BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. John Edward Mullins Margate, NJ, and Kathleen Maria Mullins Margate, NJ, Respondents.	DECISION Complaint Nos. 20070094345 20070111775 Dated: February 24, 2011

Respondent John Mullins converted and misused customer funds and breached his fiduciary obligations as an officer and trustee of a corporate customer; respondents John Mullins and Kathleen Mullins made material misstatements on annual compliance questionnaires and borrowed funds from a customer without firm approval. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., and Richard R. Best, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For John Mullins: Norman B. Arnoff, Esq.

For Kathleen Mullins: Frank P. Arleo, Esq.

Decision

Pursuant to NASD Rule 9311(a), John Mullins ("J. Mullins") and Kathleen Mullins ("K. Mullins") (together, "respondents") appeal an August 25, 2009 Hearing Panel decision. The Hearing Panel found that: (1) J. Mullins misused customer funds, in violation of NASD Rules 2330(a) and 2110, converted customer property, in violation of NASD Rule 2110, and breached fiduciary obligations he owed as an officer and trustee of a corporate customer, in violation of NASD Rule 2110; (2) respondents made material misstatements to their member firm on annual compliance questionnaires, in violation of NASD Rules 3110 and 2110; and (3) respondents borrowed funds from a customer without approval of their member firm, in violation of NASD Rules 2370 and 2110. The Hearing Panel barred J. Mullins in all capacities for converting and misusing customer funds and breaching his fiduciary obligations. The Hearing Panel suspended K. Mullins in all capacities for six months, fined her $15,000, and ordered that she requalify in all capacities for making material misstatements to her member firm. The Hearing Panel further suspended K. Mullins in all capacities for three months (to be served consecutively) and fined her $5,000 for borrowing funds from a customer without prior firm approval. Finally, the Hearing Panel ordered that respondents pay, jointly and severally, $16,003 in costs.

After a complete and independent review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual History

A. Respondents' Background

J. Mullins entered the securities industry in 1981, and his wife, K. Mullins, entered the securities industry in 1993. From June 2002 until August 2006, respondents were registered as general securities representatives with Morgan Stanley DW Inc. ("Morgan Stanley" or the "Firm"). Respondents are not currently registered with a FINRA member firm.

Respondents operated The Mullins Group from Morgan Stanley's Northfield, New Jersey branch office. The Mullins Group included J. Mullins, K. Mullins, one other registered representative and several support staff. The Mullins Group had approximately 500 customer accounts, and each member of the group serviced customers, regardless of who was designated as the financial advisor for a particular account.

B. Respondents' Relationship with Customer EW

Shortly after J. Mullins entered the securities industry, he contacted PW from a stack of inactive account cards that he received from his firm. PW was then 71 years old, childless, and married to EW (also then 71 years old). J. Mullins quickly developed a business and personal relationship with PW and EW (together, the "Ws"). K. Mullins subsequently met the Ws. Respondents described the Ws as "family," and they would frequently socialize together. The Ws enjoyed music and were involved in a number of charitable organizations promoting music. J. Mullins periodically suggested to the Ws that they form their own charitable foundation.

PW died in 1999, and respondents subsequently became even closer to EW and spent a significant amount of time with her. Respondents regularly dined with EW, assisted her with errands, and often drove her to charity events. J. Mullins testified that respondents "were like her two children . . . [and] she came to us for absolutely everything."[1]

Shortly after PW's death, EW established the EW and PW Foundation, Inc. (the "Foundation") as a non-profit corporation under Section 501(c)(3) of the Internal Revenue Code to receive and administer funds for the benefit of charities devoted to the musical arts. The Foundation's certificate of incorporation named EW, J. Mullins, and K. Mullins as trustees to manage the Foundation. EW served as the Foundation's president, J. Mullins as its vice-president, and K. Mullins as its treasurer and secretary. Respondents did not receive any compensation for their work with the Foundation.

The Foundation had an account at Morgan Stanley, which was funded solely by EW.[2] Morgan Stanley issued the Foundation a debit card and granted the Foundation check-writing privileges in connection with its account. J. Mullins was the designated financial advisor on the Foundation's account until July 2003, at which time K. Mullins became the designated financial advisor.[3] Generally, EW wrote all the checks for the Foundation from the Foundation's account, although she often gave J. Mullins signed checks and he would fill in the amounts and payees. In addition, J. Mullins would often use the debit card associated with the Foundation's account.[4]

C. <u>Respondents' Inaccurate Disclosures</u>

Morgan Stanley required that registered personnel complete and submit a compliance questionnaire annually. Respondents completed and submitted to the Firm questionnaires in

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1 EW's Last Will and Testament, dated August 29, 2000 (the "Will"), bequeathed to respondents a condominium in Philadelphia (or its value if sold before she died) plus $25,000. The Will named K. Mullins as a co-executor and co-trustee, and J. Mullins as a successor co-executor and successor co-trustee. EW also executed a Power of Attorney dated October 17, 2003, and another dated May 11, 2005, in which she designated respondents as her agents.

2 By 2006, EW had a total of 17 accounts with Morgan Stanley (including the Foundation account). Respondents serviced all of these accounts.

3 Morgan Stanley prohibited a financial advisor from servicing an account in which the advisor acted in a fiduciary capacity. In July 2003, Morgan Stanley granted J. Mullins permission to serve as the Foundation's vice-president, but prohibited him from continuing to serve as the financial advisor of record for the Foundation. K. Mullins subsequently served as the designated financial advisor for the Foundation account, although as discussed below, she also served the Foundation in a fiduciary capacity. J. Mullins continued to serve as the designated financial advisor for EW's other accounts.

4 In April 2000, the Foundation's attorney wrote to respondents to advise them against issuing and using credit cards for the Foundation's account because respondents were "serving as officers of the [F]oundation in a fiduciary capacity" and would have to account for any activity on the cards.

June 2003, March 2004, March 2005 and January 2006. The 2003 questionnaire directed registered personnel to, among other things, "[l]ist account numbers and positions for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/or beneficiary[.]" The 2004 and 2005 questionnaires directed personnel to list "account numbers and fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/or beneficiary." The 2006 questionnaire asked, "[d]o you maintain fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/or beneficiary." On each of these questionnaires, J. Mullins answered "none" or "no" to these questions, and K. Mullins failed to list the Foundation.[5]

The questionnaires also directed registered personnel to disclose "all profit and non-profit organizations, companies, and/or corporations in which you are a director, officer, employee or representative[.]" J. Mullins disclosed that he served as vice-president of the Foundation on his 2003 and 2004 questionnaires, but did not disclose this information on his 2005 questionnaire. On K. Mullins's 2003, 2004, and 2005 questionnaires, she failed to disclose that she served as the Foundation's treasurer and secretary.[6]

D. Respondents Borrow Funds from EW

During the relevant time period, Morgan Stanley prohibited employees from lending funds to or borrowing funds from customers unless the Firm granted an exemption from this policy.

On March 1, 2005, respondents borrowed $100,000 from EW intending to use the funds as a bridge loan to help finance a new home they were building pending receipt of financing from a bank. Several days later, respondents' bank approved their mortgage loan and respondents repaid EW in full on or about March 4, 2005. The only documentation of the loan was a cashier's check from EW's bank account payable to K. Mullins.

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5 Although K. Mullins did not disclose on the Morgan Stanley questionnaires her position as a trustee with the Foundation, she sought the Firm's permission to serve as the executor to an unrelated customer's account (GS) for which she was also named as a trustee, and listed these positions on her questionnaires. K. Mullins explained that she sought approval to serve as the executor for GS's account, but did not disclose her roles with the Foundation, because she played an active role in connection with GS's account, whereas her role with the Foundation was "incredibly informal. . . . [and] there were no official board member meetings. We discussed informally the direction of the [F]oundation, things like that. There were no minutes. There was nothing to treasure." Morgan Stanley denied K. Mullins's request to serve as executor of GS's account in March 2004.

6 The 2006 questionnaire asked "[a]re you a sole proprietor, partner, director, officer or employee of any outside business . . . or otherwise associated with any such business?" Respondents each answered "no" to this question. The amended complaint, however, did not identify these omissions as a basis for liability.

Respondents did not request or obtain Morgan Stanley's prior approval to borrow funds from EW and failed to disclose the loan from EW on their Morgan Stanley 2005 compliance questionnaires (dated March 8, 2005), which asked, "[h]ave you within the past 12 months made loans to, or received loans from any of your clients or family members while they maintained accounts at Morgan Stanley?" Respondents also failed to disclose the loan on their January 2006 questionnaires.

E. J. Mullins's 2006 Activity

In 2006, EW—then 96 years old—lived in an apartment at an assisted living facility and nursing home. On April 3, 2006, EW became ill and spent eight days in the hospital. On April 11, 2006, EW was transferred to the medical unit of the assisted living facility where she received 24-hour nursing care. EW remained in the medical unit for approximately one month while she recuperated.[7]

1. Four Seasons Hotel Gift Certificates

On April 12, 2006, J. Mullins attempted to use the Foundation's debit card to purchase $11,000 worth of Four Seasons Hotel gift certificates. Hotel personnel in Philadelphia questioned the attempted purchase because the Foundation's debit card was in EW's name and not J. Mullins's name. Consequently, J. Mullins left the hotel without purchasing any gift certificates. On April 14, 2006, J. Mullins returned to the hotel and purchased, on behalf of the Foundation, gift certificates totaling $11,000 using a check signed by EW and made out by J. Mullins to the Four Seasons. J. Mullins testified that after discussing the matter with EW, he purchased the Four Seasons gift certificates (as well as the gift certificates from Boyds of Philadelphia, discussed below) on behalf of the Foundation to be used to raise funds for the Foundation at silent auctions.

The gift certificates were never auctioned or used for Foundation purposes. Instead, J. Mullins used $4,000 of the Four Seasons gift certificates to pay for respondents' personal vacation in London from May 24-28, 2006, which was unrelated to Foundation business. J. Mullins testified that he used the Foundation's gift certificates to pay for lodging in London because at a lunch he attended with EW one day prior to his vacation, he learned from a third party that he would receive a "cheaper exchange rate" by paying for the hotel with the gift certificates instead of his personal credit card. J. Mullins testified that he told EW during lunch that he planned to use the Foundation's gift certificates and that EW approved. J. Mullins further testified that he fully intended to pay for the gift certificates upon his return from London. As described below, J. Mullins did not repay the Foundation for the gift certificates until June 2007, claiming he "got stupid and sloppy."

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7 J. Mullins described the medical unit as the location at which a resident of the nursing home would be placed when "you are on your way out the door to a pine box."

2. Boyds of Philadelphia Gift Certificates

On April 15, 2006, J. Mullins used the Foundation's debit card to purchase eight gift certificates totaling $3,000 from Boyds of Philadelphia ("Boyds"), an upscale haberdashery where he had a personal account and regularly shopped.[8] J. Mullins testified that he purchased the gift certificates on behalf of the Foundation at the instruction of EW, and told her that he would purchase from the Foundation any certificates that it did not auction. J. Mullins, however, used the gift certificates to pay his personal bills at the store on April 19, 2006 ($2,500) and April 25, 2006 ($500).

On June 25, 2006, J. Mullins purchased an additional $2,500 worth of Boyds gift certificates with the Foundation's debit card and redeemed all of these gift certificates on July 12, 2006, to pay his personal bill. In total, J. Mullins used $5,500 worth of the Foundation's Boyds gift certificates to pay his personal bills at the store.

3. Wine at Morton's Restaurant

On May 8, 2006, J. Mullins used the Foundation's debit card to purchase 23 bottles of wine at Morton's Restaurant in Atlantic City, New Jersey. The wine cost $1,656, and J. Mullins had the wine stored in his personal wine locker at the restaurant.[9] J. Mullins testified that he purchased the wine because Morton's offered it at a discount and EW agreed that they should take advantage of the special offer and would use it for Foundation dinner meetings.

None of the 23 bottles of wine was consumed at Foundation functions. Instead, J. Mullins consumed a bottle of the wine on August 15, 2006 (one day prior to his termination from Morgan Stanley), another bottle on October 19, 2006, and two bottles on May 3, 2007. J. Mullins consumed three of these four bottles of wine after his association with the Foundation and relationship with EW ended.

F. Morgan Stanley Terminates Respondents and EW Severs Ties with Respondents

In late July 2006, after J. Mullins had lunch with Morgan Stanley's Philadelphia district director, the district director contacted the Firm's Northfield, New Jersey branch office manager

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8 J. Mullins testified that he selected the Four Seasons gift certificates "because that's one of [EW's] favorite places." J. Mullins did not explain why he selected Boyds for the other gift certificates to be auctioned by the Foundation. In addition, beginning in February 2005, EW requested that all mail from Morgan Stanley (including the Foundation's monthly account statements that reflected use of the Foundation's debit card) be sent to the Foundation's attorney. The Foundation's attorney generally did not open this mail, and J. Mullins would periodically pick up EW's and the Foundation's unopened mail.

9 J. Mullins was the only person with access to his wine locker, and he testified that he did not obtain a locker in the name of the Foundation because "he didn't think of it. It just never dawned [on him]."

to review activity in EW's accounts for any activity that would be "odd for a woman north of 90 years old." The branch manager reviewed EW's accounts, discovered a number of unusual expenditures (including expenses from the Four Seasons and Boyds), and reported his findings. After Morgan Stanley investigated the matter further, it placed respondents on administrative leave on or about August 12, 2006. Morgan Stanley terminated respondents on August 16, 2006. Immediately thereafter, EW severed all ties with respondents. EW died in 2008.

G. J. Mullins Repays the Foundation

In May 2007, J. Mullins appeared for a FINRA investigative interview during which he was questioned about, among other things, the Four Seasons and Boyds gift certificates. During the interview, J. Mullins admitted that he "screwed up big time," although he also testified that he could not remember if he used any of the Four Seasons gift certificates for his personal use. Despite FINRA having asked questions related to the gift certificates during the May 2007 interview, J. Mullins waited another eight weeks to return them to the Foundation and pay the Foundation for the gift certificates he used in 2006. J. Mullins testified that, in July 2007, while preparing to return a piano belonging to EW that was kept at respondents' home, he found $7,000 worth of unused Four Seasons gift certificates in the piano bench. J. Mullins claimed that he "totally forgot" about the gift certificates and first realized in July 2007 that he never replaced the gift certificates he used in 2006 and never returned those gift certificates that were still in his possession. J. Mullins further testified that he drove to Philadelphia on July 4th weekend to purchase $4,000 worth of Four Seasons gift certificates, and then returned them (along with the unused Four Seasons gift certificates and replacement gift certificates for Boyds) to EW's attorney.[10]

J. Mullins repaid the Foundation for the wine after being questioned by New Jersey state authorities (who had commenced an investigation into J. Mullins's use of Foundation funds) on September 19, 2007. J. Mullins stated that the New Jersey authorities had "painted me into a corner" with questions concerning the wine and he then realized that he had acted improperly by paying for the wine with the Foundation's funds and consuming it himself. J. Mullins testified that the bottles of wine had "just absolutely gone out of my mind."

II. Procedural History

A. FINRA Investigation and Complaint

After Morgan Stanley terminated the respondents, FINRA commenced its investigation. On February 14, 2008, Enforcement filed the initial complaint against respondents. On December 8, 2008, Enforcement filed a six-cause amended complaint against respondents.[11] The

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[10] The Foundation's attorney prepared a receipt for J. Mullins evidencing return of the gift certificates. Although J. Mullins testified that he returned the property in July 2007, the receipt was dated June 26, 2007.

[11] The initial complaint alleged that J. Mullins and K. Mullins each breached the fiduciary duties that they owed to the Foundation, and also alleged that J. Mullins converted customer

[Footnote continued on next page]

amended complaint alleged that: (1) J. Mullins improperly used customer funds, in violation of NASD Rules 2330(a) and 2110; (2) J. Mullins converted customer funds, in violation of NASD Rule 2110; (3) J. Mullins attempted to convert funds from Morgan Stanley by seeking reimbursement for hotel and other expenses related to a seminar respondents attended (for which he had been fully reimbursed by the Foundation), in violation of NASD Rule 2110; (4) J. Mullins breached his fiduciary obligations as an officer and trustee of the Foundation, in violation of NASD Rule 2110; (5) respondents made material misstatements to their member firm on annual compliance questionnaires, in violation of NASD Rules 3110 and 2110; and (6) respondents borrowed funds from a customer without approval of their member firm, in violation of NASD Rules 2370 and 2110.

B. Proceedings Before the Hearing Panel

1. Respondents' Admissions and Stipulations

Respondents each filed answers generally denying the amended complaint's allegations. Prior to the hearing, respondents filed evidentiary and factual stipulations in which they agreed to the basic facts underlying each of the charges set forth in the amended complaint. On several occasions prior to the hearing, J. Mullins stated generally that he accepted liability with respect to the charges in the amended complaint and asked that the Hearing Panel consider evidence in mitigation (including evidence related to his intent) and the appropriate level of sanctions.[12] At several prehearing conferences, J. Mullins's counsel reiterated that J. Mullins was not contesting liability, but only the appropriate level of sanctions.

2. The Hearing and Hearing Panel Decision

The Hearing Panel conducted a seven-day hearing beginning on May 4, 2009. Enforcement called nine witnesses.[13] Respondents each testified, and they called one other

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funds by causing four checks totaling $375,000 (representing the value of EW's condominium in Philadelphia that she bequeathed to respondents) to be written from EW's account to pay down respondents' outstanding home equity line of credit in April and June 2006. Enforcement withdrew the allegation that K. Mullins breached her fiduciary duties, and amended the complaint to eliminate allegations concerning the $375,000 in checks. J. Mullins repaid EW $375,000 shortly after Morgan Stanley terminated him.

12 For example, in March 2009, J. Mullins's counsel stated that in light of J. Mullins's December 2008 plea in a New Jersey state criminal action (discussed in Part II.C, *infra*), J. Mullins was not contesting liability but only sanctions.

13 Pursuant to an agreement of the parties, the branch manager for the Firm's Northfield, New Jersey office from June 2002 through May 2004 testified under oath and was subject to cross examination prior to the hearing. The Hearing Officer admitted the transcript of this testimony into the record.

witness. On August 25, 2009, the Hearing Panel issued its decision. The Hearing Panel found that J. Mullins converted and misused customer funds, that J. Mullins breached his fiduciary obligations owed to the Foundation, that respondents made material misstatements to Morgan Stanley on annual compliance questionnaires, and that respondents borrowed funds from EW without Morgan Stanley's approval.[14] The Hearing Panel barred J. Mullins in all capacities for converting and misusing customer funds and for breaching his fiduciary duties; suspended K. Mullins for six months in all capacities, and fined her $15,000, for making material misstatements to Morgan Stanley; and further suspended K. Mullins for an additional three months in all capacities, and fined her an additional $5,000, for borrowing funds from EW without Morgan Stanley's approval. The Hearing Panel also ordered that K. Mullins requalify, and assessed $16,003 in costs against respondents (jointly and severally).

C. New Jersey State Criminal Proceedings

In connection with J. Mullins's personal use of the Foundation's Boyds gift certificates and the wine purchased from Morton's restaurant, the State of New Jersey conducted its own investigation. New Jersey officials subsequently charged J. Mullins with "Misapplication of Entrusted Property, Third Degree."[15] On December 23, 2008, J. Mullins pleaded guilty to the charge, and admitted to a New Jersey superior court that he was an officer and fiduciary of the Foundation during all relevant time periods and used Foundation funds for unauthorized personal purposes. The court accepted J. Mullins's plea, and he was diverted into New Jersey's Pretrial Intervention Program for 12 months with the ability to apply for early termination after six months.

III. Discussion

A. J. Mullins Converted and Misused Customer Funds and Breached Fiduciary Duties

The Hearing Panel found that J. Mullins violated NASD Rules 2330 and 2110 because he converted and misused the Foundation's funds in connection with his personal use of the Four Seasons and Boyds gift certificates and consumption of the Foundation's wine. The Hearing Panel also found that J. Mullins's conversion and misuse of the Foundation's funds breached his

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[14] The Hearing Panel found that Enforcement failed to prove that J. Mullins attempted to convert funds from Morgan Stanley. Enforcement did not appeal the matter, and we decline to review this alleged violation.

[15] New Jersey law provides that, "[a] person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary . . . in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit. 'Fiduciary' includes [a] trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary." N.J. Stat. § 2C:21-15 (2010).

fiduciary duties to the Foundation as a corporate officer and trustee, in violation of NASD Rule 2110. We affirm the Hearing Panel's findings.

NASD Rule 2330(a) provides that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." "Conversion is the wrongful exercise of dominion over the personal property of another." *Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (FINRA NAC Mar. 7, 2008). Improper use rises to the level of conversion "when the associated person intends permanently to deprive the customer of the use" of his funds or securities. *See Dist. Bus. Conduct Comm. v. Arnold*, Complaint No. C05960034, 1997 NASD Discip. LEXIS 79, at *10 n.8 (NASD NBCC Feb. 25, 1997).

NASD Rule 2110 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[16] "FINRA's disciplinary authority under NASD Rule 2110 is also 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." *John Saad*, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761, at *13 (May 26, 2010) (internal quotations omitted), *appeal pending*, No. 10-1195 (D.C. Cir. July 22, 2010). Moreover, a corporate officer has a fiduciary relationship with his corporation that forbids him from diverting corporate assets for his own self-interest. *See Dep't of Enforcement v. Foran*, Complaint No. C8A990017, 2000 NASD Discip LEXIS 8, at *17-18 (NASD NAC Sept. 1, 2000); *see also generally* 3 William Meade Fletcher, *Fletcher Cyclopedia Corporations* § 844.10 (2010) (discussing fiduciary obligations of directors and officers of corporations, including charitable or non-profit corporations). A registered representative serving as an officer of his corporate customer violates NASD Rule 2110 when he diverts corporate assets for his own interests and contrary to the interests of the corporation. *See Foran*, 2000 NASD Discip. LEXIS 9, at *17-18.

We find that J. Mullins converted and misused the Foundation's funds, in violation of NASD Rules 2330 and 2110. In so doing, J. Mullins also breached his fiduciary duties to the Foundation as a corporate officer and trustee, in violation of NASD Rule 2110. There is no dispute that J. Mullins: (1) improperly used $4,000 of the Foundation's Four Seasons gift certificates for respondents' personal vacation; (2) improperly used $5,500 of the Foundation's Boyds gift certificates to pay his personal bills at the store; (3) improperly consumed the Foundation's wine at dinners unrelated to the Foundation and its business; and (4) served the Foundation in a fiduciary capacity as its vice-president and trustee during all relevant time periods, as alleged in the amended complaint. Indeed, prior to the hearing, J. Mullins stipulated to these underlying facts, admitted in the New Jersey state criminal action that he had a fiduciary relationship with the Foundation and that he used the Foundation's funds for unauthorized personal purposes, and repeatedly stated generally that he accepted liability for the misconduct

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[16] Under NASD Rule 0115, associated persons have the same duties and obligations as FINRA members under FINRA's rules.

alleged in the amended complaint. Further, at the hearing, J. Mullins admitted that he failed to comply with high standards of commercial honor and just and equitable principles of trade.

J. Mullins argued, however, that while he accepted liability for his misconduct, the violations were technical in nature because EW approved his personal use of the Foundation's gift certificates and wine and he simply failed to obtain, in advance, a resolution from the Foundation's board of directors authorizing his activities.[17] J. Mullins explained that he "got very sloppy" and "[d]id not keep a distinct line between [EW] the client and [EW] the family member."

We reject J. Mullins's characterizations of his misconduct. The record does not support his claim that EW approved his personal use of the Four Seasons and Boyds gift certificates and personal consumption of the Foundation's wine. To the contrary, when questioned by Morgan Stanley in August 2006 about the charges to Boyds on the Foundation's debit card, EW had no knowledge of such charges.[18] J. Mullins bore the burden of producing evidence to support his claimed defenses to the charges in the amended complaint, and he failed to do so. *See Kirlin Secs., Inc.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168, at *64 n.87 (Dec. 10, 2009).[19]

We also reject J. Mullins's claim that he intended to repay the Foundation for his personal use of the Four Seasons gift certificates in May 2006 but Morgan Stanley fired him (on August 15, 2006) before he was able to do so, and the matter simply "slipped" his mind until June 2007. The Hearing Panel found J. Mullins's assertions not credible, and he has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determination on appeal. *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008

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[17] Similarly, in his brief on appeal, J. Mullins states that "he does not contest that there were in fact rule violations but does contest that the violations were as charged and found[.]"

[18] In responses to requests for information, J. Mullins stated that he called the Four Seasons in London the day before he left for vacation to ask about exchange rates and fees on currency conversions, and "[s]ince I did not have time before I departed to stop at the Philadelphia Four Seasons, I took a few of the ones I had in the Foundation file." J. Mullins, however, did not claim that he used the gift certificates with EW's approval. Moreover, J. Mullins testified that he told EW that he would purchase any unused Boyds gift certificates from the Foundation. J. Mullins, however, personally used some of the Boyds gift certificates just four days after he purchased the certificates for the Foundation in April 2006.

[19] J. Mullins argues that Enforcement was obligated to formally depose EW "to preserve evidence that would have been favorable to John Mullins that FINRA had access to[.]" J. Mullins offers no support for this argument, and Enforcement has discretion as to which witnesses it interviews in connection with its case. *See Thomas E. Warren, III*, 51 S.E.C. 1015, 1020 (1994) (rejecting argument that FINRA did not conduct an adequate investigation into respondent's misconduct where FINRA did not interview certain individuals).

SEC LEXIS 2401, at *18 (Aug. 22, 2008) (holding that credibility determinations can only be overcome by substantial evidence). We therefore affirm the Hearing Panel's credibility finding.

Moreover, J. Mullins did not repay the Foundation for the Four Seasons and Boyds gift certificates until ten months after Morgan Stanley fired him, 11 to 15 months after he personally used the Foundation's gift certificates, and well after FINRA began its investigation into his misconduct. Likewise, J. Mullins did not repay the Foundation for the wine until after New Jersey commenced its investigation. The fact that J. Mullins eventually repaid the Foundation well after discovery of his misconduct does not alter our conclusion that he converted and misused the Foundation's funds, in violation of NASD Rules 2330 and 2110. *See Dist. Bus. Conduct Comm. v. Davis*, Complaint No. C8A970040, 1998 NASD Discip. LEXIS 45, at *6 (NASD NAC Oct. 22, 1998) (rejecting respondent's claim that he did not intend to permanently deprive customer of his funds based upon respondent's attempt to repay customer within two weeks of conversion after customer complained, and holding that these attempts do "not change the fact that he converted the check"); *Joel Eugene Shaw*, 51 S.E.C. 1224, 1227 (1994) (affirming finding that representative converted funds despite representative's repayment of funds to customers after discovery of misconduct).

Finally, J. Mullins argues that Enforcement needed to demonstrate that he "purposely obtained . . . the property by deception" to prove conversion under New Jersey criminal law. J. Mullins is incorrect. First, FINRA proceedings are not criminal matters. *See Pacific On-Line Trading & Secs., Inc.*, 56 S.E.C. 1111, 1123 n.21 (2003). Second, the amended complaint alleged, and the Hearing Panel found, that J. Mullins converted the Foundation's funds in violation of the high ethical standards of commercial honor as prescribed by NASD Rule 2110, standards which do not require proof of deception to establish liability. Thus, standards from state criminal law conversion statutes are not applicable under the circumstances. *See Dep't of Enforcement v. Saad*, Complaint No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *11-12 (FINRA NAC Oct. 6, 2009) (holding that NASD Rule 2110 is an ethical rule and that "[t]he test to determine whether conduct violates Rule 2110 is whether the misconduct 'reflects 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'"), *aff'd*, 2010 SEC LEXIS 1761; *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NASD NAC June 2, 2000) ("Disciplinary hearings under Conduct Rule 2110 are ethical proceedings, and one may find a violation of the ethical requirements where no legally cognizable wrong occurred."). For all of these reasons, we find that J. Mullins converted and misused Foundation property, and breached his fiduciary duties owed to the Foundation as a corporate officer and trustee, in violation of NASD Rules 2330 and 2110.

B. Material Misstatements on Firm Compliance Questionnaires

The Hearing Panel found that respondents each failed to disclose, and misstated, material information on four Morgan Stanley annual compliance forms (which caused the Firm to maintain inaccurate books and records), in violation of NASD Rules 3110 and 2110. We affirm the Hearing Panel's findings.

NASD Rule 3110 generally requires that member firms make and preserve records in conformance with all applicable securities laws and regulations. A registered representative's failure to disclose material information to his firm violates NASD Rule 2110, and calls into question the registered representative's "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public." *Dep't of Enforcement v. Davenport*, Complaint No. C05010017, 2003 NASD Discip. LEXIS 4, at *9-10 (NASD NAC May 7, 2003); *Dep't of Enforcement v. Skiba*, Complaint No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (FINRA NAC Apr. 23, 2010) (holding that registered representative's submission of false and misleading forms to his member firm violated NASD Rule 2110); *see also James A. Goetz*, 53 S.E.C. 472, 477-78 (1998) (holding that registered representative's false statements on firm's forms reflect directly on his ability to comply with regulatory requirements fundamental to the securities industry).

There is no dispute that respondents failed to disclose their positions with the Foundation on Firm compliance questionnaires. Both respondents failed to disclose on their 2003-2006 questionnaires that they served as trustees for the Foundation. K. Mullins also failed to disclose her role as secretary and treasurer of the Foundation on her 2003, 2004, and 2005 questionnaires, and J. Mullins failed to disclose his role as vice-president on his 2005 questionnaire. Further, respondents failed to disclose the March 1, 2005 loan from EW on their 2005 questionnaires (dated just several days after respondents repaid EW) and January 2006 questionnaires. Respondents' inaccurate disclosures prevented Morgan Stanley from determining whether respondents' positions with the Foundation and loan from EW presented potential conflicts of interest. Indeed, based upon K. Mullins's failures to disclose that she served as a trustee and officer of the Foundation, Morgan Stanley permitted her to serve as the financial advisor for the Foundation's account in contravention of its policy prohibiting financial advisors serving in a fiduciary capacity from servicing an account.

Respondents argue that notwithstanding their lack of disclosures on the Morgan Stanley questionnaires, the Firm knew that respondents held positions with the Foundation based on (among other things) numerous pieces of correspondence received by the Firm disclosing such information. Respondents' branch manager at the time they joined Morgan Stanley, however, testified that he did not know that K. Mullins had any role in the Foundation, and knew only that J. Mullins served as the Foundation's vice-president. Similarly, the two successor managers of the Firm's Northfield, New Jersey office from June 2004 through respondents' termination in August 2006 testified that they did not know that respondents served as officers and trustees of the Foundation. The operations manager for the branch also testified that she did not recall any conversations with K. Mullins concerning her roles with the Foundation, and recalled only general conversations about J. Mullins's roles with the Foundation. The operations manager further testified that while she reviewed incoming customer correspondence, she did so to determine whether the correspondence contained a customer complaint or order. And, contrary to K. Mullins's claim, the operations manager testified that she did not instruct K. Mullins to omit her roles from the Foundation from the questionnaires. The Hearing Panel found this testimony to be credible, and respondents have not presented substantial evidence to disturb those findings. *See Ortiz*, 2008 SEC LEXIS 2401, at *18. Moreover, even if certain Morgan Stanley managers knew generally that respondents held positions with the Foundation, this does not excuse respondents' submission of misleading questionnaires to the Firm, and they cannot shift blame to Morgan Stanley for their misstatements and omissions. *See Dep't of Enforcement v. Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at *53 (FINRA

NAC Aug. 21, 2009) (holding registered representative is responsible for her actions and cannot shift her responsibility to her member firm or its staff).

We also reject K. Mullins's argument that she did not have to disclose her roles with the Foundation because she served as a corporate officer and trustee in name only, performed no duties in connection with these positions, and EW was the sole person controlling and operating the Foundation. First, Morgan Stanley required that a registered representative disclose her position as an officer or trustee even if she believed that her position was informal and merely ceremonial. Second, although the Foundation may not have held regular, formal meetings, K. Mullins's activities on behalf of the Foundation were more than merely ceremonial. K. Mullins testified that activity with the Foundation increased beginning in 2004 and 2005, that she communicated with representatives of numerous charities to which the Foundation gave money, attended numerous Foundation events and meetings, ensured that the Foundation had sufficient funds to pay expenses, and would transfer funds into the Foundation account at EW's request.

K. Mullins further argues that although the two questions on the Firm's questionnaire could "literally" call for disclosure of her positions as a Foundation trustee and officer, a more practical reading of the questions supports her position that she responded truthfully and accurately to the questions. Specifically, K. Mullins argues that because she was not a trustee of any Morgan Stanley account and not listed as a trustee on any account document, but rather was a trustee of an organization that had an account at Morgan Stanley, her negative response to one of the two questions was accurate.[20] Similarly, respondents argue that because the Foundation was established as a non-profit corporation (and not a trust), they were not technically trustees as that term is commonly used, and thus did not have to disclose to Morgan Stanley that they served as "trustees" on the Foundation's "board of trustees."

We reject respondents' narrow reading of the disclosure required by the questionnaires. A Morgan Stanley branch examiner, and a manager of policies and procedure in the Firm's compliance department, each testified that they would expect a trustee of a charitable foundation that held an account at Morgan Stanley to disclose the name of the foundation, the account number of the account that the foundation held at the Firm, and the exact role of the trustee on the annual questionnaire. The Firm in its compliance manual advised financial advisors to avoid acting in the capacity of a trustee for non-affiliated organizations or individuals, and the questionnaires sought to identify potential conflicts of interest. Respondents' limited reading of the questionnaire to require disclosure only in those situations where a registered representative is not only a trustee of an organizational customer, but also listed as a trustee to that customer's account, runs contrary to the purposes of the disclosure. Likewise, Morgan Stanley personnel testified that its compliance department—not the subject registered representative—should make

[20] Respondents also generally argue that because the Morgan Stanley questionnaires were ambiguous, the proceedings before the Hearing Panel were procedurally unfair. Respondents, however, have not explained how any alleged ambiguity of the Firm's forms rendered FINRA's proceedings against them unfair.

such determinations and that disclosure of respondents' roles should have been made because respondents were expressly named as trustees on the Foundation's formation documents.

K. Mullins also argues that Enforcement failed to demonstrate that she acted in bad faith in connection with her false and inaccurate disclosures and thus she is not liable for violating NASD Rules 3110 and 2110. We disagree. Enforcement need not demonstrate bad faith or unethical conduct where respondent's alleged violation of NASD Rule 2110 is based on the violation of another rule, as is the case here. *Nicholas T. Avello*, Exchange Act Rel. No. 51633, 2005 SEC LEXIS 986, at *9 (Apr. 29, 2005) ("When a violation of Conduct Rule 2110 is not based on the violation of some other rule, we have required a showing that the respondent has acted in bad faith before liability can be found. There is no bad faith requirement, however, when, as here, a violation of Conduct Rule 2110 is based upon the violation of a Commission rule."), *petition for review denied*, 454 F.3d 619 (7th Cir. 2006); *see also Stephen G. Gluckman*, 54 S.E.C. 175, 185 (1999) (stating the Commission's "long-standing and judicially recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of NASD Rule 2110); *Shvarts*, 2000 NASD Discip. LEXIS 6, at *12-13 ("[V]iolations of federal securities laws and NASD Conduct Rules, are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations.").

Finally, we reject respondents' explanations for their failures to disclose the loan from EW on their 2005 and 2006 Morgan Stanley questionnaires. Respondents claim that although they signed and dated the 2005 questionnaire on March 8, 2005, they filled out the form several weeks earlier (i.e., before they contemplated the loan from EW). Respondents also characterize the loan as an "aborted loan," and describe March 2005 as an extremely hectic and stressful period in their lives. The Hearing Panel did not find credible respondents' explanations for failing to disclose the loan, and respondents have not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determinations on appeal. *See Ortiz*, 2008 SEC LEXIS 2401, at *18. Further, it is undisputed that respondents and EW consummated the loan transaction. The Morgan Stanley questionnaires unambiguously direct disclosure of all loans from a customer within the past 12 months. EW made the loan to respondents within 12 months of both the 2005 and 2006 questionnaires. Consequently, we find that respondents violated NASD Rules 3110 and 2110.

C. Respondents Failed to Obtain Firm's Approval of Loan from EW

The Hearing Panel found that respondents borrowed funds from EW without Morgan Stanley's prior approval, in violation of NASD Rules 2370 and 2110. We affirm the Hearing Panel's findings.

NASD Rule 2370 prohibits a registered representative from borrowing funds from a customer unless the registered representative's firm has a written procedure allowing such loans and the lending agreement satisfies certain conditions.[21] *See* NASD Rules 2370(a). Morgan

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[21] For example, if a firm has a written procedure permitting a loan from a customer, and if the lending arrangement is based on a personal relationship between the registered representative

[Footnote continued on next page]

Stanley's procedures prohibited its employees from borrowing funds from customers unless they sought and obtained an exception from the Firm prior to borrowing the funds.

It is undisputed that respondents borrowed $100,000 from EW on March 1, 2005, and did not request or obtain Morgan Stanley's approval to borrow these funds. K. Mullins nonetheless argues that because the loan from EW was a "bridge loan" and repaid within several days of being made, she did not violate FINRA's rules or Morgan Stanley's procedures.[22] K. Mullins is mistaken. Morgan Stanley's prohibition on borrowing funds from customers without prior Firm approval applied to any loan from a customer made within the past 12 months, regardless of its duration or intended purpose.

K. Mullins also argues that the prohibition on loans from customers (and the scope of the questionnaire's required disclosure regarding loans from customers) required that she disclose only current and outstanding loans "to address the open risk of a broker servicing an account while the broker currently owed the customer money." The purpose of the Firm's prohibition on loans from customers, however, was to prevent conflicts and potential conflicts of interests with customers, and to avoid the appearance of conflicts of interest. *See generally NASD Notice to Members 03-62* (Oct. 2003). Even under K. Mullins's more limited view of the purpose of the question, for at least several days respondents did service EW's accounts while they owed money to EW.

Finally, we reject K. Mullins's suggestion that because of their close, familial relationship with EW, respondents did not violate FINRA rules or Morgan Stanley's written procedures. Respondents' personal relationship with EW did not excuse their failures to obtain the Firm's prior approval of the loan, and the loan did not qualify under any exception to the rule. Respondents failed to seek and obtain Morgan Stanley's approval before obtaining the loan from EW, in violation of Morgan Stanley's written procedures. Consequently, we find that respondents violated NASD Rules 2370 and 2110.

D. <u>Procedural Arguments</u>

Respondents argue that they were denied a fair hearing before the Hearing Panel, and raise a number of arguments to support their claim. Exchange Act Section 15A(b)(8) provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. *See Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009)

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and customer such that the loan would not have been solicited, offered, or given had the customer and the representative not maintained a relationship outside of the broker/customer relationship, a registered representative may borrow funds from a customer if the firm pre-approves such loan in writing. *See* NASD Rules 2370(a) and 2370(b)(1).

22 At the hearing, J. Mullins accepted liability for borrowing funds from EW without the Firm's prior approval.

(holding that FINRA must provide fair procedures for its disciplinary actions). Exchange Act Section 15A(h)(1) requires that FINRA, in a disciplinary proceeding, "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." Fairness is determined by examining the entirety of the record. *See Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *16 (Feb. 13, 2004).

For the reasons set forth below, we find that the proceedings before the Hearing Panel were fair, conducted in accordance with FINRA rules, and that respondents had ample notice of the charges and opportunity to defend themselves. We address each of respondents' specific procedural arguments in turn.

1. <u>The Hearing Officer Properly Excluded the August 2006 Letter</u>

Respondents argue that the Hearing Officer improperly excluded from the record a letter dated August 15, 2006 (the "August 2006 Letter"), allegedly handwritten by EW and addressed to Morgan Stanley. They claim that the Hearing Officer excluded the August 2006 Letter because it is "clearly favorable to respondents in tone and content," and that exclusion of the August 2006 Letter rendered these proceedings fundamentally unfair because the letter demonstrates that J. Mullins did not convert the Foundation's property. For the reasons set forth below, we see no abuse of discretion by the Hearing Officer in excluding the August 2006 Letter and, in any event, because our de novo review includes a review of the substance of the excluded letter, we see no prejudice to the respondents by its exclusion.[23]

a. <u>Background of the August 2006 Letter</u>

J. Mullins testified that several days after Morgan Stanley placed him on administrative leave, and just prior to his termination from the Firm on August 16, 2006, he met with EW. EW immediately knew that something was wrong, and J. Mullins informed EW that he was "in trouble." EW offered to speak to J. Mullins's supervisors at Morgan Stanley to help him. J. Mullins rejected this offer. Instead, EW wrote the August 2006 Letter in J. Mullins's presence. The August 2006 Letter states as follows:

> I am writing to apologize for putting John and Kathy Mullins in a bad position with Morgan Stanley. They have taken care of [PW] and me over 25 years and I want them to continue to handle all of my affairs for the rest of my life. For many years before my husband passed away, he and I talked and agreed our condo in Philadelphia should go to them. We also agreed they should run the Foundation

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[23] *See Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999) (holding that de novo review is intended to insulate proceedings from procedural unfairness), *aff'd*, 54 S.E.C. 655 (2000); *Dep't of Enforcement v. Sathianathan*, Complaint No. C9B030076, 2006 NASD Discip. LEXIS 3, at *59-60 (NASD NAC Feb. 21, 2006) (reviewing hearing officer's exclusion of respondent's exhibits and finding, after a "close review," that they were irrelevant), *aff'd*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572 (Nov. 8, 2006), *aff'd,* 304 F. App'x 883 (D.C. Cir. 2008).

> they set up for us to provide for our favorite charities. After a brief illness last March I decided I don't want to wait for John and Kathy to have the condo until I passed away, and since the condo is rented and I know that John had a mortgage I insisted that he take my gift now. I wanted to see him enjoy it while I was alive. The only string attached was that it remain confidential until I pass [sic] away. I did not mean to cause John any problems with my gift. . . . John and Kathy are my "grandkids" they help me with everything. . . . I wanted them to have $375,000 the value of the condo. I do not want the gift back that would be rude. I think you should give them the employee of the year award. Please arrange for them to continue handling all my affairs as they have so wonderfully for 25 years. . . .

b. Procedural History

On February 5, 2009, the Hearing Officer entered his Second Order Establishing Pre-Hearing and Hearing Schedule and Procedures (the "Scheduling Order"), which required the parties to file witness and exhibit lists on or before March 30, 2009. K. Mullins timely filed 11 proposed exhibits, but did not identify or include the August 2006 Letter. J. Mullins did not identify or file any exhibits pursuant to the Scheduling Order. At a prehearing conference conducted on April 9, 2009, the Hearing Officer directed J. Mullins's counsel to file exhibit and witness lists, notwithstanding the March 30, 2009 deadline established by the Scheduling Order. On April 30, 2009, J. Mullins filed several proposed exhibits related to the New Jersey criminal action, but did not list or include the August 2006 Letter.

Beginning with opening arguments on the first day of the hearing before the Hearing Panel, and again at various points during the seven-day hearing, counsel for J. Mullins sought to introduce the August 2006 Letter. The Hearing Officer declined to admit into evidence the August 2006 Letter on several occasions, finding that: (1) J. Mullins failed to identify and submit the letter pursuant to the Scheduling Order, and permitting J. Mullins to introduce the August 2006 Letter in contravention of the Scheduling Order would unfairly prejudice Enforcement; and (2) the August 2006 Letter was not relevant and repeated testimony already contained in the record.

For the reasons set forth below, we find that the Hearing Officer did not abuse his discretion in declining to admit the August 2006 Letter into evidence.

c. Respondents Have Not Shown Substantial Justification for Failing to Comply with Scheduling Order

Pursuant to NASD Rule 9280, the Hearing Officer had the authority to exclude from evidence witnesses or exhibits that respondents, without substantial justification, failed to disclose pursuant to the Scheduling Order and NASD Rules 9242 and 9261.[24] *See Dep't of*

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[24] Pursuant to NASD Rule 9242, a Hearing Officer has the authority to order parties to, among other things, furnish to the Hearing Panel and other parties a list and copies of documents that a party intends to introduce at the hearing. NASD Rule 9261(a) provides that each party

[Footnote continued on next page]

Enforcement v. Epstein, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *89-90 (FINRA NAC Dec. 20, 2007), *aff'd*, 2009 SEC LEXIS 217.

Respondents have not demonstrated substantial justification for their failure to comply with the Scheduling Order. First, we reject respondents' contention that because the August 2006 Letter was to be used as rebuttal evidence, they did not need to identify it as an exhibit pursuant to the Scheduling Order. *See Dep't of Enforcement v. Alexander Secs., Inc.*, Complaint No. CAF010021, 2004 NASD Discip. LEXIS 16, at *62-63 (NASD NAC Aug. 16, 2004) (affirming hearing officer's exclusion of exhibits offered as rebuttal evidence because such exhibits were not identified or filed pursuant to scheduling order and had only been supplied to Enforcement on the night before the hearing), *aff'd*, Exchange Act Rel. No. 51974, 2005 SEC LEXIS 1558 (July 6, 2005). Moreover, respondents' characterization of the August 2006 Letter as rebuttal evidence that they intended to use "in anticipation of FINRA offering hearsay evidence of the statements of decedent [EW]" conflicts with their description of the letter as crucial to demonstrating that J. Mullins did not convert or misuse Foundation funds, which was the thrust of J. Mullins's defense at the hearing.

Second, although J. Mullins's counsel admitted that he did not separately file the August 2006 Letter pursuant to the Scheduling Order (or the Hearing Officer's subsequent instructions at the April 9, 2009 pre-hearing conference), he argues that Enforcement had a copy of the August 2006 Letter because it was attached to a motion to dismiss filed by J. Mullins in June 2008. The fact that Enforcement may have possessed the August 2006 Letter because J. Mullins attached it to a pleading filed 11 months prior to the hearing does not excuse J. Mullins's failure to comply with the Scheduling Order and its requirement that the parties identify in advance of the hearing specific documents they intended to introduce as exhibits. Further, had respondents properly and timely identified the August 2006 Letter, Enforcement could have offered evidence disputing the authenticity of the document (including the testimony of the attorney who represented EW immediately after she severed ties with respondents in August 2006). We agree with the Hearing Officer's determination that under the circumstances, Enforcement would have been unfairly prejudiced had the August 2006 Letter been admitted into evidence.

Third, J. Mullins's counsel argues that his client should not be penalized for counsel's failure to comply with the Scheduling Order. Respondents, however, are "held accountable for the acts and omissions of their chosen counsel." *Dep't of Enforcement v. Mission Secs., Corp.*, Complaint No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *34 (FINRA NAC Feb. 24, 2010) (quoting *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 397 (1993)), *aff'd*, Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010). This is particularly true where, as here, the Hearing Officer expressed concern "about what appears to have been a pretty calculated disregard" for the Scheduling Order by not complying with its terms. Moreover, for the reasons described below, we reject counsel's characterization of the

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shall submit copies of documentary evidence it intends to present at the hearing no later than 10 days prior to the hearing or at such earlier date specified by the Hearing Officer.

Hearing Officer's ruling as "penalizing" J. Mullins because the August 2006 Letter is immaterial to our findings of misconduct.

d. <u>The August 2006 Letter Is Not Material</u>

Even if we were to assume that respondents had demonstrated substantial justification for their failure to comply with the Scheduling Order (which they have not), we find that the August 2006 Letter was not material to the Hearing Officer's determination nor to our conclusion as to respondents' liability and sanctions.

Pursuant to Rule 9263(a), a Hearing Officer may exclude all evidence that is irrelevant, immaterial, or unduly repetitious. "NASD Rule 9263 grants hearing officers broad discretion to accept or reject evidence, thus, the NAC reviews the exclusion of evidence only for an abuse of discretion." *Dep't of Enforcement v. Strong*, Complaint No. E8A2003091501, 2008 FINRA Discip. LEXIS 19, at *17 (FINRA NAC Aug. 13, 2008). J. Mullins argues that the August 2006 Letter is relevant because it shows that "he did not steal from [EW]," the "longstanding positive relations" between EW and respondents, and demonstrates "the nature and extent of [EW's] bounty and relationship with J. Mullins." The August 2006 Letter addresses EW's $375,000 in payments to respondents, but does not reference J. Mullins's use of the Foundation's funds to purchase, and then make personal use of, the Four Seasons gift certificates, the Boyds gift certificates, or the bottles of wine at Morton's restaurant. Further, Enforcement amended the complaint and withdrew charges relating to the $375,000 in payments from EW. Contrary to J. Mullins's argument, the August 2006 Letter does not support his claims that he did not commit the violations alleged in the amended complaint concerning his conversion and misuse of Foundation funds, and breach of his fiduciary obligations to the Foundation.

To the extent that the August 2006 Letter shows the positive personal relationship between EW and respondents in the years prior to J. Mullins's conversion and misuse of the Foundation's funds, the record contains ample evidence demonstrating the nature of EW's relationship with respondents. In addition, just several days after EW allegedly wrote the August 2006 Letter, her attorney wrote to respondents and directed that they have no further contact with EW, informed them that EW had revoked the Power of Attorney naming them as her agents, and demanded that they repay EW the $375,000. And notwithstanding the positive personal relationship respondents enjoyed with EW prior to her termination of their relationship in August 2006, the record demonstrates that J. Mullins converted and misused the Foundation's property, and breached his fiduciary duties owed to the Foundation, in violation of FINRA rules. Thus, we find that the Hearing Officer properly excluded the August 2006 Letter.

Finally, even if we were to conclude that the Hearing Officer abused his discretion by excluding the August 2006 Letter, we independently conclude that it does not alter our view of the facts and violations. Indeed, if anything, the August 2006 Letter highlights J. Mullins's breach of EW's trust due to the unethical activities not referenced in the letter.

2. <u>K. Mullins Was not Unfairly Prejudiced by Failure to Sever Claims</u>

K. Mullins argues that the Hearing Officer erred in denying her request to sever the claims against her from those of J. Mullins. We find that the Hearing Officer properly denied K. Mullins's request.

NASD Rule 9214 provides that a Hearing Officer may order the severance of a disciplinary proceeding into two separate proceedings. The rule further provides that in considering such a request, the Hearing Officer shall determine whether: (1) the same or similar evidence reasonably would be expected to be offered at each of the possible hearings; (2) severance would conserve the time and resources of the parties; and (3) any unfair prejudice would be suffered by one or more of the parties if severance is not ordered.

The Hearing Officer denied K. Mullins's request, held that severing this disciplinary proceeding would not be expected to conserve time and resources given the factual overlap among the causes of action, and held that K. Mullins would not be unfairly prejudiced if the Hearing Officer denied her request. We agree. The claims against both respondents shared a number of underlying facts, witnesses, and exhibits, and the record does not show that K. Mullins suffered unfair prejudice because the Hearing Panel heard the claims against her in the same proceeding as the claims against J. Mullins. *See Donner Corp. Int'l*, Exchange Act Rel. No. 55313, 2007 SEC LEXIS 334, at *68-69 (Feb. 20, 2007) (finding that FINRA adjudged each respondent based solely upon the record evidence pertaining to that applicant). The Hearing Officer did not abuse his discretion in declining to sever the claims against K. Mullins from those of J. Mullins. *Cf. Jolley v. Welch*, 904 F.2d 988, 994 (5th Cir. 1990) (applying abuse of discretion standard in reviewing trial court's denial of motion to sever).

3. <u>Post-Hearing Briefs</u>

J. Mullins argues that the Hearing Officer improperly denied his request to file post-hearing briefs, which deprived him of a full opportunity to be heard. J. Mullins sought to address in a post-hearing brief the differences under New Jersey law between misapplication of entrusted funds and misappropriation of funds, the admissibility of the August 2006 Letter, alleged "clear misstatements" of fact by Enforcement that J. Mullins argues were highly prejudicial to respondents, and the unfairness of certain evidentiary rulings by the Hearing Officer.

NASD Rule 9266(a) provides that the Hearing Officer has the discretion to order the parties to file post-hearing briefs. The Hearing Officer, after consulting with the Hearing Panel, denied J. Mullins's oral request made on the last day of the hearing to file post-hearing briefs, and denied a second written request from J. Mullins filed post-hearing. The Hearing Officer determined that because respondents had stipulated to many of the underlying facts of the case, and because the factual and legal issues of this case were not complex, post-hearing briefs would not assist the Hearing Panel. We find that the Hearing Officer did not abuse his discretion in denying J. Mullins's request, and J. Mullins had ample opportunity to address the issues with which he is concerned.

4. Alleged Preclusion of Witness Testimony and Discovery Issues

J. Mullins argues that the Hearing Officer improperly cut off or precluded the testimony of numerous witnesses throughout the seven-day hearing. The record does not support J. Mullins's claim. The Hearing Officer was charged with regulating the course of the proceeding, and nothing in the record suggests that he improperly prevented or cut short witness testimony. *See* NASD Rule 9235(a) (granting Hearing Officer authority to regulate course of hearing and resolve all procedural and evidentiary matters); *Sathianathan*, 2006 NASD Discip. LEXIS 3, at *56-57 (rejecting argument that hearing officer improperly interrupted testimony and finding that respondent had multiple opportunities to present his case).

Finally, respondents complain that despite their demands, neither Morgan Stanley nor FINRA produced five years' worth of day planners and correspondence files, and that such failures hindered respondents' abilities to defend themselves.[25] The record does not support respondents' claims. Morgan Stanley informed FINRA that it searched for, and did not find, any day planners. Consequently, we reject respondents' arguments, and find that the proceedings before the Hearing Panel were fair and conducted in accordance with FINRA's rules.

IV. Sanctions

The Hearing Panel imposed a unitary sanction for J. Mullins's conversion, misuse, and breach of fiduciary duties, and barred him in all capacities for this misconduct. The Hearing Panel suspended K. Mullins in all capacities for six months and fined her $15,000 for making material misstatements on Morgan Stanley questionnaires. The Hearing Panel further suspended K. Mullins for an additional three months in all capacities (to be served consecutively), and fined her an additional $5,000, for borrowing funds from EW without Morgan Stanley's approval.[26]

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[25] Respondents apparently make this argument in connection with their failures to make accurate disclosures on Firm questionnaires. For instance, respondents argue that the day planners would have shown that Morgan Stanley personnel attended Foundation events at which respondents allege that their names were mentioned as officers of the Foundation (and therefore buttress their arguments that Morgan Stanley knew respondents' roles in the Foundation). Testifying Morgan Stanley personnel, however, admitted to attending various Foundation events although they generally did not know respondents' roles in the Foundation. Moreover, as discussed in Part III.B, *supra*, the general knowledge of certain Morgan Stanley personnel concerning respondents' activities with the Foundation would not excuse respondents' failures to disclose material information on the Firm's compliance questionnaires.

[26] For J. Mullins's material misstatements to Morgan Stanley, the Hearing Panel concluded that he merited a one-year suspension in all capacities, a $25,000 fine, and be ordered to requalify. For borrowing customer funds without Firm approval, the Hearing Panel further concluded that he merited a three-month suspension in all capacities, a $5,000 fine, and be ordered to requalify. In light of the bar imposed upon J. Mullins, the Hearing Panel did not impose these additional sanctions.

The Hearing Panel also ordered that K. Mullins requalify, and assessed $16,003 in costs against respondents (jointly and severally).

For the reasons set forth below, we affirm the Hearing Panel's sanctions.

A. J. Mullins's Conversion, Misuse, and Breach of Fiduciary Duties

FINRA's Sanction Guidelines ("Guidelines") for conversion and improper use of funds state that a bar is the standard sanction for conversion, regardless of the amount converted.[27] Conversion "is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that the NASD seeks to promote." *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976). The Guidelines also recommend considering a bar for improper use, and where the improper use results from respondent's misunderstanding of his customer's intended use of the funds, or other mitigation exists, consider suspending respondent for a period of six months to two years. "[I]mproper use of customer funds is a serious offense which undermines the integrity of the securities industry." *District Bus. Conduct Comm. v. Westberry*, Complaint No. C07940021, 1995 NASD Discip. LEXIS 225, at *24 (NASD NBCC Aug. 11, 1995). In determining appropriate sanctions, we also have considered the General Principles and Principal Considerations in Determining Sanctions applicable to all violations, as well as the seriousness of J. Mullins's offenses and the potential for recurrence.[28]

We find that barring J. Mullins in all capacities is the only effective remedial sanction for his conversion, misuse, and breach of fiduciary duties.[29] The record reflects that J. Mullins intentionally used the Foundation's gift certificates for his own personal benefit, and consumed the Foundation's wine.[30] The testimony and documents leave no doubt that J. Mullins knew he did not own the Foundation's property, and also knew that he could not use such property for his own benefit. Despite this knowledge, J. Mullins used Foundation gift certificates on four separate occasions over a period of several months, and consumed the Foundation's wine on

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27 *See FINRA Sanction Guidelines* 38 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. The Guidelines do not specifically address a breach of fiduciary duty by a registered representative serving as a corporate officer or trustee.

28 *See McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (finding that, in connection with sanctions, it is appropriate to consider: (1) all mitigating factors that the respondent has raised; (2) the seriousness of his offenses; (3) the corresponding harm that he caused to members of the trading public; (4) his potential gain for disobeying the rules; (5) the potential for repetition of his misconduct in light of the current regulatory regime; and (6) the deterrent value to the respondent and others).

29 As the Hearing Panel did, we have considered these violations together for purposes of assessing sanctions because they all flow from J. Mullins's improper personal use of Foundation property. *See Jordan*, 2009 FINRA Discip. LEXIS 15, at *41 n.17.

30 *Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 13 and 17).

three occasions over a period of 10 months (including several bottles well after Morgan Stanley had terminated him and EW severed all ties with him).[31] An aggravating factor is that J. Mullins's misconduct began while EW, then 96 years old, was recovering from an eight-day hospital stay and in the medical unit of her assisted living facility. The timing of these events suggests that J. Mullins concluded that he could misuse his customer's funds and property with impunity.

J. Mullins argues that he always intended to repay the Foundation, and did in fact repay the Foundation for the gift certificates and the wine. The Hearing Panel, however, found J. Mullins's claims that he intended to repay the Foundation, especially with respect to the Four Seasons gift certificates, were not credible. J. Mullins has presented no evidence to disturb these findings. *See Ortiz*, 2008 SEC LEXIS 2401, at *18. Moreover, J. Mullins repaid the Foundation for the Four Seasons and Boyds gift certificates in June 2007, well after Morgan Stanley fired him for this misconduct and after FINRA had commenced its investigation, and did not repay the Foundation for the wine until October 2007. Consequently, we do not find J. Mullins's eventual repayment of the Foundation to be mitigating.[32]

Similarly, we do not credit J. Mullins's claim that he accepted responsibility. In support of this claim, J. Mullins argues that he hired a forensic accountant to investigate Foundation expenditures. J. Mullins hired the accountant, however, only after Morgan Stanley terminated him. In addition, the accounting prepared by the forensic accountant failed to capture J. Mullins's personal use of the Four Seasons gift certificates and Foundation wine, and mischaracterized J. Mullins's purchases of the Boyds gift certificates as "medical and personal supplies." To the extent that J. Mullins has in fact accepted responsibility for his misconduct, he did so only after detection by the Firm and FINRA.[33]

Moreover, we agree with the Hearing Panel's finding that J. Mullins "persisted, long after spending the gift certificates, in concealing and minimizing his misconduct."[34] During his May 2007 on-the-record interview, J. Mullins did not mention using $4,000 worth of the Foundation's Four Seasons gift certificates for his May 2006 London vacation when asked about the gift certificates. Nor did J. Mullins mention his personal use of the Foundation's Boyds gift certificates. In a request for information dated May 14, 2007, FINRA staff asked J. Mullins if he had used any of the gift certificates for personal purposes. Despite several responses from J. Mullins, and additional requests from FINRA, J. Mullins did not answer FINRA's question until August 28, 2007, when he finally admitted using the Four Seasons gift certificates for his London vacation and the Boyds gift certificates. Even then, J. Mullins failed to disclose his

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31 *Id.* (Principal Considerations in Determining Sanctions, Nos. 8, 9, and 18).

32 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 4).

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

34 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10, 12).

consumption of the Foundation's wine—in fact, he falsely stated that "there are no other missing and/or unreplaced certificates, funds, or property."

We reject several additional claims of mitigation. The fact that J. Mullins does not have a disciplinary record is not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006). We also reject J. Mullins's comparison of his sanctions to sanctions imposed in other disciplinary cases. *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."), *pet. for review denied*, 168 F.3d 478 (1998).[35] We also do not consider mitigating that no customer suffered any harm because J. Mullins eventually made restitution to the Foundation for the gift certificates and wine. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) ("[T]here is no authority for the proposition that the absence of harm to customers is mitigating."), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005).

Finally, J. Mullins argues that because he has been out of the securities industry for more than three years in connection with his misconduct, this fact should be considered in the sanctions we impose. We disagree. As a general matter, FINRA, in determining the appropriate sanction, does not give weight to a respondent's time out of the industry. *See Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NASD NAC Dec. 18, 2000) ("We [do not] credit a respondent who was terminated by a firm" in determining the length of a suspension.); *Dep't of Enforcement v. Greer*, Complaint No. C05990035, 2001 NASD Discip. LEXIS 34, at *13-14 (NASD NAC Aug. 6, 2001) (stating that it is "neither appropriate nor consistent with the Sanction Guidelines" when determining the length of the suspension to give Greer credit for time out of the industry since Greer's firm terminated him).

J. Mullins's conversion and misuse of the Foundation's property, and breach of his fiduciary duties as a corporate officer and trustee to the Foundation, was an "egregious abuse of his customer's trust and confidence." *See Davis*, 1998 NASD Discip. LEXIS 45, at *5. J. Mullins's misconduct reveals a troubling disregard for fundamental principles of the securities industry. Based upon all of the forgoing, we find that J. Mullins poses a danger to the investing public and barring him in all capacities is necessary to deter him and others similarly situated from engaging in similar misconduct.

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[35] Further, the NAC decision cited by J. Mullins to compare sanctions involved unauthorized trading, and not conversion or misuse of customer funds. *See Dep't of Enforcement v. Sears*, Complaint No. C07050042, 2007 FINRA Discip. LEXIS 1 (FINRA NAC Sept. 24, 2007), *aff'd in part*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008).

B. Respondents' Failures to Disclose Their Roles with the Foundation

For violations of NASD Rules 3110 and 2110, the Guidelines recommend imposing a fine of $1,000 to $10,000, suspending the firm for up to 30 business days, and suspending the responsible individual for up to 30 business days.[36] In egregious cases, the Guidelines recommend imposing a fine of $10,000 to $100,000, and a lengthier suspension (up to two years) or barring the responsible individual. The Guidelines instruct adjudicators to consider the nature and materiality of inaccurate or missing information.[37]

The Hearing Panel suspended K. Mullins for six months in all capacities, fined her $15,000, and ordered that she requalify in connection with her violations of NASD Rules 3110 and 2110. We affirm the Hearing Panel's sanctions. K. Mullins made numerous material misstatements on four annual compliance questionnaires executed in four different years.[38] K. Mullins's omissions concerning her roles with the Foundation were important, and her inaccurate Firm questionnaires prevented the Firm from properly monitoring respondents' relationship with EW and the Foundation and identifying conflicts of interest and potential conflicts of interest. Moreover, K. Mullins failed to disclose the loan from EW to respondents—made on March 1, 2005 and repaid several days later—on the 2005 compliance form signed just days later on March 8, 2005. Under the circumstances, K. Mullins's failure to disclose the loan from EW was, at best, reckless.[39] K. Mullins's material misstatements on Morgan Stanley annual compliance questionnaires were egregious, and her "dishonesty to [her] firm reflects directly on [her] ability to abide by [her] firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public." *Davenport*, 2003 NASD Discip. LEXIS 4, at *10. Consequently, we find that a six-month suspension, $15,000 fine, and an order that K. Mullins requalify, are appropriately remedial.[40]

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[36] *Guidelines*, at 30.

[37] *Id.*

[38] *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, and 18).

[39] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13). In addition, we do not find mitigating respondents' claim that certain Morgan Stanley employees may have known generally about respondents' roles with the Foundation, or may have been able to discover respondents' roles. *See Davenport*, 2003 NASD Discip. LEXIS 499, at *12. We also reject K. Mullins's arguments that her lack of disciplinary history is mitigating, and deny her request that we credit her time out of the industry in assessing sanctions. *See* Part IV.A, *supra*.

[40] The Guidelines suggest that adjudicators order that a respondent requalify where a respondent's actions have demonstrated a lack of knowledge or familiarity with securities laws and rules. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 7). We find that under the circumstances, an order that K. Mullins requalify by examination before serving again in any registered capacity in the securities industry is appropriately remedial.

We also affirm the Hearing Panel's conclusion that J. Mullins's violations of NASD Rules 3110 and 2110 merited a one-year suspension in all capacities, a $25,000 fine, and an order that he requalify (although we do not impose such sanctions in light of the bar imposed for J. Mullins's other misconduct). Similar to K. Mullins, J. Mullins made numerous material misstatements on four annual compliance questionnaires executed in four different years, including failing to disclose the loan from EW. This information was important and hindered the Firm's ability to monitor J. Mullins's relationship with EW and the Foundation, and from identifying conflicts of interest and potential conflicts of interest. Indeed, more accurate disclosure from J. Mullins may have precluded him from being in a position to convert and misuse the Foundation's funds. Moreover, J. Mullins played a larger role than K. Mullins in the establishment of the Foundation and in the Foundation's affairs, and we find that his material misstatements on Morgan Stanley annual compliance questionnaires were egregious. Consequently, we affirm the Hearing Panel's sanctions. In light of the bar imposed upon J. Mullins, however, we do not impose such sanctions.

C. Unapproved Loan from EW

The Guidelines contain no specific guideline applicable to respondents' borrowing funds from EW without Morgan Stanley's prior approval. Nevertheless, the Guidelines provide principal considerations to guide the formulation of all sanctions.[41]

The Hearing Panel suspended K. Mullins for three months, fined her $5,000, and ordered the she requalify in connection with her violations of NASD Rules 2370 and 2110. We affirm the Hearing Panel's sanctions. Morgan Stanley's written procedures required prior Firm approval for any loan from a customer. Despite this policy, K. Mullins borrowed $100,000 from EW without seeking or obtaining Morgan Stanley's prior approval. In addition, no documentation evidenced the loan from EW (who was then 95 years old) except a cashier's check made payable to K. Mullins. Although respondents repaid the loan within several days, the lack of documentation for the loan provided opportunity for inappropriate activity with respect to EW's account, especially considering J. Mullins's subsequent misconduct. FINRA has stressed the importance of complying with NASD Rule 2370 "because of the potential for misconduct." *See NASD Notice to Members 03-62*. We find that the sanctions imposed by the Hearing Panel are appropriate under the circumstances.

We also find that consecutive, rather than concurrent, suspensions upon K. Mullins are appropriate in this case. K. Mullins's material misstatements on the Firm's questionnaires involved fundamentally different misconduct than her failure to obtain prior Firm approval of her loan from EW. *See Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *46-47 (Oct. 6, 2008) (affirming FINRA's imposition of consecutive suspensions in cases where rule violations are of fundamentally different natures), *aff'd in rel. part,* 592 F.3d 147 (D.C. Cir. 2010).

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41 *See Guidelines*, at 6-7.

The Hearing Panel concluded that J. Mullins's borrowing of funds without Morgan Stanley's approval merited a three-month suspension, $5,000 fine, and an order that he requalify, although it did not impose such sanctions in light of the bar. For the same reasons discussed in connection with K. Mullins's violations of NASD Rules 2370 and 2110, we find the sanctions assessed upon J. Mullins by the Hearing Panel to be appropriately remedial. We further find that were we to impose these sanctions, consecutive, rather than concurrent, suspensions upon J. Mullins for his material misstatements to Morgan Stanley and unauthorized loan from EW would be appropriate. However, in light of the bar imposed upon J. Mullins for his conversion, misuse, and breach of fiduciary duties, we do not impose these additional sanctions.

For all of these reasons, we affirm the sanctions imposed by the Hearing Panel.[42]

V. <u>Conclusion</u>

We affirm the Hearing Panel's findings that: (1) J. Mullins violated NASD Rules 2330 and 2110 by converting and misusing customer funds, and violated NASD Rule 2110 by breaching fiduciary obligations he owed as an officer to a corporate customer; (2) respondents violated NASD Rules 3110 and 2110 by making material misstatements to their member firm on annual compliance questionnaires (which caused the Firm to maintain inaccurate books and records); and (3) respondents violated NASD Rules 2370 and 2110 by borrowing funds from a customer without approval of their member firm. Accordingly, we: (a) bar J. Mullins in all capacities;[43] (b) suspend K. Mullins in all capacities for nine months; (c) fine K. Mullins $20,000; (d) order that K. Mullins requalify before acting in any capacity requiring registration;

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[42] We also affirm the Hearing Panel's order that respondents pay, jointly and severally, $16,003 in costs (which consist of $15,253 in court reporting and hearing transcript costs and a $750 administrative fee). Respondents erroneously assert that the Hearing Panel lacked the authority to impose costs. *See* NASD Rule 8330 (providing that an associated person "shall bear such costs of the proceeding as the Adjudicator deems fair and appropriate under the circumstances"); *E. Magnus Oppenheim & Co., Inc.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *21 (Apr. 6, 2005) ("NASD acted well within its discretion in assessing the costs following the decision."). Notwithstanding respondents' general assertion that they were billed separately for, and paid, the court reporter for their own set of transcripts, we find that the imposition of costs is fair and appropriate under the circumstances.

[43] The bar is effective as of the date of this decision.

and (e) order that respondents pay, jointly and severally, hearing costs of $16,003. In addition, respondents are assessed, jointly and severally, $1,562 in appeal costs, consisting of $1,000 and the appeal hearing transcript costs of $562.[44]

On behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[44] Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

We also have considered and reject without discussion all other arguments of the parties.