BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Kenny Akindemowo Hopkins, MN, Respondent.	DECISION Complaint No. 2011029619301 Dated: December 29, 2015

Respondent induced two investments by deceptive means, converted investor funds, and engaged in private securities transactions and outside business activities without providing written notice to his firm. Held, findings affirmed and sanctions modified to order disgorgement.

Appearances

For the Complainant: Jonathan Golomb, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Kenny Akindemowo, Pro Se

Decision

Pursuant to FINRA Rule 9311, Kenny Akindemowo ("Akindemowo") appeals the Hearing Panel's decision in this matter. The Hearing Panel found that Akindemowo induced investments in securities by deceptive means, namely misrepresentations, and then converted the investors' funds to his own use. In addition, the Hearing Panel found that Akindemowo engaged in private securities transactions and outside business activities without the requisite disclosures to his firm. The Hearing Panel barred Akindemowo for the conversion and imposed a separate bar for the fraud. After a complete review of the record, we affirm the Hearing Panel's findings of violation, but modify the sanctions to order Akindemowo to disgorge the $15,000 that he obtained through his misconduct.

I. Background

Akindemowo entered the securities industry in 2000 and has been associated with several member firms. Akindemowo was also an insurance agent with The Prudential Insurance Company of America ("Prudential") beginning in June 2010. Akindemowo's conduct relevant to this decision occurred while he was registered with Prudential's affiliated broker-dealer, Pruco Securities, LLC ("Pruco" or "the Firm"). Akindemowo first registered with Pruco in June 2010 as a general securities representative and an investment company products and variable contracts limited representative. In September 2011, Akindemowo resigned from Pruco while the Firm was investigating him for the misconduct at issue in this case.[1] Since that time, he has not been registered with any FINRA member.

II. Facts

A. Akindemowo's Involvement with Apex Venture Capital Group

Akindemowo's investment recommendations in this case involved Apex Venture Capital Group ("Apex"), which was operated by Akindemowo's acquaintance, Brad LaCombe ("LaCombe"). According to Akindemowo, Apex would pool investor funds and loan these funds to distressed businesses in need of cash. Apex purportedly then would pay the investors a lower interest rate than it charged the borrowers, keeping the difference as a profit. Akindemowo described Apex as "a loan pool that we pooled together to loan other people money."

B. Akindemowo Convinced Two Individuals to Invest in Apex

Central to this case is the testimony of two individuals, AG and RB, who gave Akindemowo a total of $15,000 to invest in Apex. AG and RB did not know each other but recounted similarly at the hearing Akindemowo's investment pitch related to Apex, his evasiveness in providing them with documentation of their investments, and his refusal to remit their invested funds. Instead of investing AG's and RB's funds as he represented, Akindemowo used them to pay his personal expenses.

1. Investor AG

Akindemowo met AG through an on-line dating service in the summer of 2010. The two dated until December 2010. Prior to meeting Akindemowo, AG's investment experience was limited to an employer-sponsored 401(k) plan.

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[1] FINRA began investigating this matter upon receiving Akindemowo's Uniform Termination Notice for Securities Industry Registration filing by Pruco that disclosed that he had resigned while "under internal review for fraud or wrongful taking of property or violating investment related statutes, regulations, rules or industry standards of conduct."

Soon after they began dating, AG mentioned to Akindemowo that she was interested in other investment opportunities. Akindemowo told her about Apex. He described Apex as a venture capital group that pooled investors' money and loaned the funds to banks and other businesses. Akindemowo told AG that her investment would generate six percent interest and that quarterly she could withdraw her money without penalty or add to her investment. Akindemowo told AG that she could invest in Apex through his company, Goshen Wealth Management Group ("Goshen"). According to Akindemowo's LinkedIn page that AG reviewed before she remitted funds to Akindemowo to invest in Apex, he was Goshen's owner and chief investment officer, and Goshen provided "Wealth Management, Financial Advisory Services, [E]quity [A]nalysis, Financial and Estate Planning, Risk Analysis and Insurance." At the hearing, Akindemowo testified, however, that Goshen conducted "no specific business" and was a business that he "registered in order to purchase [an] Allstate agency."

Between the summer of 2010 and December 2010, Akindemowo persisted in his efforts to obtain AG's investment in Apex, even encouraging her to withdraw funds from her 401(k) to do so. Akindemowo told AG that because Apex was a "quarterly investment," December was her "opportunity" to invest. On December 6, 2010, AG withdrew $10,000 from an account she held at a credit union in order to invest in Apex. At Akindemowo's instruction, AG made the check payable to Goshen. AG expected that Akindemowo would invest her funds in Apex. Instead, Akindemowo deposited AG's money into his Goshen bank account, which he used as a personal account, and unbeknownst to AG used her funds for his own purposes.

Akindemowo has offered various explanations for how he used AG's funds. In his investigative testimony, Akindemowo stated that he used AG's funds to pay past-due taxes on his home. At the hearing, Akindemowo stated that he used AG's money to lease an office and to buy furniture for the acquisition of an Allstate insurance business. And in his appellate brief, Akindemowo states that he applied AG's $10,000 toward the purchase of a book of business from a retiring Allstate insurance agent, but the sale fell through.[2] What is clear, however, is that Akindemowo never transferred AG's funds to Apex as he represented. When asked at the hearing if he ever gave AG's money to Apex, Akindemowo stated that he "gave the money to Apex Ventures in principal," but ultimately admitted that he never transferred the funds to Apex.

Later in December 2010, after AG and Akindemowo stopped dating, Akindemowo asked AG if she wanted her investment returned without interest. AG declined and decided to wait until March 2011 to withdraw her funds when, as she understood from Akindemowo, she would receive the quarterly interest that accrued on her investment.

Over the next few months, AG tried unsuccessfully to obtain documentation of her Apex investment from Akindemowo. When she repeatedly asked him for the documentation, he either dodged her requests or made excuses for why he could not provide her with the documents. AG

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[2] To that end, Akindemowo contends that he approached LaCombe for a $10,000 loan to facilitate the insurance business purchase and LaCombe "allowed [Akindemowo] to use [AG's] $10,000 . . . as the proceeds for the loan."

became suspicious and requested in March 2011 that Akindemowo return her funds with the quarterly interest that she was due from Apex. Again, Akindemowo dodged her request. AG scheduled several meetings with Akindemowo, but he cancelled them. Frustrated with Akindemowo's stalling, AG retained an attorney who sent a complaint letter on her behalf to Akindemowo at his Prudential and Goshen addresses on April 13, 2011.[3]

When Akindemowo's Pruco supervisors confronted Akindemowo soon thereafter, he claimed that AG's complaint was baseless and that she was a jilted former girlfriend who loaned him $10,000 for the purchase of a home. When asked about Goshen, he stated that Goshen was an entity that would buy homes or cars at auctions and flip them. He explained that Goshen existed prior to his employment at Pruco and that it was no longer active or doing business.

Akindemowo never repaid AG, and he resigned from Pruco in September 2011 before the Firm completed its investigation of him. On November 30, 2011, after Pruco completed its investigation of AG's complaint, the Firm paid AG $10,000 plus interest.

2. Investor RB

Akindemowo met RB in 2008 or 2009 when she was a real estate agent showing him a home. The two dated briefly thereafter. Akindemowo re-established contact with RB in December 2010 to discuss selling his house. RB mentioned to him that she would be receiving

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[3] AG's complaint letter stated in part:

> We understand that [AG] deposited $10,000 at your direction with Goshen Wealth Management Group on December 6, 2010 for the purchase of an interest in Apex Venture Capital. Both prior and subsequent to her investment, [AG] requested information numerous times regarding the investment itself and documentation of her account. To the best of her knowledge, [AG] has never filled out an application to be a client despite her requests, received any disclosures or other information regarding the investment nor received a statement or any documentation on her investment. It is not clear to us at this point whether [AG] was purchasing a security, a debenture or some other type of investment vehicle. Nevertheless, [AG] made it clear to you that she was relying on your advice as her investment advisor to make the investment. . . . We further understand that you have not either returned [AG's] investment or provided her any documentation despite numerous requests by her since December 2010. You have declined to handle this matter by mail and have insisted on meeting her in person. Despite her willingness to meet with you, you have failed to meet with [AG] despite frequent attempts by her to schedule an exchange.

some money from her mother's estate and asked him to suggest investment options and someone with whom she could discuss investing. Akindemowo suggested an investment in a business which pooled investors' money to loan to others who were trying to start businesses such as franchises. He told RB that her money would be pooled with that of other investors and that she would earn a nine percent guaranteed return.[4] Akindemowo told her that she could withdraw her investment upon 90 days' notice. When discussing this investment opportunity, Akindemowo also mentioned his affiliation with Goshen. RB subsequently researched Goshen on the Internet, but found nothing about the entity. When RB questioned Akindemowo about this, he assuaged her concerns by showing her that he also was associated with Pruco.

On March 28, 2011, RB agreed to invest $10,000 with Akindemowo—$5,000 to be invested through an IRA with Pruco and $5,000 to be directed into the Apex investment pool through Goshen.[5] RB wrote the $5,000 check for her Apex investment payable to Goshen.

Like he did with AG's money, Akindemowo deposited RB's funds into his Goshen account and used the money to pay his personal expenses, including a payment to his mortgage company and for purchases at stores and restaurants. He used most of the money, $3,300, to pay his mortgage company on March 31, 2011.[6]

Meanwhile, RB repeatedly pressed Akindemowo for documentation of her investment, but Akindemowo stonewalled and never provided her with any. For example, when RB arranged to meet Akindemowo at his house to obtain the documents, he said the papers were at his office (and vice versa). In response to Akindemowo's evasiveness, RB emailed him and requested that he return her investment. Akindemowo replied that she had to wait 90 days. After the 90 days passed, RB persisted and demanded repayment. RB set up several meetings with Akindemowo, but he gave her what she described as a weeks-long "runaround."

In August 2011, after RB threatened to complain to Pruco, Akindemowo gave RB a check for $5,300 from his Goshen account, but told her not to cash it immediately because he did not have sufficient funds in the account.[7] After more than two weeks passed, during which

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[4] RB did not mention Apex by name when testifying about the investment. Akindemowo in his testimony, however, acknowledged that he told RB about Apex.

[5] Pruco rejected RB's IRA application due to problems with the paperwork.

[6] Akindemowo's testimony on this point during the investigation and the hearing differ. In his investigative testimony, Akindemowo stated that he used the funds to pay attorney's fees that he owed to his mortgage company related to a legal settlement. During the hearing, he stated he used RB's money to "make a mortgage payment." Regardless, Akindemowo's March 2011 Goshen bank statement showed a balance of $115.33 on March 28, the day before he deposited RB's check. There was a total of $55 in other deposits after RB's. The account held $1,330.51 on March 31, 2011, after Akindemowo wrote the $3,300 check to his mortgage company.

[7] The additional $300 was to repay RB for a previous loan.

Akindemowo promised to wire funds into the account, RB tried twice without success to cash the check. The bank first told her that there were insufficient funds in the account. When she tried a second time to cash it, the bank refused because the check was otherwise defective with her first and last names in different handwriting on the check's payee line.[8] In addition, the payment amounts (in numerals and words) listed on the check did not match.

In September 2011, RB complained to Pruco and the police. Several weeks later, Akindemowo offered to pay RB her $5,000 if she would write to Pruco and tell the Firm that she lied in her complaint. Akindemowo told RB that he would be in contact to discuss his offer further, but he never contacted her again.

In November 2011, Pruco repaid RB in full with interest.

C. Akindemowo's Efforts to Open an Insurance Business

In early 2009 or 2010, before registering with Pruco, Akindemowo began the process of acquiring an Allstate insurance agency. At some point in 2010, he rented and furnished an office for his Allstate business. Akindemowo maintained that office until the end of 2010. Two and a half months after registering with Pruco, on September 8, 2010, Akindemowo filed articles of incorporation with the Minnesota Secretary of State to register Goshen for the purpose of acquiring and operating an Allstate agency. On September 14, 2010, Akindemowo was appointed as an agent for four Allstate insurance companies, which gave him the ability to sell Allstate products.

Pruco discovered in January 2011 that Akindemowo had been appointed with Allstate. At that time, Pruco's affiliate, Prudential, reviewed the insurance agent database in connection with Akindemowo's request to be appointed to sell Liberty Mutual property casualty insurance through Prudential. When his Pruco supervisor confronted Akindemowo and told him he could not be affiliated with Allstate because Prudential had an exclusive relationship with Liberty Mutual, Akindemowo stated that he would cancel his appointments with Allstate. Akindemowo did not terminate his appointment with Allstate until March 2011.

III. Procedural History

Enforcement filed a four-cause complaint against Akindemowo in February 2013. Cause one alleged that Akindemowo converted funds from AG and RB, in violation of FINRA Rule 2010. Cause two alleged that Akindemowo induced the purchase of securities by means of misrepresentations to AG and RB, in violation of FINRA Rules 2020 and 2010. Cause three alleged that Akindemowo violated NASD Rule 3040 and FINRA Rule 2010 by engaging in private securities transactions without written notice to his Firm. Cause four alleged that Akindemowo violated NASD Rule 3030 and FINRA Rules 3270 and 2010 by engaging in

[8] Because Akindemowo listed only RB's first name on the payee line, RB added her last name.

outside business activities without written notice to his Firm.[9] After a two-day hearing, at which AG, RB, and Akindemowo's Pruco supervisors testified, the Hearing Panel found Akindemowo liable for the violations alleged in the complaint. The Hearing Panel barred Akindemowo for the conversion and imposed an independent bar for the fraud.[10] This appeal followed.

IV. Discussion

We affirm the Hearing Panel's findings that Akindemowo converted AG's and RB's funds through fraudulent means. We further affirm the Hearing Panel's findings that Akindemowo engaged in private securities transactions and outside business activities, both without the necessary written notice to Pruco. We discuss the violations in detail below.

A. Akindemowo Converted Investor Funds

We affirm the Hearing Panel's findings that Akindemowo violated FINRA Rule 2010 when he converted AG's and RB's funds, which were intended to be invested in Apex, for his own use.

FINRA Rule 2010 requires that members and associated persons observe high standards of commercial honor and just and equitable principles of trade. "It sets forth a standard that encompasses a wide variety of conduct that may operate as an injustice to investors or other participants in the securities markets." *Dep't of Enforcement v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *6 (FINRA Bd. of Governors May 9, 2014) (internal quotation marks omitted), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015). Conversion is 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'" and is antithetical to the requirements of FINRA Rule 2010. *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33, 42 (Feb. 10, 2012) (explaining that conversion is "extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that [FINRA] seeks to promote") (*quoting FINRA Sanction Guidelines* 38 (2007)); *see also Dist. Bus. Conduct Comm. v. Kwikkel-Elliot*, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4, at *13, 21 (NASD NBCC Jan. 16, 1998) (obtaining funds by false pretenses violates just and equitable principles of trade).

AG and RB entrusted Akindemowo with money that was intended to be invested in Apex. In both instances, Akindemowo deposited the funds into the Goshen bank account that he controlled and used the funds without AG's or RB's knowledge or authorization for his own purposes, including paying his mortgage company. *See supra* note 6.

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[9] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[10] In light of the two bars, the Hearing Panel declined to recommend or impose any sanctions for Akindemowo's private securities transactions or outside business activities. Enforcement in its appellate brief concurs with this determination, and we affirm.

Akindemowo admitted most of the facts necessary to establish that he converted AG's funds.[11] Akindemowo argues, however, that he did not violate FINRA Rule 2010 with respect to either AG or RB because these were personal transactions involving friends and were unrelated to his business. His argument is neither legally nor factually supportable. FINRA has jurisdiction over Akindemowo as an associated person. As such, FINRA may exercise its disciplinary authority under Rule 2010, which is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security." *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996); *see also Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) (finding workplace conduct inconsistent with just and equitable principles of trade and high standards of commercial honor when registered representative charged expenses to a co-worker's credit card without authorization); *DWS Sec. Corp.*, 51 S.E.C. 814, 822 (1993) (rejecting respondents' assertion that NASD had no jurisdiction to oversee their activities as entrepreneurs, which they viewed as distinct from their actions as securities professionals). "Business-related" activities under Rule 2010 include those that "reflect[] on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money." *Manoff*, 55 S.E.C. at 1162.

These were financial transactions related to an investment of funds and therefore fall within Akindemowo's "business" for purposes of Rule 2010. Akindemowo converted funds that he obtained from AG and RB while undertaking to perform investment-related services on their behalf. *See id*. at 1163. Akindemowo's activities reflect on his ability to comply with fundamental regulatory requirements and to fulfill his fiduciary responsibilities in handling other people's money. *See id.* at 1162; *Ernest A. Cipriani*, 51 S.E.C. 1004, 1006 (1994) (determining respondent violated just and equitable principles of trade by misappropriating funds remitted to him by nonbroker-dealer customers for the purchase of insurance). Moreover, Rule 2010 prohibits conversion even when the victim is not a customer of the firm with whom the registered representative is associated. *See Manoff*, 55 S.E.C. at 1163 (rejecting notion that the existence of a personal relationship with victim precludes a finding that misconduct was business-related); *Mike K. Lulla*, 51 S.E.C 1036, 1038-39 (1994) (refusing to narrow the reach of an NASD rule to only current customers of the associated person and explaining that FINRA was entitled to pursue action where the respondent intentionally misappropriated funds even when the victim was not a customer at the time of the violation). The evidence also shows that RB attempted to become a Pruco customer and open an IRA through Akindemowo at the same time

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[11] Akindemowo asserts in his appellate brief, however, that he was not registered with Pruco when AG remitted the $10,000 to him to "participate in Mr. LaCombe's side business." The record shows otherwise. Akindemowo was registered with Pruco from June 21, 2010, until September 12, 2011. On December 6, 2010, AG remitted her $10,000 to Akindemowo to be invested in Apex. Indeed, Akindemowo admitted in his hearing testimony that he was registered with Pruco when AG gave him the $10,000 check. Akindemowo remains subject to FINRA's jurisdiction for purposes of this proceeding because the complaint was filed within two years after the termination of his registration with a member firm, and it charges him with misconduct that commenced prior to the termination of his registration. *See* FINRA By-Laws, Article V, Section 4.

that she gave him the funds to invest in Apex, but that the IRA was never approved due to problems with the account documents.

With respect to RB, Akindemowo contends that she did not intend to invest in Apex but rather, that she loaned him $5,000 to pay the real estate taxes on his home. We reject Akindemowo's characterization of the circumstances under which he received RB's funds. The record does not support his claim that RB paid him $5,000 as a personal loan or that she approved of his personal use of her funds. To the contrary, when questioned by both Enforcement's counsel and Akindemowo at the hearing, RB consistently testified that these funds were *not* intended to be a loan or to be used to pay his property taxes, but were to be invested in the loan pool that Akindemowo described to her.[12] Akindemowo bore the burden of producing evidence to support his claimed defenses to the charges in the complaint, and he failed to do so. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *64 n.87 (Dec. 10, 2009).

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. *See Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976) (explaining that conversion of funds is "extremely serious" and "patently antithetical to the high standards of commercial honor and just and equitable principles of trade" that NASD sought to promote (internal quotation marks omitted)). Akindemowo converted to his own use $15,000 remitted by AG and RB for investments in Apex. We, accordingly, affirm the Hearing Panel's findings that Akindemowo converted AG's and RB's funds in violation of FINRA Rule 2010.[13]

B. The Apex Investments Were Securities

Enforcement alleged two causes of action, fraud and private securities transactions, which require us to determine preliminarily whether the Apex investment was a security; therefore, we begin our analysis of these causes of action with this threshold issue. We determine that the Apex investments that Akindemowo offered to AG and RB are "investment contracts" that fall squarely within the definition of a "security" under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").[14]

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[12] RB testified that she did loan Akindemowo $300 but that was after she invested the $5,000 with him.

[13] Associated persons are subject to the duties and obligations of FINRA Rule 2010 under FINRA Rule 0140.

[14] The Exchange Act defines the term "security" as:

> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, reorganization certificate or subscription,

[Footnote continued on next page]

"'Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (*quoting Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990)). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment,'" including an "investment contract." *Id.* While the Exchange Act does not define "investment contract," the Supreme Court has established that an investment contract is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC v. W.J. Howey Co*., 328 U.S. 293, 298-99 (1946) (explaining that there is an investment contract, and consequently a security, where there is: (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits; (4) to come solely from the efforts of the promoter or a third party). More recently, the Commission has noted that the Supreme Court has affirmed that an "investment contract" under *Howey* is "a contract or scheme for the 'placing of capital or laying out of money in a way intended to secure income or profit from its employment.'" *Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 813 n.21 (2004) (*quoting Edwards*, 540 U.S. at 394). This definition of investment contract "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Edwards*, 540 U.S. at 393. We conclude that the Apex investment satisfies the three elements of the *Howey* test.[15]

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> transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing . . . .

15 U.S.C. § 78c(a)(10) (emphasis added). The definitions of a security under the Securities Act and Exchange Act are virtually identical and may be considered the same. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975).

[15] The Commission has held that a "common enterprise" is "not a distinct requirement for an investment contract under *Howey*." *Johnny Clifton*, Exchange Act Release No. 69982, 2013 SEC LEXIS 2022, at *32 n.55 (July 12, 2013) (*citing Anthony H. Barkate*, 57 S.E.C. 488, 495 n.13 (2004), *aff'd*, 125 F. App'x 892 (9th Cir. 2005)). Relying on *Clifton*, our findings that the Apex investment was a security does not therefore require determining whether there was a common enterprise. Even so, the facts in this case reflect that Apex was an investment in a common enterprise. The Commission indicated in *Clifton* that where the common enterprise test is required, the "pooling of interests among more than one investor is the clearest example of a

[Footnote continued on next page]

First, AG and RB invested money. The "investment of money" prong requires a showing that the purchaser gave up "some tangible and definable consideration in return for an interest that had substantially the characteristics of a security." *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 559-560 (1979)); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) (explaining that the key question on the "investment of money" prong is whether the investor "commit[s] his assets to the enterprise in such a manner as to subject himself to financial loss"). By checks made out to Goshen, AG invested $10,000 in December 2010 and RB invested $5,000 in March 2011. AG and RB both testified unequivocally that their funds were to be invested in the loan pool that Akindemowo described and recommended to them. In addition, when RB was trying to get her money back from Akindemowo, she sent him a text message threatening to complain to Pruco about "the 5000.00 I invested with goshen."

Second, Akindemowo led AG and RB to expect profits. The Supreme Court explained that an expectation of profits is shown when investors are led to expect income or return, including, for example, dividends, other periodic payments, or the increased value of the investment. *Edwards*, 540 U.S. at 394 (noting that "investments pitched as low-risk (such as those offering a 'guaranteed' fixed return) are particularly attractive to individuals more vulnerable to investment fraud" but that there is "no reason to distinguish between promises" of fixed or variable returns because in both cases "the investing public is attracted by representations of investment income"). The inquiry is an objective one "based on what the purchasers were led to expect." *Warfield*, 569 F.3d at 1021-22 (internal quotation marks omitted) (noting that courts frequently examine the promotional materials associated with an investment or transaction); *Teague*, 35 F.3d at 987-90 & n.12 (stating that "[i]t would make little

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common enterprise." 2013 SEC LEXIS 2022, at *32 n.55 (internal quotation marks omitted). Here, when Akindemowo described the Apex investment to AG and RB, he specifically represented it as involving a pooling of investor funds—thus establishing evidence of a common enterprise. This form of a "common enterprise" is known as "horizontal commonality," which the majority of circuit courts recognize as satisfying the *Howey* common enterprise requirement. *See, e.g., SEC v. SG Ltd.*, 265 F.3d 42, 50 (1st Cir. 2001); *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87-88 (2d Cir. 1994); *SEC v. Infinity Grp. Co.*, 212 F.3d 180, 188 (3d Cir. 2000); *Teague v. Bakker*, 35 F.3d 978, 987 n.8 (4th Cir. 1994); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 394 (6th Cir. 1989); *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 614 (D.C. Cir. 2000). Moreover, Akindemowo also explained at the hearing that LaCombe profited on the spread between the amount he took in from borrowers and the amount he paid to the Apex investors, which also establishes a form of commonality—vertical commonality. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 732 (11th Cir. 2005) (explaining that vertical commonality test requires a showing that "the investors are dependent upon the expertise or efforts of the investment promoter for their returns" (internal quotation marks omitted)); *see also Dep't of Enforcement v. de Vietien*, Complaint No. 2006007544401, 2010 FINRA Discip. LEXIS 45, at *21 (FINRA NAC Dec. 28, 2010) (noting that vertical commonality "is exemplified where the promoter shares in the profits of the venture"). Both horizontal and vertical commonalty are present in the Apex investment.

sense for the existence of a 'security' to turn solely on whether those who actually invest do so without regard to profit" and finding that products could not be excluded from securities laws on the grounds that plaintiffs claimed they intended them to be for personal use, where the products' promotional materials emphasized the profit potential, referred to the products as investments, and offered purchasers the possibility of realizing capital appreciation).

The investors in Apex expected to receive profits from their investments in the form of a substantial rate of return. Indeed, both AG and RB testified that Akindemowo led them to believe that they would receive a specified percentage of return as profit on their investment. AG testified that Akindemowo told her she would receive a six percent return on her investment, whereas RB testified Akindemowo told her she would receive a nine percent return. In addition, Akindemowo represented that the investment was "quarterly" and they could not withdraw their funds for 90 days after investing. Thus, Akindemowo induced AG and RB with the promise of proposed profits. *See Warfield*, 56 F.3d at 1021-22.

Third, the profits that the Apex investors expected came from the efforts of others and not through their own participation. AG and RB relied upon others to place the loans and generate and collect the interest payments from which they would profit. *See, e.g., Dep't of Enforcement v. Kunz*, Complaint No. C3A960029, 1999 NASD Discip. LEXIS 20, at *23-24 (NASD NAC July 7, 1999) (finding "efforts of others" element of *Howey* met when investors relied on promoter to place loans using investor provided funds to generate interest to pay promised returns), *aff'd*, 55 S.E.C. 551 (2002), *aff'd*, 64 F. App'x 659 (10th Cir. 2003).

Akindemowo argues that his conduct cannot violate FINRA Rule 2020 or NASD Rule 3040 because his activities did not involve securities. Akindemowo's subjective belief that the investments were not securities is not dispositive to our findings. The determination of whether an investment is a security is based on how it was presented to the investors. *See, e.g., SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967) ("In the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be."); *John P. Goldsworthy*, 55 S.E.C. 818, 826 (2002) (explaining that the determination of whether an investment is a security is guided by the objective evidence as to the characteristics of the investment as marketed to the purchasers). "[W]hile the subjective intent of the purchasers may have some bearing on the issue of whether they entered into investment contracts, we must focus our inquiry on what the purchasers were offered or promised." *Warfield*, 569 F.3d at 1021. "[Akindemowo] overlooks the fact that it is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security)." *Lauer*, 52 F.3d at 670.

A preponderance of the evidence shows that AG and RB intended to enter into an investment contract by investing in the loan pool that Akindemowo described to them and expected, through the loans that Akindemowo represented that LaCombe would make to others, to receive a specific percentage return on their money. The Apex investments satisfy the three elements of the *Howey* test and therefore are securities for the purpose of our fraud and private securities transactions analyses.

C. Akindemowo Committed Fraud

The Hearing Panel found that Akindemowo's misstatements to AG and RB that their funds would be invested in Apex, which induced AG's and RB's investments, violated FINRA Rules 2020 and 2010.[16] FINRA Rule 2020 is FINRA's antifraud rule, and it prohibits members and their associated persons from effecting any transaction in, or inducing the purchase or sale of, a security "by means of any manipulative, deceptive or other fraudulent device or contrivance." Thus, under Rule 2020, Akindemowo is liable if he, acting with scienter, induced the purchase or sale of a security "by means of" a material false statement. *See Fillet*, 2015 SEC LEXIS 2142, at *30 (interpreting NASD Rule 2120, the predecessor of FINRA Rule 2020). We agree with the Hearing Panel that Akindemowo's conduct here violated FINRA rules.

Preliminarily, the Apex investment that Akindemowo recommended to AG and RB was an investment contract and therefore a security. While there was no actual purchase or sale of securities here because Akindemowo used AG's and RB's money for his own purposes, FINRA's antifraud provision applies nonetheless. *See, e.g.*, *Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 587 (7th Cir. 1984) ("Neither delivery of nor the passing of title to the contracted-for security is required for the transaction to be considered a 'sale' for purposes of the antifraud provisions of the securities laws."); *First Nat'l Bank v. Estate of Russell*, 657 F.2d 668, 673 n.16 (5th Cir. 1981) ("That the securities were never owned or acquired by [the defendant] does not preclude coverage by the 1934 Act"); *Goodman v. H. Hentz & Co.*, 265 F. Supp. 440, 444-45 (N.D. Ill. 1967) ("The fact that the fraud was so substantial that entire transactions intended by plaintiffs to be purchases and sales for their accounts, amounted to complete conversions of their funds by Rubloff, does not deprive plaintiffs of their right to recover under the Securities Act, a right they clearly would have if Rubloff had perpetrated lesser frauds . . . ."). As the Seventh Circuit explained: "It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws. . . . A central purpose of the securities laws is to protect investors and would-be investors in the securities markets against misrepresentations." *Lauer*, 52 F.3d at 670. Akindemowo represented to AG and RB that their funds were being used to invest in Apex, which was a security. AG and RB, who were parties to the transactions, would have become actual purchasers but for Akindemowo's conversion of their funds. The fact that Akindemowo failed to actually buy or sell securities is not dispositive. *See, e.g.*, *SEC v. George*, 426 F.3d 786, 788-89 (6th Cir. 2005) (concluding that defendants committed securities fraud by telling potential investors that their funds would be invested in certain types of securities, but then commingling the funds and using them "to pay purported profits to other investors or to make extravagant personal purchases"). Akindemowo's fraud was directly connected with these transactions.[17]

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[16] "Misrepresentations also are inconsistent with just and equitable principles of trade . . . ." *Dane S. Faber*, 57 S.E.C. 297, 306 (2004); *see Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *31 n.33 (May 27, 2015).

[17] The Supreme Court has interpreted the concept of "in connection with" broadly. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002) (explaining that the "in connection with" language in Exchange Act § 10(b) and Rule 10b-5 must be read flexibly, not technically and restrictively so

[Footnote continued on next page]

The information that Akindemowo misstated was also material. Whether information is material "depends on the significance the reasonable investor would place on the . . . information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Information is material "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 231-32 (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011) (relying upon materiality standard set forth in *Basic*). Akindemowo falsely told AG and RB that he would place their money with the Apex program for investment purposes and instead he used their funds for payment of his personal expenses. A reasonable investor would want to know that her money was not being used as represented. *See SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) ("[I]t would be material to a reasonable investor that his or her money was not being used as represented in safe investment strategies, but rather, in high risk ventures and for the payment of personal expenses."). Akindemowo's misrepresentations concerning the use of AG's and RB's investment proceeds were material. *See id.*; *SEC v. U.S. Funding Corp.*, Civ. No. 02-2089, 2006 U.S. Dist. LEXIS 24789, at *13 (D.N.J. Apr. 11, 2006).

We also find that Akindemowo acted with scienter. Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter is established if a respondent acted intentionally or recklessly. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007); *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2007 SEC LEXIS 2558, at *35 (Nov. 3, 2007), *aff'd*, 269 F. App'x 217 (3d Cir. 2008). Rather than transferring AG's and RB's investments to Apex as promised, Akindemowo instead converted the funds to his own use and subsequently never repaid AG and RB. Akindemowo's "flagrant personal use of investor funds" supports a finding of scienter. *See SEC v. Presto Telcoms., Inc.*, 237 F. App'x 198, 200 (9th Cir. 2007); *see also SEC v. Reynolds*, Civ. No. 1:06-CV-1801-RWS, 2010 U.S. Dist. LEXIS 106822, at *13 (N.D. Ga. Oct. 5, 2010) ("Reynolds' use of investor funds for personal expenses demonstrates a high level of scienter."). Akindemowo also evaded their inquiries about documentation related to their investments and misled AG and RB about the status of their funds when they requested remittance. These circumstances go beyond mere recklessness and indicate a deliberate intent to defraud investors. *Cf. Mullins*, 2012 SEC LEXIS 464, at *38 (finding that circumstantial evidence in the record lends further support to the conclusion individual acted with intent); *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *17 (Apr. 26, 2006) ("Proof of scienter may be inferred from circumstantial evidence.").

[cont'd]

that novel and atypical as well as garden type variety frauds do not escape its prohibitive scope). In *Zandford*, the Court held that a deceptive practice may be "in connection with" a securities transaction if it "coincided" with the transaction. *Id.* at 820. Adopting a reasonably broad interpretation of the facts here, Akindemowo's actions in promoting an investment in Apex to AG and RB, which resulted in AG's and RB's investments, are considered "in connection with" the sale or purchase of securities.

Thus, we find that Akindemowo, acting with scienter, induced AG and RB to remit funds for the purchase of securities—an investment in Apex—by means of a "manipulative, deceptive, or other fraudulent device or contrivance," namely the false statements that their funds would be invested as represented, in violation of FINRA Rules 2020 and 2010.

D. Akindemowo Engaged in Private Securities Transactions

The Hearing Panel determined that Akindemowo engaged in undisclosed private securities transactions when he offered the Apex investment to AG and RB, in violation of NASD Rule 3040 and FINRA Rule 2010. We concur.

NASD Rule 3040(a) prohibits an associated person from participating in any manner in private securities transactions without providing prior written notice of these transactions to his member firm. A "private securities transaction" is "any securities transaction outside the regular course or scope of an associated person's employment with a member." NASD Rule 3040(e)(1). The rule requires that the associated person describe to his firm in detail the nature of the proposed transaction and his proposed role. NASD Rule 3040(b).

In order to find that Akindemowo violated Rule 3040, we must determine that: (1) the Apex investments constituted "private securities transactions"; (2) Akindemowo "participated" in the transactions; and (3) Akindemowo failed to provide Pruco with prior written notice of the transactions and his role in them. *See* NASD Rule 3040(a)-(b); *Dep't of Enforcement v. Mielke*, Complaint No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *13-14 (FINRA NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015). As discussed in Part IV.B, we conclude that the Apex investments were investment contracts and therefore securities. Moreover, it is undisputed that Akindemowo's activities in conjunction with Apex were outside the scope of his employment with Pruco and that he did not provide Pruco with prior written notice of these transactions or a description of his role in them.

The sole remaining issue is whether Akindemowo participated in the transactions within the meaning of the rule. The answer is unquestionably yes. The NAC and the Commission have interpreted broadly the rule's phrase, "participate in any manner," in order to further FINRA's regulatory purpose. *See Dep't of Enforcement v. Love*, Complaint No. C3A010009, 2003 NASD Discip. LEXIS 17, at *30, 32 (NASD NAC May 19, 2003) (explaining that phrase's "broad construction . . . implicitly recognizes" that investors "may give special weight to a broker's involvement in an investment transaction" and perceive the transactions "as having the broker's imprimatur"), *aff'd*, 57 S.E.C. 315 (2004). The evidence in this case reflects that AG and RB invested in Apex solely because Akindemowo recommended the investment opportunity to them. Neither woman knew anything about Apex before Akindemowo discussed it and presented the investment opportunity to them. Akindemowo facilitated AG's and RB's investments by directing them to write their checks payable to Goshen, Akindemowo's company. Akindemowo then deposited the funds into the Goshen bank account that he controlled. Instead of using AG's and RB's funds to invest in Apex as he represented, he converted the funds to his own use.

Akindemowo's actions in this case intersect directly with NASD Rule 3040's prophylactic purpose. "The purpose of NASD Rule 3040 is to protect investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment." *Chris Dinh Hartley*, 57 S.E.C. 767, 775 n.17 (2004) (internal quotation marks omitted). Rule 3040 not only protects investors, "but also [permits] securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions." *Love*, 57 S.E.C. at 320. Had Akindemowo disclosed his Apex activities as required by the rule, Pruco would have had the opportunity to intervene before AG and RB remitted their funds to Akindemowo.

A preponderance of the evidence shows that Akindemowo participated in private securities transactions by offering the Apex investments to AG and RB without prior written notice to Pruco, in violation of NASD Rule 3040 and FINRA Rule 2010.[18]

E. Akindemowo Engaged in Outside Business Activities

The Hearing Panel found that Akindemowo's actions to establish an Allstate insurance business, including his involvement with Goshen, constituted outside business activities in violation of FINRA Rule 3270 and its predecessor, NASD Rule 3030.[19] We affirm these findings.

FINRA Rule 3270 and NASD Rule 3030 prohibit associated persons from engaging in any business activity outside the scope of their relationship with their employer firm, unless they have provided prompt written notice to the member. Rules 3270 and 3030 extend to all outside business activity, not just securities-related activity. *See Dep't of Enforcement v. Schneider*, Complaint No. C10030088, 2005 NASD Discip. LEXIS 6, at *12-13 (NASD NAC Dec. 7, 2005); *see also NASD Notice to Members 01-79* (emphasizing that under NASD Rule 3030 associated persons are required "to report *any* kind of business activity engaged in away from their firm"). To comply with the prompt notification requirement, the associated person must "disclose outside business activities at the time when steps are taken to commence a business activity unrelated to his relationship with his firm." *Schneider*, 2005 NASD Discip. LEXIS 6, at *13-14; *see Micah C. Douglas*, 52 S.E.C. 1055, 1058-59 (1996); *see also Dep't of Enforcement v. Abbondante*, Complaint No. C10020090, 2005 NASD Discip. LEXIS 43, at *31 (NASD NAC Apr. 5, 2005) (rejecting argument that representative was not required to disclose outside

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[18] A violation of the private securities transactions rule also violates FINRA Rule 2010. *See, e.g.*, *Goldsworthy*, 55 S.E.C. at 835 ("It is a longstanding and judicially-recognized policy that a violation of another Commission or NASD rule or regulation, including Conduct Rule 3040, constitutes a violation of [just and equitable principles of trade]." (Internal quotation marks omitted)).

[19] FINRA Rule 3270 superseded NASD Rule 3030 on December 15, 2010. *See FINRA Regulatory Notice 10-49*, 2010 FINRA LEXIS 96 (Oct. 2010).

business activity when outside business was formed to conduct future business), *aff'd*, 58 S.E.C. 1082 (2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006).

The purpose of the outside business activities rule "is to ensure that firms receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law." *Dep't of Enforcement v. Giblen*, Complaint No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at *12 (FINRA NAC Dec. 10, 2014) (internal quotation marks omitted). FINRA's outside business activities rule prevents harm to the investing public, and to FINRA member firms, by allowing these firms to monitor in a timely manner their registered representatives' outside business activities. *See Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at *2 (Sept. 6, 1988) (explaining that proper disclosure of an associated person's outside business activities may prevent a member firm's entanglement in legal difficulties). "When adhered to, [the outside business activity rule] is prophylactic and allows FINRA [member] firms to oversee their employees' outside business activities, or to prohibit the activities altogether." *Giblen*, 2014 FINRA Discip. LEXIS 39, at *26-27.

Akindemowo argues that he was not actively engaged in business with Allstate or Goshen. The preponderance of the evidence, however, shows that Akindemowo had taken steps toward engaging in an Allstate insurance business through Goshen which required written notice to Pruco of his activities. A few months after associating with Pruco, on September 8, 2010, Akindemowo registered Goshen with the state of Minnesota by filing articles of incorporation for the purpose of acquiring and operating an Allstate agency. Akindemowo never disclosed to Pruco his creation of Goshen. Six days later, on September 14, 2010, Akindemowo was appointed as an agent for four Allstate insurance companies, which gave him the ability to sell Allstate products. At some point in 2010, he also rented and furnished an office for his Allstate business. Akindemowo maintained that office until the end of 2010. Akindemowo testified at the hearing that he used AG's funds to pay the lease and to buy furniture for that office space. In addition, Akindemowo was attempting to purchase an Allstate book of business from a retiring insurance producer and admitted in his appellate brief that he also used AG's $10,000 in order to facilitate that purchase.

The evidence also shows that Akindemowo did not give Pruco written notice that he was engaged in an outside business activity. When Akindemowo interviewed with Pruco, he mentioned that he had a relationship with Allstate at the time. His soon to be Pruco supervisor told Akindemowo during that interview that he could not continue to have an outside affiliation with Allstate if Pruco employed him. After Akindemowo joined Pruco in June 2010, he answered "no" to the question on the Uniform Application for Securities Industry Registration or Transfer ("Form U4") asking whether he was engaged in any outside business activities. Pruco's written policies required representatives to provide prior written notice of all outside business activities to their supervising principal through a designated Firm database. Every 30 days, the Firm's procedures required representatives to attest to the accuracy of the Form U4 disclosures. Pruco specifically required disclosure of appointments to insurance agencies (other than those handling Prudential-sponsored programs) and ownership of insurance agencies as outside

businesses. Akindemowo never updated his Form U4 to disclose, or otherwise disclosed in writing to Pruco, his Allstate-related activities.[20]

At the hearing, Akindemowo claimed that he did not amend his Form U4 when he registered Goshen with the state of Minnesota because he had previously disclosed Goshen's existence to his Pruco supervisors and they told him that he was not required to disclose Goshen if it was not conducting business. The testimony of both of Akindemowo's supervisors from Pruco undercut this claim. They denied that Akindemowo had disclosed anything about Goshen prior to receiving AG's complaint in April 2011. Moreover, given his undisclosed Allstate activities, the purported oral disclosures were also incomplete. In any event, even if Akindemowo had discussed Goshen with Pruco, such oral disclosure is insufficient under both FINRA Rule 3270 and NASD Rule 3030, which require fulsome and prompt disclosure in writing to the Firm. *See Giblen*, 2014 FINRA Discip. LEXIS 39, at *11-12, 17 ("NASD Rule 3030 requires actual, written notice of an associated person's outside business activities . . . .").

We determine that Akindemowo was engaged in outside business activities without providing the requisite written notice to Pruco, in violation of NASD Rule 3030 and FINRA Rules 3270 and 2010.[21]

V. Sanctions

The Hearing Panel barred Akindemowo for conversion and imposed a separate bar for his fraud. For the reasons set forth below, we affirm the sanctions imposed by the Hearing Panel. In addition, we order Akindemowo to disgorge the $15,000 that he converted to his own use through fraudulent means.

A. Sanctions for Fraud and Conversion

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanctions for Akindemowo's fraud and conversion. The Guidelines for misrepresentations of fact recommend, for intentional or reckless misconduct, a fine of $10,000 to $100,000 and a suspension of an individual for 10 business days to two years.[22] For egregious misrepresentations cases, the Guidelines recommend consideration of a bar of an individual.[23]

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[20] Akindemowo last amended his Form U4 in March 2011, but did not disclose any outside business activities.

[21] A violation of FINRA Rule 3270 or NASD Rule 3030 constitutes conduct inconsistent with just and equitable principles of trade and violates FINRA Rule 2010. *See Dep't of Enforcement v. Moore*, Complaint No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *25 n.19 (FINRA NAC July 26, 2012).

[22] *FINRA Sanction Guidelines* 88 (2013) [hereinafter *Guidelines*].

[23] *Id.*

The Guidelines governing sanctions for conversion direct us to "[b]ar the respondent regardless of amount converted."[24] A bar is necessary in conversion cases because, as the Commission has recognized, conversion is "generally among the most grave violations committed by a registered representative," "extremely serious[,] and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that underpin the self-regulation of the securities markets." *Mullins*, 2012 SEC LEXIS 464, at *73 (internal quotation marks omitted). What occurred in this case is no exception.

When we consult the Guidelines' Principal Considerations in Determining Sanctions, we find that several of these considerations are relevant to Akindemowo's misconduct and serve to aggravate sanctions.[25] Akindemowo acted intentionally when, through fraudulent means, he converted funds from two investors.[26] He capitalized on his personal relationships with AG and RB in order to induce their investments and then used their money for his own pecuniary benefit. Akindemowo also refused to remit AG's and RB's funds[27] and attempted to lull them into inactivity when they persisted that he repay them.[28] AG resorted to hiring an attorney to escalate matters and complain to Pruco in an effort to recoup her funds after Akindemowo evaded her requests. And when RB threatened to complain to Pruco, Akindemowo disingenuously wrote her a check for $5,300 from his Goshen account that she could not cash because the account had insufficient funds, the check listed solely her first name on the payee line, and the payment amounts did not match. After RB complained to Pruco, Akindemowo offered to pay RB her $5,000 only if she would write to Pruco and recant, telling the Firm that she lied in her complaint. Akindemowo's fraud and conversion harmed AG and RB while resulting in Akindemowo's monetary gain.[29]

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[24] *Id.* at 36.

[25] *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions).

[26] *See id.* (Principal Considerations in Determining Sanctions, Nos. 8, 13).

[27] Akindemowo claims that he could not repay either AG or RB because Pruco settled with them and the Firm told him not to contact either woman. We give this claim no mitigative weight. Akindemowo resigned from Pruco in September 2011, which was approximately two months before the Firm settled with AG and RB. Moreover, AG and RB repeatedly requested that Akindemowo return their funds before Pruco knew of his misconduct, and he refused. An adjudicator may consider repayment as mitigating when done by the respondent voluntarily and prior to detection and intervention. *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 4) (considering whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct).

[28] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

[29] *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 17).

In addition, Akindemowo has not accepted responsibility for his misconduct, blaming AG, RB, and Pruco.[30] *See N. Woodward Fin. Corp*., Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *44 (May 8, 2015) (explaining that respondent is "entitled to present a vigorous defense" but the denial that conduct was wrongful demonstrated either a misunderstanding or a lack of recognition of his duties as a professional and of his regulatory obligations), *appeal docketed*, No. 15-3729 (6th Cir. July 7, 2015). His failure to appreciate the requirements of the securities business and the gravity of his misconduct and the harm it caused warrants significant sanctions. *See, e.g.*, *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *75 (Jan. 30, 2009) ("We agree with FINRA that Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public." (Internal quotation omitted)), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008) (finding that the fact that respondent never accepted responsibility for his misconduct and blamed others for what occurred were factors that supported a bar). Moreover, the Hearing Panel found that Akindemowo was not forthcoming throughout these proceedings. We agree with the Hearing Panel's characterization that Akindemowo, "rather than taking responsibility for his actions, has provided a false account of the facts to his employer, FINRA Staff, and the Hearing Panel," a finding that Akindemowo has not overcome before us.[31] *See, e.g.*, *Jay Houston Meadows*, 52 S.E.C. 778, 784 (1996), *aff'd*, 119 F.3d 1219 (5th Cir. 1997). Undeniably, Akindemowo's version of what occurred in this case is riddled with discrepancies.

Taking these factors into account, we conclude that this is an egregious case and Akindemowo presents a substantial risk to the investing public. Independently barring Akindemowo for his conversion and fraud are the only appropriate sanctions.[32] Moreover, the bars serve to deter others from engaging in such serious misconduct. *See Mullins*, 2012 SEC LEXIS 464, at *80 ("We support the NAC's conclusion . . . that a bar is necessary to deter him and others similarly situated from engaging in similar misconduct." (Internal quotation marks omitted)).

B. Disgorgement

We also determine that disgorgement is appropriate in this case. The Guidelines recommend that adjudicators consider a respondent's ill-gotten gain when determining an appropriate remedy.[33] Disgorgement may be appropriate where "the record demonstrates that

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30 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

31 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12).

32 We find no mitigation in Akindemowo's argument that he has no customer complaints involving his securities business. *See, e.g.*, *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and the representative "was required to comply with the NASD's high standards of conduct at all times").

33 *Guidelines*, at 5.

the respondent obtained a financial benefit from his or her misconduct."[34] Disgorgement seeks to prevent a respondent's unjust enrichment, and it is an appropriate remedy where, as here, a respondent has converted investor funds. *See Dep't of Enforcement v. Mission Sec. Corp.*, Complaint No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *48 (FINRA NAC Feb. 24, 2010), *aff'd*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010). Akindemowo converted $15,000 in investor funds for his own benefit and should not be permitted to retain these ill-gotten gains. Accordingly, we order Akindemowo to pay $15,000 plus prejudgment interest to FINRA as disgorgement.[35]

VI. Conclusion

We affirm the Hearing Panel's findings that Akindemowo violated FINRA Rule 2010 by converting AG's and RB's funds and induced AG's and RB's investments by fraudulent means, in violation of FINRA Rules 2020 and 2010. We also affirm the findings that Akindemowo engaged in private securities transactions, in violation of NASD Rule 3040 and FINRA Rule 2010 and outside business activities, in violation of NASD Rule 3030 and FINRA Rules 3270 and 2010. We bar Akindemowo in all capacities for his conversion and impose a separate all-capacity bar for his fraud, effective upon service of this decision. In addition, Akindemowo is ordered to disgorge to FINRA $15,000, plus prejudgment interest.[36] In light of the two bars, we decline to impose any sanctions for Akindemowo's private securities transactions or outside business activities. We affirm the order that Akindemowo pay $2,954.85 in hearing costs and order him to pay $1,489.26 in appeal costs.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[34] *Id.*

[35] By ordering prejudgment interest on a disgorgement amount, an adjudicator achieves "the proper deterrence for the misconduct because disgorgement alone does not reflect the time value of ill-gotten gains, and in effect, provides the respondent with an interest free loan until the disgorgement order is final." *Dep't of Enforcement v. Davidofsky*, Complaint No. 2008015934B01, 2013 FINRA Discip. LEXIS 7, at *42 (FINRA NAC Apr. 26, 2013). Prejudgment interest shall be paid at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See id*. at *42, *44.

[36] Prejudgment interest will begin to accrue as of December 6, 2010, for $10,000 of the disgorgement amount, until paid in full, and will begin to accrue as of March 28, 2011, for the remaining $5,000, until paid in full.