BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Michael Joseph Clarke Jersey City, NJ, Respondent.	DECISION Complaint No. 2016050938301 Dated: September 17, 2020

Registered representative converted funds, made material misrepresentations, and executed bad checks and failed electronic transfers. Held, findings and sanctions modified in part.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Melissa DePetris, Esq., Colleen J. O'Loughlin, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Brian L. Grossman, Esq.

Decision

Michael Joseph Clarke appeals a May 8, 2019 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Clarke converted funds, made material misrepresentations, and wrote 46 bad checks and authorized 14 electronic transfers that failed to clear because of insufficient funds, in violation of FINRA Rule 2010. For his misconduct, the Hearing Panel imposed on Clarke two separate bars in all capacities and ordered him to pay $612,400 in restitution.

The majority of the underlying facts are undisputed. While associated with various broker-dealers, Clarke ran an outside business brokering events tickets. Clarke offered his securities industry colleagues and other individuals the chance to participate in his ticket business. Clarke claimed to have many contacts willing to sell him various sports and events tickets at a discounted price, and buyers willing to repurchase the tickets at a premium. Clarke did not have the funds to purchase the tickets, so he proposed that others front the money to buy the tickets and that he would repay them the full amount plus a share of the profits after the resale of the tickets. In fact, Clarke never repaid in full the individuals who fronted him the money for the ticket sales, and instead he used the funds to pay personal expenses while repeatedly offering excuses for his nonpayment.

After an independent review of the record, we modify, in part, the Hearing Panel's liability findings and sanctions. We affirm the Hearing Panel's liability findings with respect Clarke's conversion and material misrepresentations and modify the findings with respect to his bad checks and failed electronic transfers. We also modify the sanctions.

I. Facts

A. Background

Clarke entered the securities industry in 1982 and has been registered as a municipal securities representative for nearly 40 years. From February 2008 to February 2010, Clarke associated with Whitaker Securities LLC ("Whitaker Securities"). From November 2010 to September 2015, Clarke associated with Tradition Asiel Securities Inc. ("Tradition"). From October 2015 to July 2016, Clarke associated with MARV Capital Inc. ("MARV Capital"). Clarke is currently associated with Avatar Capital Group, LLC ("Avatar") and remains registered as a municipal securities representative.

B. Clarke's Ticket Business

Since at least 2006, Clarke engaged in brokering and reselling tickets for sporting events, concerts, and other events by acquiring tickets and reselling them for a profit. He told colleagues about his outside business and often disclosed it to employers. Clarke claimed to have contacts with various individuals and venues in the New York area who supplied him with tickets to events. He also touted contacts within the securities industry interested in purchasing those tickets for entertaining clients, personal use, or for resale. Clarke often did not have the money to purchase the tickets, so he borrowed money from others, including from his coworkers at various FINRA firms, telling them that he already had buyers lined up to buy the tickets.

In 2008 when he was associated with Whitaker Securities, Clarke borrowed $64,000 from the firm's CEO for the purpose of buying and reselling World Series tickets. Clarke said he was going to use the borrowed money to buy the tickets and then would resell them at a profit, from which he would pay interest to the firm's CEO on the advanced money. Clarke signed promissory notes agreeing to repay the money in full, plus interest, by October 15, 2008. On October 10, 2008, Clarke gave the CEO a check for $25,000, along with a promise to pay the remainder of the loan in a few days. The check bounced, and Clarke attempted no other payment until November 2008, when he paid the CEO $10,000. Clarke continued to promise to pay the remaining money he owed but never did. At one point, Clarke gave the CEO a blank check as a sign of "good faith." In February 2009, Clarke paid another $36,000, leaving a balance of $18,000 of the principal. Clarke never paid the remaining principal or any interest.

Clarke's colleague at Whitaker Securities, BL, also gave Clarke at least $35,000 to purchase and resell basketball and Super Bowl tickets, for which Clarke told him he would give him a portion of the profits. Clarke then gave BL numerous checks that bounced. Eventually, Clarke repaid a portion of the $35,000 debt and never paid BL any profit.

In February 2010, Whitaker Securities terminated Clarke. On his Uniform Termination Notice for Securities Industry Registration ("Form U5"), the firm disclosed that it terminated Clarke after "review[ing] allegations that [Clarke] had not repaid all of the monies he borrowed from non-customers to conduct his outside business, may have used such borrowed funds for other non-disclosed purposes, and may have issued checks for repayment . . . on a closed account." The firm concluded there was "reason to believe the allegations to be true."

Around the time of his termination from Whitaker Securities, the Kings County District Attorney's Office investigated Clarke for similar misconduct. The investigation focused on transactions in which three individuals gave Clarke $63,100 after Clarke represented to them that the money would be used for investments arranged by Clarke in his capacity as a ticket broker. That investigation led to an April 2011 deferred prosecution agreement, in which the prosecutor agreed not to bring charges against Clarke if he repaid the three individuals the full amount of the principal advanced to him. According to the District Attorney, Clarke's representations about his ticket reselling "may have been false and/or fraudulent when he made them, in that he lacked the capacity to arrange and execute the supposed deals."

Clarke associated with Tradition in November 2010. At that time, Clarke's Tradition supervisor directed him to cease his outside ticket brokering business. Despite this directive, Clarke continued borrowing money from coworkers and industry colleagues, purportedly to or buy sports and events tickets and resell them at a profit. By February 2015, Clarke owed his Tradition colleague, PO, more than $300,000. PO threatened Clarke that, if Clarke failed to repay him, he would to file an action against Clarke and report Clarke to FINRA and the Internal Revenue Service for unreported income. By the middle of 2015, Clarke also owed $169,800 to another Tradition colleague, JG. He owed money to others as well.[1] In September 2015, Clarke left Tradition to associate with MARV Capital, leaving outstanding debts to his Tradition colleagues and others.

C. Clarke Borrowed Money from MARV Capital Partners and Their Business Associate

Clarke associated with MARV Capital in October 2015. MARV Capital is a small broker-dealer operated by two partners, Maneesh Awasthi and Virupaksha Raparthi. Almost immediately, Clarke began soliciting and working to persuade his new coworkers to invest in his purported ticket business. As he had done previously, Clarke represented that he would use their

[1] Clarke also borrowed money from JM, a friend and securities broker, on at least two occasions. Clarke told JM that he would use the money from one loan to purchase tickets and that he would use the money from the second loan to pay for his son's college tuition and health insurance. With respect to the latter loan, Clarke, in fact, used the money from JM to repay another individual to whom he was indebted. Clarke did not repay JM on time or in full. In June 2016, Clarke gave JM a check for $26,000, which bounced. Clarke later gave JM two other checks, but each time JM went to deposit them, the bank teller warned him that the account had insufficient funds. JM therefore never deposited the checks and never was fully repaid. At the hearing, JM said he was "pretty confident" that Clarke's debts to him were settled and JM wrote off the remaining $1,000 or $2,000 because Clarke was a friend.

money to buy events tickets, resell the tickets for a substantial profit, and repay the money plus a share of the profits. Clarke made these representations to Awasthi, Raparthi, and AG, a MARV advisory client and business associate of Awasthi and Raparthi. As a result of these representations, Awasthi, Raparthi, and AG collectively invested $637,400 with Clarke.

Specifically, in the latter part of October 2015, Awasthi loaned Clarke $61,500 to purchase tickets for resale. At the time, Clarke represented to Awasthi that Clarke had contacts that would sell him tickets at low prices and that he already had buyers lined up to purchase the tickets. As a result of these representations, Awasthi believed the loan to be virtually riskless. Clarke promised to return Awasthi's money, plus $10,000 in interest that would be paid from the profits Clarke generated by reselling the tickets. Awasthi advanced the money to Clarke in two payments on October 23 and 26, 2015. Their initial agreement was oral, but after Clarke missed their agreed upon repayment deadline, they memorialized the terms in writing at Awasthi's request.

Around this time, Clarke also borrowed money from Raparthi and AG. As with Awasthi, Clarke told Raparthi that he already had buyers lined up to purchase the tickets and promised to return Raparthi's money along with interest. Based on these assurances, Raparthi loaned Clarke $218,600 to purchase tickets for resale between October and November 2015.[2]

Raparthi told AG, a MARV advisory client and business associate of Awasthi and Raparthi, about Clarke's ticket brokering business. AG then spoke directly with Clarke, who assured him that he already had buyers lined up, that the investment was low risk, and that Clarke would return the original investment plus interest. Based on these representations, AG loaned Clarke $45,300.[3] Clarke promised to repay Raparthi and AG their principal along with $33,590 in interest to Raparthi and $5,700 in interest to AG by the end of November 2015. Their initial agreement was oral, but after Clarke missed their agreed upon repayment deadline, they memorialized the terms in a "February 1, 2016 Letter Agreement."

Despite Clarke's representations to Awasthi, Raparthi, and AG that he would use their money to purchase tickets for resale, Clarke used the money for other purposes. Prior to receiving the funds from Awasthi, Raparthi, and AG, Clarke's checking account was overdrawn. After receiving the funds into his account, Clarke began spending it. Immediately after receiving the money from Awasthi, Clarke wired $130,000 from his account to his former Tradition colleague, PO, to whom he owed more than $300,000. Days later, Clarke transferred $43,000 to another Tradition colleague, JG. He paid another creditor $13,000. Clarke withdrew more than $20,000 in cash and transferred $6,700 to his daughter. He also used the money for other personal expenditures, including restaurants, liquor stores, groceries, and personal items. At the hearing, Clarke admitted that he used some of the money he received from Awasthi, Raparthi, and AG for personal expenses.

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[2] Raparthi loaned the money together with his wife and two entities he controlled.

[3] Raparthi originally advanced AG's investment to Clarke, and AG paid back Raparthi.

D. Clarke Borrowed an Additional $312,000 from Raparthi for US Open Seat Licenses

Shortly after Raparthi loaned Clarke $218,600, but before the loan and interest came due, Clarke proposed another ticket venture to Raparthi. Clarke represented that he had an opportunity to acquire lifetime rights to multiple permanent seat licenses for the US Open Tennis Championship. Clarke explained that the holder of the licenses could acquire the entire season's tickets at face value and then resell the tickets for substantial profits because of "massive demand." Clarke claimed to know a family interested in selling the seat licenses because of financial hardship, and he offered Raparthi the "rarely" available opportunity to purchase some of the rights to six available seat licenses.

Clarke claimed that he would invest his own money to buy three of the licenses and proposed that Raparthi buy the other three. Clarke, however, then claimed he was short of funds and asked Raparthi to advance Clarke's share. Based on Clarke's representations, Raparthi wired $312,000 to Clarke's personal checking account. Clarke told Raparthi that the transfer of the licenses would take four to six weeks, but he assured Raparthi that the funds would be placed in an escrow account with Clarke's attorney until the transaction closed.

Clarke never put Raparthi's funds into escrow, and Clarke did not use the funds to purchase US Open licenses or tickets. Rather, on the same day that Raparthi wired him the money, Clarke wired $255,000 to PO.

E. Clarke's Excuses for Failing to Repay Awasthi, Raparthi, and AG

Clarke did not repay the loans he took from Awasthi, Raparthi, and AG. Instead, Clarke offered a litany of excuses for his nonpayment and made numerous false promises about repayment in the future. He blamed his failure to pay the loans on a buyer's check not arriving as expected, his business partner depositing funds in the wrong account, and a problem with the mail. At one point, Clarke claimed he was expecting a large payment from someone in Florida that would enable him to repay Awasthi, Raparthi, and AG. Clarke claimed in a text message that he was in Florida getting the money, when, in fact, he was still at home in New York.

Clarke also became difficult to contact. For example, he claimed in text messages he was unavailable because he was traveling to California, when in reality he was still in New York. He also claimed various family emergencies prevented him from communicating.

By January 2016, Awasthi had become increasingly concerned about Clarke's failure to perform and wanted to have Clarke's promise to repay the loan in writing. Clarke agreed and signed documents acknowledging the loan amounts and dates by which Clarke had promised to repay. Clarke had promised a first payment by December 4, 2015, and a second payment by January 30, 2016.[4] Clarke and Awasthi signed the undated document shortly before January 30, 2016. Clarke also gave Awasthi a blank check in an apparent effort to reassure him. After

[4] Despite signing the document in January 2016, Clarke acknowledged that he had promised a first payment by December 4, 2015, a month prior.

failing to meet the repayment deadlines, Clarke promised Awasthi that repayment would happen by February 16, 2016. Awasthi gave Clarke an extra month and agreed to repayment by March 16, 2016. Clarke and Awasthi memorialized the repayment terms in another written agreement.

The February 1, 2016 Letter Agreement, which Clarke executed to memorialize his agreement with Raparthi and AG, stated that Clarke would repay Raparthi and AG all of their principal and interest by early February 2016.[5] The agreement also documented that Raparthi had advanced $312,000 to Clarke—$210,00 for three US Open seat licenses and $102,000 as a personal loan to Clarke to be repaid by February 12, 2016. Clarke also in writing "affirm[ed] that the $312,000 has been deposited in a mutual escrow [attorney trust] account with [an] attorney." Clarke knew that the money had not been deposited in an escrow fund.

Clarke made a $5,000 interest payment to AG in late January, a $10,000 interest payment to Awasthi in February, and a $34,290 interest payment to Raparthi in February.[6] These payments represented Clarke's promised interest payments. Clarke nevertheless paid none of the principal owed to Awasthi ($61,500), Raparthi ($218,600), or AG ($45,300). Clarke's promised payment deadlines came and went without further payment.

In April 2016, Clarke wrote bad checks to Raparthi and AG for their outstanding principal balances of $218,600 and $45,300, respectively. Clarke's bank account, however, did not have sufficient funds to cover either check, and the $218,600 check written to Raparthi was returned. Later that month, Clarke authorized MARV Capital to withhold $25,000 of his commissions to reduce the amounts he owed to Raparthi, Awasthi, and AG. Awasthi, Raparthi, and AG decided to split the money evenly, with each person receiving $8,333.

By July 2016, Raparthi and Awasthi contemplated terminating Clarke from MARV Capital. Before he was fired, Clarke resigned effective immediately and associated with Avatar. Clarke never paid Awasthi's $53,167 loan principal; AG's $36,967 loan principal; or Raparthi's $210,266 loan principal or the $312,000 that Raparthi advanced to Clarke for the US Open seat licenses, totaling $612,400.

F. Clarke Continues His Ticket Brokering Business After Leaving MARV

When Clarke associated with Avatar in July 2016, the firm required Clarke to sign a document prohibiting him from conducting any business with any other employee without prior written approval. Despite this agreement, Clarke continued his ticket brokering business with his new Avatar colleagues.

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[5] Raparthi drafted the agreement, and he, his wife, AG, and Clarke signed it. Raparthi testified that, in his rush to complete the document, he inadvertently omitted AG's investment with Clarke and the principal and interest owed to AG. AG nonetheless executed the agreement.

[6] The $34,290 interest payment to Raparthi was comprised of the interest owed to Raparthi ($33,590) and the remaining balance of $700 owed to AG as interest. After receiving the interest payment, Raparthi gave AG the $700.

On Friday, September 9, 2016, Clarke asked his subordinate at Avatar to loan him $5,000 to purchase tickets for the US Open finals. He claimed that he already had a buyer, but needed the funds that day to purchase the tickets. Clarke told his colleague that he would repay him the following Monday along with "some kind of return for being part of the deal."

Based on these assurances, Clarke's colleague deposited $5,000 per Clarke's instructions. Clarke did not repay his Avatar Capital colleague the following Monday as promised. Approximately one week later, Clarke gave the colleague a check for $7,000.[7] When the colleague deposited the check, however, it was returned for insufficient funds. Clarke claimed the bank had made a mistake and said the bank would send a bank check. When the colleague advised that he had not received anything from the bank and needed the money to pay his property taxes and mortgage, Clarke said he would electronically transfer the money the next day. The next day, Clarke told his colleague that he had transferred the funds, but no money arrived in the colleague's account. Days later, Clarke drove to his bank with the colleague to pick up a bank check. Clarke asked his colleague to stay in the car because he could not park. Clarke later came out of the bank claiming the check was not ready.

On October 19, 2016, Clarke gave his Avatar colleague another check for $7,600. Clarke's colleague tried multiple times to use these funds to open a new account, but the bank told him the account on which the check was written lacked sufficient funds. Clarke again claimed that the bank made an error. Clarke never repaid the loan.

H. Clarke Executed Bad Checks and Failed Electronic Transfers

As described above, Clarke at times wrote his colleagues checks in purported satisfaction of his debts, but without sufficient funds in his account. This was part of a larger pattern for Clarke. Between February 2013 and September 2016, Clarke wrote at least 46 checks and authorized 14 electronic transfers that failed to clear because of insufficient funds. Clarke's bad checks and failed electronic transfers were drawn on four different checking accounts at different banks.

II. Procedural History

On June 15, 2018, Enforcement filed a three-cause complaint against Clarke. The complaint alleged that Clarke converted funds from Awasthi, Raparthi, and AG and made material misrepresentations and false statements to induce them to provide him funds, in violation of FINRA Rule 2010. The complaint also alleged that Clarke wrote, tendered, or authorized 60 failed transfers through bounced checks and failed electronic payments. After a four-day hearing, the Hearing Panel issued its decision on May 8, 2019, finding that Clarke engaged in the misconduct as alleged. For Clarke's conversion and material misrepresentations, the Hearing Panel imposed a unitary bar on Clarke. The Hearing Panel imposed a second bar on

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[7] The additional $2,000 represented the colleague's return on his investment and reimbursement for tickets the colleague previously purchased on his credit card at Clarke's request.

Clarke for the bad checks and failed electronic transfers. Clarke appealed the Hearing Panel's decision.

III. Discussion

The Hearing Panel found that Clarke engaged in unethical conduct by converting $612,400 advanced to him for the purpose of purchasing and reselling tickets and the purchase of US Open licenses, making misrepresentations and false statements related to his conversion, and causing at least 60 bounced checks and failed electronic transfers, in violation of FINRA Rule 2010. After considering the record, we affirm the Hearing Panel's liability findings with respect Clarke's conversion and material misrepresentations and modify the findings with respect to his bad checks and failed electronic transfers.

A. Credibility Findings by the Hearing Panel

The Hearing Panel found that Clarke was not a credible witness. The Hearing Panel's "[credibility] determinations, based on hearing the witness's testimony and observing demeanor, are entitled to considerable deference." *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *30 n.45 (Mar. 31, 2016), *aff'd sub nom., Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

The Hearing Panel specifically found Clarke's claimed intention of using his colleagues' money for ticket resales was "false." Noting Clarke's lack of meaningful records for his supposed ticket business and his lack of awareness of any money he made from ticket resales, the Hearing Panel concluded that Clarke intended to use the borrowed funds in large part to repay prior creditors and fund his personal expenditures. The Hearing Panel rejected Clarke's excuses for his failure to pay Awasthi, Raparthi, and AG, dismissing them as "excuses lacking credibility" and "false promises about repayment in the future." The Hearing Panel also rejected Clarke's claim that he sent the money from Raparthi for the US Open transaction to PO because PO was helping with the transaction. Rather, the Hearing Panel concluded that PO "knew nothing about any US Open seat licenses" and that "[i]n fact, Clarke was repaying previous loans from [PO]." Finally, the Hearing Panel did not credit Clarke's testimony that he did not pay attention to how much money he had in his bank accounts and thus did not realize he was bouncing checks and authorizing payments that failed to clear due to insufficient funds. The Hearing Panel concluded that "the frequency, volume, and duration of the failed payments over the relevant period establish that Clarke deliberately passed bad checks and caused the failed electronic transfers."

We defer to the Hearing Panel's credibility determinations. They are supported by the record, which contains no substantial evidence to the contrary. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1161-62 & n.6 (2002) (explaining that a Hearing Panel's credibility determination is entitled to deference absent substantial evidence to the contrary).

B. Clarke Violated FINRA Rule 2010 by Converting Funds

The Hearing Panel found that Clarke converted funds from Awasthi, Raparthi, and AG. We affirm these findings.

FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[8] The rule is "'designed to enable [FINRA] to regulate the ethical standards of its members' and 'encompass[es] business related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.'" *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *10 (Mar. 29, 2016) (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996)). Conversion, which is broadly defined as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it," is conduct that violates FINRA Rule 2010. *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012) (quoting *FINRA Sanction Guidelines* 38 (2007)). Conversion violates FINRA Rule 2010, even if the person from whom the funds are converted is not a customer of the firm with which the respondent is or was associated. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23 (Sept. 30, 2016).

Awasthi, Raparthi, and AG entrusted Clarke with money based on his representations that it would be used for ticket brokering and securing US Open seat licenses. Despite Clarke's representations about the use of the funds, Clarke intentionally used $612,400 he received for his personal benefit, including repaying other creditors and covering personal expenses, without Awasthi's, Raparthi's, and AG's knowledge. Clarke's unauthorized use of the funds constitutes conversion. His conduct defied the high standards of commercial honor and just and equitable principles of trade by which all securities industry professionals must abide and constituted a conversion of funds that violated FINRA Rule 2010. *See, e.g.*, *id.* (respondent's unauthorized use of funds constituted conversion); *Grivas*, 2016 SEC LEXIS 1173, at *11 (finding that respondent's unauthorized withdrawal from a fund's operating account constituted conversion); *Mullins*, 2012 SEC LEXIS 464, at *42 (finding that the respondent's personal use of gift certificates and wine, purchased with the funds of a charitable foundation, constituted conversion and violated just and equitable principles of trade).

Clarke stipulated to most of the facts necessary to establish that he converted Awasthi's, Raparthi's, and AG's funds.[9] Clarke argues, however, that he did not violate FINRA Rule 2010 because his colleagues "willingly" loaned him the money and he did "not take any of [it] without [the lenders'] authority." But it is well established that if a person gives a registered representative money for a specific purpose, the representative's use of that money for a different, unauthorized purpose constitutes conversion. *See Akindemowo*, 2016 SEC LEXIS

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

[9] The parties stipulated that Awasthi, Raparthi, and AG loaned Clarke money for him to purchase events tickets for resale and lifetime premium tickets to the US Open tennis tournament. In actuality, and as is well documented by the record, Clarke did not offer to buy lifetime premium tickets to the US Open but rather lifetime rights to several permanent seat licenses for the US Open, which would give the seat license holder the right to purchase season tickets at face value. This discrepancy does not affect our findings.

3769, at *23 (respondent converted money willingly given to him for investment purposes by using it to pay personal expenses); *Dep't of Enforcement v. Casas*, Complaint No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *19-24 (FINRA NAC Jan. 13, 2017) (finding conversion where respondent solicited and obtained money claiming it would be used as seed capital for his outside business but instead used the funds for personal expenses and to repay a loan). Here, the parties stipulated that Clarke used the funds lent to him by Awasthi for the purchase of tickets for resale to pay PO, to whom Clarke was indebted more than $300,000. The parties also stipulated that Clarke did not purchase US Open tickets. In fact, the record contains no evidence that Clarke ever bought any tickets for resale with the funds he received from Awasthi, Raparthi, and AG.

That Clarke's transactions involved colleagues, rather than customers, is not relevant to our determination that Clarke violated FINRA Rule 2010 for his conversion from them. *See Manoff*, 55 S.E.C. at 1161 (finding that respondent violated FINRA Rule 2010 predecessor rule by engaging in the unauthorized use of his colleague's credit card numbers); *Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *18 (FINRA NAC Dec. 29, 2015) ("Rule 2010 prohibits conversion even when the victim is not a customer of the firm with whom the registered representative is associated."), *aff'd*, 2016 SEC LEXIS 3769, at *1.

Clarke also argues that he cannot be held liable for conversion because he did not intend to keep the money indefinitely. Even if Clarke intended to repay Awasthi, Raparthi, and AG, he intentionally used the money for an unauthorized purpose. That Clarke signed promissory notes agreeing to repay the money, or that he had paid back some of funds, does not negate Clarke's conversion. Moreover, the Hearing Panel correctly found, and the evidence overwhelmingly shows, that Clarke's claimed intention of using his colleagues' money to purchase tickets for resale was false. As soon as he received the funds, Clarke immediately used the money to pay personal expenses and repay debts to other lenders instead of purchasing tickets.[10] His lack of business records to support his ticket brokering purchases and his pattern of misconduct collectively evidence his deliberate intent. *See Peter W. Schellenbach*, 50 S.E.C. 798, 801 (1991) (finding that respondent's pattern of misconduct evidenced deliberate intent); *Dep't of Enforcement v. Butler*, Complaint No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *24-25 (FINRA NAC Sept. 25, 2015) (finding that respondent's failure to keep any business records to show use of funds was authorized was sufficient to show conversion).

Clarke contends that "regardless of whether the transaction was structured as a loan or an investment," conversion is not an appropriate cause of action because "[a] lender-borrower agreement is governed by contract law."[11] Of course, the question of whether individuals

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[10] Clarke also asserts that he did not convert the funds because he intended to repay the money but was "forced to take [it] following Raparthi and Awasthi improperly withholding his commissions." His argument is neither legally nor factually supportable.

[11] We agree with the Hearing Panel that Awasthi's, Raparthi's, and AG's transactions were loans, and these loans were also investments, from which they expected to receive interest or profit derived from Clarke's business efforts. It was not necessary, as Clarke claims, for the Hearing Panel, or the NAC, to conclude that the loans are securities in order to find conversion.

provided Clarke with funds as a loan or an investment is irrelevant. Moreover, this is a FINRA disciplinary proceeding, not a private right of action to vindicate private rights.[12] *See Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *28-29 (FINRA NAC Feb. 24, 2011) (collecting cases), *aff'd*, 2012 SEC LEXIS 464. And "FINRA has a compelling interest in regulating the conduct of its associated persons that threatens the integrity of the industry such as the misconduct that occurred in this case." *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *20. Conversion is the appropriate cause of action here because Clarke used the funds he received from Awasthi, Raparthi, and AG for an unauthorized purpose.

The record in this case conclusively shows that Clarke obtained $612,400 in funds from Awasthi, Raparthi, and AG based on Clarke's false representations that the funds would be used for Clarke's ticket brokering business and to purchase US Open seat licenses. Instead of using the funds for those purposes, Clarke converted the funds for his own use. Accordingly, we affirm the Hearing Panel's findings that Clarke violated FINRA Rule 2010.[13]

C. Clarke Violated FINRA Rule 2010 by Making Material Misrepresentations

The Hearing Panel found Clarke made material misrepresentations to Awasthi, Raparthi, and AG about his use of their funds to obtain money, in violation of FINRA Rule 2010. We affirm these findings.

An associated person who obtains money or conducts business through the use of misrepresentations acts in a manner inconsistent with just and equitable principles of trade. *See Donner Corp.*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *29 (Feb. 20, 2007). Associated persons may be held liable under FINRA Rule 2010 for any unethical, business-related conduct, regardless of whether it relates to securities or an associated person's customers. *See, e.g.*, *Vail*, 101 F.3d at 39 (affirming findings that a representative violated FINRA Rule 2010's predecessor rule by misappropriating funds from a political club while serving as the club's treasurer and misrepresenting that the club's funds were held in an account at the representative's member firm); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We consistently have held that misconduct not related directly to the securities industry nonetheless may violate [just and equitable principles of trade]."), *aff'd*, No. 98-70854, 1999 U.S. App. LEXIS 10362, at *4-5 (9th Cir. May 20, 1999).

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[12] A FINRA disciplinary proceeding is not the equivalent of a civil claim by the property owner under tort or contract law. Regardless of whether an injured party can obtain relief from the wrongdoer in a civil action, FINRA has authority to determine whether the wrongdoer who converted property is fit to continue working in the securities industry. *See Dep't of Enforcement v. Doni*, Complaint No. 2011027007901, 2017 FINRA Discip. LEXIS 46, at *26-27 (FINRA NAC Dec. 21, 2017).

[13] We, like the Hearing Panel, cite *Akindemowo* in support of our conclusion that Clarke engaged in conversion in violation of FINRA Rule 2010. Clarke's attempts to distinguish the case are unpersuasive.

The complaint alleged that Clarke made material misrepresentations to Awasthi, Raparthi, and AG when he convinced them to provide him with funds based upon false statements that he would use the money to purchase events tickets in connection with Clarke's ticket brokering business; that he would repay the money by a specific date; and that he would pay significant interest. The complaint further alleged that Clarke made additional misrepresentations to Raparthi when he told Raparthi that he would use the money to acquire US Open seat licenses and that Raparthi's money would be held in an escrow account with Clarke's attorney.

The record overwhelmingly supports that Clarke made these material misrepresentations. The parties stipulated that Awasthi, Raparthi, and AG agreed to lend Clarke money so that Clarke could purchase tickets for resale. The parties also stipulated that Clarke informed Awasthi, Raparthi, and AG that he already had buyers lined up to purchase the tickets. Finally, the parties stipulated that Clarke told Raparthi that he would use the $312,000 to purchase lifetime premium season tickets to the US Open tennis tournament, and that the funds would be placed into an escrow account until the tickets were purchased. All of these statements were false.

Clarke's statements also were material. "Whether information is material 'depends on the significance the reasonable investor would place on the . . . information.'" *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *32 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988), *aff'd,* 2016 SEC LEXIS 3769. Misrepresentations about how solicited funds will be used are material. *See Casas*, 2017 FINRA Discip. LEXIS 1, at *27–28 (finding it material that the respondent, contrary to representations he made to investors, used most of the money invested for his own personal use).

Clarke argues he cannot be held liable for making material misrepresentations because the statements were true when he made them. The Hearing Panel, however, rejected that claim as not credible and found that Clarke's statements made to induce the loans were false when he made them, and there is no basis in the record to overturn this finding. Clarke similarly argues that Awasthi, Raparthi, and AG did not reasonably rely on Clarke's statements because they were "involved [] in the finance industry and know that brokers cannot guarantee any return" and, as "finance industry veterans," they "should also be wary of high rates of return in a short time frame, such as the rates that Clarke purported to promise to his colleagues." We reject Clarke's defense that his representations were so obviously false that Awasthi, Raparthi, and AG should have known better than to believe them. Moreover, the record supports that Awasthi, Raparthi, and AG would not have given Clarke money had they known that Clarke was going to use their funds to pay personal expenses and repay other creditors.

Clarke also takes issue with the Hearing Panel's finding that his "deception continued even after he received the funds, putting off his lenders with false promises, bogus assurances, and made-up excuses." We note that misrepresentations even after an investment is made, such as those made by Clarke, are material where they lull an investor into a false sense of security and discourage the investor from taking action. In this case, however, these later misrepresentations were not charged in the complaint. Thus, we do not find Clarke liable for them, but we nonetheless consider them relevant for sanctions purposes. *Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9, at *15–16 (NAC May 18, 2004) (holding that respondent's false statements about rates of return made to "lull customer into a false sense of security" after customer bought the security constituted material misrepresentations); *Dep't of Enforcement v. Ortiz*, Complaint No. 2014041319201, 2017

FINRA Discip. LEXIS 5, at *23–24 (Jan. 4, 2017) (finding that respondent who created fictitious account statements and a fictitious wire transfer confirmation to conceal losses in a customer's account made material misrepresentations).

We conclude that Clarke made material misrepresentations to Awasthi, Raparthi, and AG about his intended use of the funds they provided for Clarke's ticket brokering business and US Open seat licenses, in violation of FINRA Rule 2010.[14]

D. Clarke Violated FINRA Rule 2010 by Executing Bad Checks and Failed Electronic Transfers

The Hearing Panel found that Clarke violated FINRA Rule 2010 by writing bad checks and authorizing electronic funds transfers without sufficient funds. We modify these findings.

The parties stipulated that, between February 2013 and September 2016, Clarke wrote 46 bad checks and authorized 14 electronic transfers that failed to clear because of insufficient funds. Clarke's bad checks and failed electronic transfers were drawn on four different checking accounts at different banks. Of the 60 transactions, 51 posted when Clarke's account had a negative balance, frequently of more than a thousand dollars.

While Clarke stipulated he wrote 46 bad checks and authorized 14 electronic transfers that failed to clear because of insufficient funds, Clarke contends that his misconduct did not violate FINRA rules because it had "nothing to do with securities trading." We disagree. First, associated persons may be held liable under FINRA Rule 2010 for any unethical, business-related conduct, regardless of whether it relates to securities or an associated person's customers. *See, e.g.*, *Vail*, 101 F.3d at 39.

Second, Clarke's misconduct with respect to four checks is business related and within the broad range of misconduct proscribed by FINRA Rule 2010: (1) the $218,600 check to Raparthi for which payment failed on September 9, 2016; (2) the $26,000 check to JM, for which payment failed on July 11, 2016; (3) the $11,000 check to JO, Clarke's colleague at Tradition and Avatar, for which payment failed on December 29, 2014; and (4) the $19,500 check to JJ, Clarke's supervisor at Tradition, for which payment failed on October 23, 2014. The record shows that Clarke wrote the check to Raparthi in connection to his outside ticket brokering business after Clarke's unauthorized use of Raparthi's funds. Similarly, the record shows that Clarke wrote the check to JM, his industry colleague, after Clarke's unauthorized use of the funds JM loaned him. Both checks were part of a larger scheme in which Clarke converted funds and used the checks to lull his colleagues into a false sense of security that they would be fully repaid. The other two checks were written to his industry colleagues.

Clarke's misconduct "reflects on the associated person's capacity 'to comply with the regulatory requirements of the securities business and to fulfill [his or her] fiduciary duties in handling other people's money.'" *Grivas*, 2016 SEC LEXIS 1173, at *10 (quoting *Manoff*, 55

[14] The Hearing Panel found that the second cause of action (misrepresentation) was an alternative theory of liability for the same conduct in the first cause of action (conversion). We disagree. The complaint did not provide that the causes were alternative theories of liability, and the causes are based on different conduct by Clarke.

S.E.C. at 1163). We therefore conclude Clarke violated the high standards of commercial honor and just and equitable principles of trade by which all securities industry participants must abide. *See George R. Beall*, 50 S.E.C. 230, 231 (1990) (holding that respondent's passing of bad checks to his firm constituted a violation of the predecessor rule to FINRA Rule 2010); *Lamb Bros., Inc.*, 46 S.E.C. 1053, 1057 (1977) (holding that the practice of writing bad checks knowing that there is not money to cover them is "patently unethical in the securities business").

The NAC is setting aside liability for the remaining bad checks and failed electronic transfers because the evidence is insufficient to establish that those bad checks and failed electronic transfers were business-related, as required by FINRA Rule 2010. FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." Nonetheless, the NAC has considered the Hearing Panel's findings that Clarke deliberately passed bad checks and caused the failed electronic transfers, and accepts the support they provide to our findings with respect to the four checks described above. The Hearing Panel found that Clarke "wrote checks and authorized the electronic transfers with ample reason to know the transactions would not clear," and that "the frequency, volume, and duration of the failed payments over the relevant period establish that Clarke deliberately passed bad checks and caused the failed electronic transfers." We rely on the Hearing Panel's findings because they are fully supported by the evidence and are based on judging the credibility of Clarke's claim that he believed the checks were valid. We agree with the Hearing Panel that Clarke wrote bad checks when he knew that others had been returned or knew that there were insufficient funds. He also wrote checks on accounts he had just opened and into which he had not deposited sufficient funds for the checks to clear. The large differences between the balances in Clarke's accounts and the amounts of the checks he wrote further support that Clarke knew he was writing bad checks.[15] *See Voss & Co.*, 47 S.E.C. 626, 628 (1981) (finding that record supported the inference that the respondent knew he had insufficient funds when he passed bad checks).

Clarke deliberately wrote four checks—$218,600 check to Raparthi, $26,000 check to JM, $11,000 check to JO, and $19,500 check to JJ—with ample reason to know that the checks would not clear. We conclude that Clarke's misconduct with respect to these four checks fits violated FINRA Rule 2010.

IV. Sanctions

The Hearing Panel imposed on Clarke two separate bars from associating with any FINRA member in any capacity. We modify these sanctions.

A. Conversion and Misrepresentations

The Hearing Panel assessed a unitary sanction for Clarke's conversion and misrepresentations in connection with the loans to Awasthi, Raparthi, and AG. We agree that

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[15] For instance, Clarke opened a new account in late June 2016, with an initial $160 deposit. That same day, he withdrew $100 from the account. Days later—and without making any additional deposits to the account—Clarke wrote two checks totaling $28,800.

both violations arose out of the same conduct and do the same.[16] *See Dep't of Mkt. Regulation, v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *82 (FINRA NAC Dec. 26, 2013), *aff'd*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *1 (Feb. 13, 2015).

The FINRA Sanction Guidelines ("Guidelines") for conversion provide that a bar is the standard sanction regardless of the amount converted.[17] This "reflects the reasonable judgment that, in the absence of mitigating factors warranting a different conclusion, the risk to investors and the markets posed by those who commit such violations justifies barring them from the securities industry." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *31-32 (Aug. 22, 2008). The Guidelines for misrepresentations of material fact recommend that, in cases of intentional misconduct, adjudicators should strongly consider a bar.[18]

By using monies from Awasthi, Raparthi, and AG for unauthorized purposes, Clarke "exhibited flagrant dishonesty that, without mitigation, renders him ostensibly unfit for employment in the securities industry." *Dep't of Enforcement v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *25 (FINRA NAC July 16, 2015), *aff'd*, 2016 SEC LEXIS 1173. Numerous aggravating factors exist that further support barring Clarke for his misconduct. Clarke's conduct was intentional, inherently deceitful, and for his monetary gain.[19] Clarke converted more than $600,000 from Awasthi, Raparthi, and AG, and later offered various excuses and misrepresentations about his plans for repayment, creating a false impression that their investments would be repaid.[20] While the alleged misconduct occurred over a six-week period, it was part of a years-long pattern of unethical financial dealings with colleagues in the securities industry, including while associated with Whitaker, Tradition, and Avatar. Clarke's actions show a pattern of misconduct, constituting multiple acts over an extended period of time.[21] Despite being fired by Whitaker and prosecuted by the Kings County District Attorney's Office, resulting in a deferred prosecution agreement, Clarke's behavior continued unabated years later.[22] Clarke has yet to exhibit any remorse for his actions or an acceptance of responsibility.[23]

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16 *FINRA Sanction Guidelines* 4 (2019), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*] (General Principle No. 4).

17 *Guidelines*, at 36.

18 *Guidelines*, at 89.

19 *See Guidelines*, at 8 (Principal Considerations in Determining Sanctions, Nos. 13, 16).

20 *See id.* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 10, 11, 17).

21 *See id.* (Principal Considerations in Determining Sanctions, Nos. 8, 9, 17).

22 *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 14).

23 *See id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 2, 4).

Conversion is extremely serious misconduct and is one of the gravest violations that a securities industry professional can commit. *Mullins*, 2012 SEC LEXIS 464, at *73. Based on this record, and taking into consideration both the many applicable aggravating factors and complete lack of mitigating factors, we conclude that barring Clarke serves a remedial interest and protects the investing public.

We also order that Clarke make restitution in the amount of $612,400, plus interest from the date that Clarke received the money.[24] Specifically, we order Clarke to pay $53,167 to Awasthi with prejudgment interest as of October 26, 2015; $522,266 to Raparthi with prejudgment interest as of November 12, 2015; and $36,967 to AG with prejudgment interest as of November 5, 2015.[25] These amounts shall be offset by any documented payments or adjustments to the amounts owed as a result of the civil matter filed by Raparthi and AG against Clarke in New York Supreme Court.[26]

B. Bad Checks

The Guidelines do not specifically address intentionally writing checks without sufficient funds. We therefore consider the nature of the violation and apply the Principal Considerations and General Principles Governing All Sanction Determinations.

Clarke's behavior was irresponsible, intentional, and unethical. The frequency, volume, and duration of the failed payments over a three-year period establish that Clarke acted intentionally with respect to the four checks for which we found him liable.[27] Clarke wrote his industry colleagues checks, often in purported satisfaction of his debts, without having sufficient funds in his account, lulling them into inactivity or making them believe that his debts were repaid.[28] His behavior "subjected the recipient of his checks to serious risk of loss."[29] *See Voss*

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[24] *See Guidelines*, at 4 ("Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct.").

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

[26] Clarke asserts that restitution is inappropriate because, among other things, New York usury law renders the loans void and unenforceable due to the high rates of return that Clarke agreed to pay. Clarke has argued the same in the New York Supreme Court civil matter. Here, the issue is not whether the loans are enforceable but whether Clarke violated FINRA ethical rules. Regardless, we find restitution is appropriate because Clarke, who proposed the transactions and allegedly usurious interest rates, directly caused an identifiable loss suffered by Awasthi, Raparthi, and AG. *See id*.

[27] *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

[28] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 10).

[29] *See id.* (Principal Considerations in Determining Sanctions, No. 11).

& Co., 47 S.E.C. at 633. The subject checks were part of a larger scheme in which Clarke engaged, moving from firm to firm, seeking loans from unsuspecting colleagues and offering payment via checks without sufficient funds.[30]

Clarke's complete lack of remorse or acceptance of responsibility for this conduct further aggravates his misconduct.[31] In fact, Clarke continues to blame the victims of his bad checks, arguing that they cashed checks when he told them not to do so or engaged in fraud by "altering" them. Far from being mitigating, Clarke's attempt to blame the victims for his writing bad checks is aggravating. *See Dep't of Enforcement v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *48-49 (FINRA NAC July 21, 2016).

The scheme in which Clarke engaged "obviously contravened the most basic tenets of just and equitable principles of trade." *See Voss & Co.*, 47 S.E.C. at 634. For the four bad checks, we suspend Clarke in all capacities for six months and impose a $10,000 fine. In light of the bar imposed upon Clarke for his conversion and material misrepresentations, however, we do not impose these additional sanctions.

V. Conclusion

Clarke converted funds, made material misrepresentations, and executed bad checks, in violation of FINRA Rule 2010. For the conversion and misrepresentations, we bar Clarke. For the bad checks, we suspend Clarke in all capacities for six months and impose a $10,000 fine, but do not impose these additional sanctions in light of the bar. We also order that Clarke make restitution in the amount of $612,400, plus interest from the date of that Clarke received the principal amounts from each individual, as described in this decision. Finally, we affirm the Hearing Panel's order that Clarke pay $9,337.89 in hearing costs.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell

Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

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30 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 8).

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