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NASAA

January 24, 2020

By email to: pubcom@finra.org

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

Re: Regulatory Notice 19-36: Rule to Limit a Registered Person from Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

Dear Ms. Mitchell:

I am writing on behalf of the North American Securities Administrators Association, Inc. ("NASAA")[1] in response to the request for comment by the Financial Industry Regulatory Authority ("FINRA") on *Regulatory Notice 19-36: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer* (the "Request for Comment").[2] Addressing the conflicts of interests that occur when a registered person is named as a beneficiary or is holding a position of trust[3] for a customer is an important step in advancing investor protection. NASAA commends FINRA for its engagement and efforts on issues related to protections for senior investors – an area in which FINRA and NASAA have been able to collaborate successfully.

As proposed, Rule 3241 would allow a registered person to be named a beneficiary or hold a position of trust for a customer where the customer is an immediate family member or when the registered person's firm provides written approval.[4] It is NASAA's position however, that a

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

2 *See* Regulatory Notice 19-36: Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer, FINRA (November 11, 2019) *available at* https://www.finra.org/rules-guidance/notices/19-36.

3 For the purposes of this response, the term "position of trust" is defined as including but not limited to receiving a bequest; acting as power of attorney, trustee, and/or executor; or holding any other position of power or control over a customer's financial affairs.

4 NASAA, like FINRA, recognizes that there are differences in the duties and obligations that arise when a person is designated as a beneficiary versus being named to a position of trust. But serving in either of these

registered person should be prohibited from being named as a beneficiary or appointed to a position of trust by a customer unless the customer is an immediate family member. This prohibition should also apply to family members of the registered person and entities controlled by the registered person.[5] Further, even if the rule were limited to immediate family members, the registered person should be required to seek prior written authorization from the member firm and the firm should be required to implement heightened supervision of the accounts.

Alternatively, if FINRA is inclined to move forward with allowing registered persons to be named as beneficiaries or serve in positions of trust for customers beyond their immediate family members, FINRA should, at a minimum, require the member firm to implement heightened supervision of these accounts. Furthermore, the definition of immediate family members should be narrowed, and FINRA should explicitly state that member firms may choose to limit or prohibit registered persons to be named as a beneficiary or serve in positions of trust.

Justification for the above positions are more fully explained below in response to the specific questions raised by FINRA in the Request for Comment. As such, NASAA encourages FINRA to revise the rule as set forth above.

Responses to Certain Questions in the Request for Comment

Question 1. Are there approaches other than the proposed rule that FINRA should consider?

Yes. FINRA should revise the rule to prohibit registered persons being named as a beneficiary or holding a position of trust for a customer unless they are an immediate family member. Further, the registered person should be required to seek prior written authorization from the member firm and the firm should be required to implement heightened supervision of the accounts. This approach is more consistent with other self-regulatory organizations in North America and aligns with policies and procedures currently in place at some FINRA member firms.[6]

In Canada, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA)[7] limit the instances when a registered person may act in a position of trust for a customer and mandate that protective measures be implemented when registered persons assume these roles. IIROC amended its dealer member rules concerning

capacities creates potential conflicts of interest. Therefore, it is NASAA's position that the methods of addressing them should be the same.

5 The prohibitions recommended in this letter for registered persons should also apply to immediate family members of the registered person and entities controlled by the registered person. This approach would prevent registered persons from attempting to circumvent the prohibitions that would otherwise be applicable to them.

6 *See* FINRA Regulatory Notice 19-36, page 3 noting that "Many, but not all, member firms address these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship."

7 IIROC is the national self-regulatory organization which oversees all investment dealers and trading activity on debt and equity marketplaces in Canada. The MFDA is a national self-regulatory organization for the distribution side of the Canadian mutual fund industry.

personal financial dealings and outside business activities in 2017. As amended, the rules prohibit approved persons of a dealer member from directly or indirectly engaging in any personal financial dealings with customers. Under the rules there is a prohibition on acting as a power of attorney, trustee, executor, or otherwise having full or partial control or authority over the financial affairs of a customer,[8] unless the customer is a related person under the *Income Tax Act* (Canada).[9] The prohibition is premised on the fact that that these are personal financial dealings and any personal financial dealings with customers creates an unacceptable conflict of interest between the dealer member employee and the customer. The rules further provide that when an approved person is appointed by a family member, they must receive prior approval from the dealer member.

Similarly, the MFDA amended its rules in 2017 to prohibit a member or approved person from having full or partial control or authority over the financial affairs of a customer, unless the customer was a related person as defined by the *Income Tax Act* (Canada).[10] This includes accepting or acting upon a power of attorney from a customer, accepting an appointment to act as a trustee or executor of a customer, or acting as a trustee or executor in respect of the estate of a customer. The MFDA also mandates that an approved person notify the member of an appointment and obtain written member approval prior to accepting or acting upon the control or authority.

A rule limiting registered persons being named as a beneficiary or holding a position of trust to immediate family members only, with prior member firm authorization and heightened supervision of the accounts, would provide the investor protections necessary to address the conflicts of interest identified in the Request for Comment.

Question 2. Should the scope of the proposed rule be expanded to encompass other requirements?

Yes. The scope of the proposed rule should be expanded to address the prohibitions and requirements discussed below.

A. Prior Authorization from the Member Firm

If the rule permits a registered person to be named a beneficiary or to act in a position of trust for a customer, regardless of whether the customer is an immediate family member or not, the rule should require that in all circumstances the registered person seek prior written approval from the member firm. The rule should also provide guidance to the member firm regarding the information that should be reviewed before approving such requests. At a minimum the registered

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8 In the Canadian context the "registered individuals" acting as a dealing representative or an advising representative would deal with or advise clients.

9 IIROC Rule 42 on general Conflicts of Interest would likely, in most instances, prevent an IIROC member from being permitted to be named a beneficiary from a client. Most IIROC member firms would have policies and procedures prohibiting such appointment due to the inherent conflict, however there may be circumstances that warrant an exception in firm policies and procedures.

10 MFDA Rule 2.1.4 would suggest being named a beneficiary from a client would create an unacceptable conflict of interest.

person should be required to disclose:

- relevant information about the customer, including the length of time the registered person has known the customer;
- the nature of any special or familiar relationship between the registered person and the customer;
- the circumstances precipitating any appointment or designation, or any information that might make the customer vulnerable; and
- identification of the role(s) in which the registered person is being appointed.

In addition, the rule should provide guidance to the member firm when reviewing the written requests, and require that the process of the approval be documented to include:

- the steps that the member firm undertook to assess the risk prior to the registered person being approved;
- the steps that the member firm will take to minimize the conflict of interest;
- how the member firm communicated to the customer the risk created by the appointment so that the customer appreciates the risk; and
- an outline of the supervisory measures that will be taken by the member firm.

B. Heightened Scrutiny of Approved Accounts

As written, the rule does not require member firm approval for family members and only requires member firms to "reasonably supervise" the registered person's compliance with conditions or limitations placed on the account. This rule is insufficient as there are inherent conflicts of interest present even where the customer is an immediate family member of the registered person. The member firm must closely monitor the account even where formal conditions are not imposed by the firm. For instance, firms could treat these relationships like heightened supervision situations and place additional review on trades and transactions in the account and withdrawals from the account to make sure the registered person is making suitable recommendations and not taking advantage of the position of trust.

Heightened supervision of any related accounts is appropriate as a guard against abuse of the power and trust that come with these relationships, including where the registered person and customer have a familial relationship. The National Council on Aging reports that in almost 60% of elder abuse and neglect incidents, the perpetrator is a family member with two-thirds of the perpetrators being adult children or spouses.[11]

In the circumstances where a senior investor has become isolated from family or friends, a registered person may think it is appropriate to step in to fill the gap. While these relationships can start with good intentions, they have the potential to become exploitative situations. In more malevolent cases, a registered person may "groom" a customer with the goal of exploitation. To

[11] *See* https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/

illustrate this reality, attached as Appendix "A"[12], is a state sentencing memorandum from a case where a registered representative from Maine stole millions of dollars from his widowed senior customer and her disabled adult son. He was able to perpetrate this abuse and to gain positions of trust by exploiting a long-standing personal relationship (albeit not as an immediate family member).

Additionally, responsible registered persons should be familiar with resources available to customers who may be isolated or estranged from family and friends. Registered persons should become aware and be knowledgeable of the existing network of resources available to assist customers such as the local adult protective services, non-governmental organizations that specialize in providing services and support for the elderly, local bar associations and legal aid services, and similar agencies that may be able to assist when a customer is unable to turn to friends or family to assist with financial affairs.

C. Modification of Account Applications to Assure Customer Awareness

FINRA should require member firms to advise customers in the account application of the restrictions applicable to naming a registered person, an immediate family member of the registered person, or an entity controlled by the registered person as a beneficiary or to a similar position of trust for the customer. While a registered person has no control as to who a customer ultimately designates when the customer does not consult the member firm or representative, such communication at account opening would ensure customers are fully aware of the potential problems and conflicts created when designating their broker as beneficiary or appointing them to serve in a position of trust. In addition, the member firm should ask customers about existing executor, trustee, and power of attorney arrangements, and similar positions of trust, and whether the customer named the registered person as a beneficiary. The member firm should ask this during account opening and periodically thereafter. Such an inquiry could be included in regular customer profile updates.

D. Interview Customers Outside the Presence of the Registered Person

To the extent practicable, when reviewing a request to approve a registered person to be named as a beneficiary or to act in a position of trust, member firms should be required to interview the customer outside the presence of the registered person. This should be a practice in all instances, whether the registered person is assuming the role for a non-family member or a family member. This practice will ensure that the request to appoint the registered person is well informed and has not been coerced. Where it is not possible to interview the customer, the member firm should be required, at the very least, to verify that the customer indeed directed the appointment of their own volition and did not feel pressure by the registered person to appoint the registered person to the position of trust.

12 This memorandum was also appended to NASAA's comment letter in response to FINRA Regulatory Notice 19-27.

E. Any Member Firm May Adopt Policies to Prohibit Members from These Roles

It should be made clear that any member may adopt policies and procedures that prohibit their members from acting in these roles for non-family members, even if the FINRA rule permits the registered person to be named a beneficiary or to act in a position of trust for a customer.

F. The Definition of "Immediate Family Member" Should be Narrowed

FINRA should revise and narrow the definition of "immediate family member" to prevent abuse of the following language: "any other person who the registered person financially supports, directly or indirectly, to a material extent." NASAA recommends that FINRA require that any such person "who the registered person financially supports" must reside in the same household as the registered person.

G. The Prohibition Should Apply Where the Registered Person is Unaware of the Appointment

NASAA would support a rule that prohibits registered persons from being named a beneficiary or to act in a position of trust for a customer even in situations where a registered person is named without his or her knowledge. NASAA does not, however, object to a rule that would permit registered persons to be named beneficiaries of family-member customers where the registered person was unaware of the designation.

In the case where a registered person is aware of the intent of a non-related customer to appoint them to a position of trust, the registered person should decline such designation. Where the registered person becomes aware of the appointment after the customer is incapacitated or has passed away, the registered person should decline the appointment in favor of an alternate person. If there is no alternate person immediately available to assume the position, the rule should permit the registered person who has been named to the position of trust to accept the appointment on an interim basis if the customer's account is temporarily transferred to a different registered person while the original registered person on the account obtains a replacement to serve in that position. Obtaining a replacement may require the registered person to seek the assistance of the court or local adult protective services agency. In situations where there is no one else to be placed in the position of trust or when the registered person would be authorized to act in a position of trust, the member firm should be required to permanently assign the customer account to another representative.

Registered persons who were previously named to positions of trust prior to the implementation of this rule should be required to take steps to unwind these relationships, to the extent possible.

In the case where a registered person is aware of the intent of a non-related customer designating them as a beneficiary or appointing them to a position of trust, the registered person should decline such designation. Where the registered person becomes aware of being designated beneficiary by a customer only after the death of the customer the registered person should be required to immediately report the designation to their member firm who can determine whether there is a conflict of interest and how to properly manage the conflict of interest. Member firms should have written supervisory procedures addressing how the firm will handle these situations and address all conflicts of interest.

H. Prohibit the Registered Person, Their Immediate Family, and Controlled Entities From These Roles

The rule should prohibit the registered person's immediate family members and entities controlled by the registered person from being named beneficiary or to act in a similar position of trust for the registered person's customer. While Supplementary Material .06 states that the registered person instructing the customer to name another person to be named a beneficiary or receive a bequest is inconsistent with the rule, it does not go far enough. NASAA notes that in many cases the practice of allowing representatives to act in these capacities is already prohibited by member firms. In some cases, because the practice is prohibited by the member firm, the registered person may have an immediate family member, or an entity controlled by the registered person to be named while the registered person continues to direct the customer's affairs.

Question 7. Is the time period in the definition of "customer" for purposes of the proposed rule (i.e., a customer who in the previous six months had a securities account assigned to the registered person) a sufficient period to mitigate potential conflicts of interest and to deter circumvention of the rule?

A lookback period of 12 months is more appropriate than the 6-month period proposed in the rule as the longer look back period would help prevent circumvention of the rule.

Question 8. Should the proposed rule apply to beneficiary status and positions of trust that were entered into prior to the existence of a broker-customer relationship?

The rule should include language applicable to pre-existing positions. Supplementary Material .05 discusses pre-existing positions; however, including language in the rule is the appropriate way to address this important circumstance. The conflicts noted above are no less significant or concerning because the position of trust was established prior to the brokerage relationship.

NASAA is of the view that anytime a registered person is to be named as a beneficiary or to act in a position of trust by a customer, the relationship should be screened. There should not be a "grandfathering" clause for pre-existing positions. Ultimate concern should be for customers' well-being and ensuring that conflicts of interest are avoided. Moreover, member firms should ask about the existence of such relationships during the hiring process so that the relationship can be screened before the individual is hired.

Question 9. Should the proposed rule require a specific form of written notice for requesting approval by a registered person to be named a beneficiary or to a position of trust?

NASAA supports requiring a specific form of written notice for requesting approval. However, absent a specific form, guidance should be provided regarding the information the registered person should provide the member firm as discussed above.

Conclusion

NASAA supports FINRA's ongoing efforts to protect senior investors and appreciates the opportunity to comment. It is NASAA's position that FINRA can take further steps to assure appropriate protections are in place to address the conflicts of interest presented by a registered person being named a beneficiary of a customer, or to hold a position of trust for a customer.

If you have questions about these comments, please contact Joseph Brady, NASAA's Executive Director.

Sincerely,

Christopher Gerold
NASAA President
Chief, New Jersey Bureau of Securities

Appendix A

STATE OF MAINE
PENOBSCOT, ss

UNIFIED CRIMINAL DOCKET
DOCKET NO. CR-17-707

STATE OF MAINE	)	
V.	)	STATE'S SENTENCING MEMO
ROBERT KENNETH LINDELL JR. (AKA R. KENNETH LINDELL OR R. KENNETH LINDELL JR.	)	

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

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

INTRODUCTION

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

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

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

PROCEDURAL AND FACTUAL BACKGROUND

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

Trial Evidence

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

a. Phyllis Poor

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

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

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

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

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

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

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

b. Gianna Lewis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SENTENCING ANALYSIS

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

Hewey Analysis

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

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

a. Basic Sentence

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

i. Thefts

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

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

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

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

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

ii. Income Tax Evasion

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

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

b. Maximum Sentence

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

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

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

ii) Mr. Lindell's bail violation;

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

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

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

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

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

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

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

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

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

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

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

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

c. Final Sentence

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

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

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

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

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

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

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

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

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

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

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

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

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

In terms of a breakdown, the restitution consists of:

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

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

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

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

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

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

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

COMPARABLE SENTENCES

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted.

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