgage Advisors v. Lewis* (1979) 444 U.S. 11, 17 [where the Supreme Court found that section 206 of the Act establishes "fiduciary standard" to govern the conduct of investment advisers].) Hence, in California, such violations are enforceable under section 25235. In *SEC v. Steadman* (1992) 967 F.2d 636,643, fn. 5, the Supreme Court noted that a violation of section 206

of the Advisers Act may rest on a simple finding of negligence, without requiring scienter. By extension, a violation of section 25235 in California also may rest on a finding of negligence and does not require scienter.

14. In this case, respondents owe a fiduciary duty to the investors of Maccio Investments, who are also their clients. This fiduciary duty includes an obligation to provide full and fair disclosure of all material facts and to serve the best interests of the clients. (See *SEC v. Mannion* (2011) 789 F.Supp.2d 1321, 1339.) Respondents did not disclose in Maccio Investments' Offering Memorandum that respondent Maccio could borrow money from the fund to cover her own personal expenses. This failure to disclose is a material omission affecting a prospective client's decision to invest in the fund. In addition, respondent Maccio's borrowing of client money for her personal expenses, withdrawing amounts that well exceeded the \$500,000 limit of the Promissory Note, and failure to pay the principal and interest on the Promissory Note after its maturation on February 1, 2021, do not serve the clients' best interests and constitute a breach of her fiduciary duties. This conduct operated as a fraud or deceit on respondents' clients. Therefore, cause exists to revoke Maccio Financial's investment adviser certificate and to bar respondent Maccio, pursuant to sections 25232, subdivision (e), and 25232.1, in conjunction with section 25235.

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NON-WILLFUL VIOLATIONS¹⁰ OF THE CORPORATE SECURITIES LAW AND THE REGULATIONS PROMULGATED THEREUNDER

Failure to Maintain Books and Records

15. Complainant established that respondents failed to maintain the following books and records:

- Balance sheets as of July 2020;
- Income statements for the period of July 2020 (year to date);
- General ledger for the period of July 2020 (year to date);
- Monthly bank statements and reconciliations of all business accounts for July 2020;
- Monthly brokerage statements and reconciliations of all business accounts for July 2020;
- Minimum financial requirement computations for July 2020;
- Audited financial statements for 2019 for Maccio Investments, Boston Digital Fund LP, and Winter City Trust LP; and

¹⁰ Pursuant to section 25232.1, non-willful violations of the Corporate Securities Law and its regulations do not constitute cause to bar respondent Maccio. However, these non-willful violations constitute cause to revoke Maccio Financial's investment adviser certificate, under section 25232, subdivision (h).

- Account statements sent to investors of Maccio Investments as of July 31, 2020.

(Factual Findings 18 to 20.)

Therefore, cause exists to revoke Maccio Financial's investment adviser certificate, pursuant to section 25232, subdivision (h), in conjunction with section 25241 and CCR sections 260.237 and 260.241.3.

Failure to Submit Books and Records for Examination

16. Complainant established that respondents failed to submit the books and records listed above for examination by the Department. (Factual Findings 18 to 23.) Therefore, cause exists to revoke Maccio Financial's investment adviser certificate, pursuant to section 25232, subdivision (h), in conjunction with section 25241.

Failure to File Annual Financial Reports

17. Complainant established that respondents failed to file annual financial reports. (Factual Findings 24 and 25.) Therefore, cause exists to revoke Maccio Financial's investment adviser certificate, pursuant to section 25232, subdivision (h), in conjunction with section 25241 and CCR section 260.241.2.

Failure to Provide Account Statements to Clients

18. Complainant established that respondents failed to provide periodic account statements to their clients who are investors of Maccio Investments as of July 31, 2019. (Factual Findings 38 to 40.) Therefore, cause exists to revoke Maccio Financial's investment adviser certificate, pursuant to section 25232, subdivision (h), in conjunction with section 25235 and CCR section 260.237.

Failure to Provide Verified and Audited Financial Statements to Clients

19. Complainant established that respondents failed to provide audited financial statements for 2019 to their clients who are investors of Maccio Investments. (Factual Findings 38 to 40.) Therefore, cause exists to revoke Maccio Financial's investment adviser certificate, pursuant to section 25232, subdivision (h), in conjunction with section 25235 and CCR section 260.237.

Level of Discipline

20. Respondents' violations are numerous and extremely serious in nature. Respondents willfully failed to disclose the Virgin Islands Order in Part 1 of the Form ADV. Respondent Maccio borrowed money from clients by entering into the Promissory Note, withdrew funds greatly in excess of the \$500,000 limit on the Promissory Note, and failed to pay the principal and interest after the Promissory Note matured. Respondents also did not disclose to potential investor of Maccio Investments that respondent Maccio could borrow money from the fund. Respondents' conduct with respect to the Promissory Note constitutes a breach of respondents' fiduciary duties to their clients and operates as a fraud or deceit on their clients. Respondents also committed multiple violations of the Corporate Securities Law and the regulations promulgated thereunder, including violations relating to maintaining books and records, submitting to an examination, and providing statements and audited financial statements to clients. Respondents financially benefitted from their misconduct, which resulted in actual harm to their clients, as evidenced by the testimony of J.C. and R.G. Additionally, respondents are subject to both the Virgin Islands Order and the Order to Discontinue Violations, both of which are orders from securities administrators relating to violations of securities law.

21. At the hearing, respondent Maccio presented little evidence of rehabilitation. She expressed no remorse for her actions. Respondent Maccio claimed that she disclosed the Virgin Islands Order, even though she never amended or updated Part 1 of the Form ADV to reflect the existence of the order, even after Van instructed her to do so in June 2020. She continued to file the Form ADV in September 2020 without disclosing the Virgin Islands Order. Respondent Maccio asserted that the Promissory Note was not illegal or fraudulent. She blamed others, including Theorem Fund and Richey May, for failure to maintain books and records, when she did not provide the necessary information for the fund administrator and auditor to complete their work. Respondent Maccio's failure to take responsibility for her actions demonstrates that she has not gained any insight into her wrongdoing. Furthermore, respondent Maccio presented no evidence of any changes in business practices that would prevent a reoccurrence of the same misconduct.

22. In light of these factors, to protect the public, Maccio Financial's investment adviser certification must be revoked, and respondent Maccio must be barred from employment, management or control of any investment adviser, or from acting as any officer, director, partner, employee of, or person performing similar functions.

Restitution

23. Section 25254, subdivision (a), provides:

If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under this part a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement

or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the administrative law judge shall have jurisdiction to award additional relief.

24. Complainant seeks restitution in the amount of \$1,612,508.73 for Maccio Investments' investors, whose money respondent Maccio borrowed pursuant to the Promissory Note. Complainant established that as of March 31, 2021, the estimated promissory note principal balance was \$1,342,086.12; interest receivable balance was \$270,422.61; and total promissory note principal and interest receivable was \$1,612,508.73. (Factual Finding 33.) The Promissory note matured on February 1, 2021, but respondent Maccio has not made any payments towards the promissory note principal and interest receivable. (Factual Finding 29 and 33.) Based on the foregoing, complainant established that investors of Maccio Investments suffered damages in the amount of \$1,612,508.73. Therefore, respondent Maccio shall be ordered to pay this sum in restitution to clients whose money respondent Maccio borrowed pursuant to the Promissory Note.

25. Complainant also seeks restitution in the amount of \$1,640,166.36, which represents respondent Maccio's undocumented withdrawals from the Maccio Investments' Interactive Broker account during the period of August 31, 2019, to August 31, 2020. However, as Huang admitted at the hearing, some of this money may have been withdrawn for legitimate purposes such as redemptions by investors or payment for fund and accounting expenses. (Factual Finding 42.) Thus, it was not established that investors of Maccio Investments suffered \$1,640,166.36 in damages, or that respondents were unjustly enriched by the same amount, justifying disgorgement. Therefore, there is no authority under section 25254, subdivision (a), to

order respondents to pay restitution of \$1,640,166.36 for undocumented withdrawals from the Interactive Broker account.

The Cease and Desist Order

26. Complainant established that respondent Maccio borrowed money or securities from clients who are not broker dealers, affiliates of the investment adviser, or a financial institution engaged in the business of loaning money or securities. (Factual Findings 29 to 36; Legal Conclusions 8 to 11.) Therefore, the November 9, 2020 Cease and Desist Order requiring respondents to “desist and refrain from engaging in activities that do not promote fair, equitable or ethical principles by borrowing money or securities from a client unless the client is a broker dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds or securities” shall be upheld. (Ex. 2.)

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ORDER

1. Investment Adviser Certificate, CRD No. 169793, issued to Maccio Financial, LLC, is revoked.
2. Michelle Maccio is barred from any position of employment, management, or control of any investment adviser, broker-dealer, or commodity adviser, and from acting as an officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person.
3. Michelle Maccio shall pay restitution in the amount of \$1,612,508.73 to investors of Maccio Investments LP.
4. The November 9, 2020 Cease and Desist Order is upheld.

DATE:

JI-LAN ZANG
Administrative Law Judge
Office of Administrative Hearings