FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS[1]

DEPARTMENT OF ENFORCEMENT, Complainant, v. SHANE A. SELEWACH (CRD No. 2936484), Respondent.	Disciplinary Proceeding No. 2006005005301 Hearing Officer – LBB **HEARING PANEL DECISION** February 20, 2008

For improper use of customer funds in violation of Conduct Rules 2330 and 2110, Respondent is barred in all capacities. In light of the bar, no fine or suspension is imposed for borrowing from customers in violation of Conduct Rules 2370 and 2110. In addition to the bar, Respondent is ordered to provide full restitution to the injured customers.

Appearances

Paul D. Taberner, Esq., and John M. D'Amico, Esq., for the Department of Enforcement.

Edmund Polubinski, Jr., Esq., Lyne, Woodworth & Evarts, LLP, for the Respondent.

DECISION

The Complaint in this action was filed on March 14, 2007. The First Cause of Action alleges that Respondent violated NASD Conduct Rules 2330(a) and 2110 by accepting funds from a customer for investment purposes, but instead depositing the funds into his personal

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD.

account. The Second, Third, and Fourth Causes of Action allege that Respondent borrowed funds from customers, violating NASD Conduct Rules 2370 and 2110.

I. Findings of Fact

A. Respondent

Respondent began employment with FINRA member firm Ameriprise Financial Services, Inc. ("Ameriprise") (formerly known as American Express Financial Advisors, Inc.) in August 1997, and was first registered with NASD as a General Securities Representative at Ameriprise on September 22, 1997. Respondent was registered as a General Securities Principal at Ameriprise on July 20, 2000. Respondent's employment with Ameriprise was terminated on April 11, 2006, and his registration was terminated on April 17, 2006. CX-1; CX-10A.

On July 10, 2006, Respondent entered into a consent order with the Office of the Secretary of the Commonwealth Securities Division of the Commonwealth of Massachusetts, suspending his registration with Massachusetts for three years and fining him $5,000. CX-2.

B. Respondent's Outside Business Interests

Two outside business activities are important to an understanding of this case. The first was a commodities fund that Respondent proposed to form, but never did. The second was a motel and restaurant property in West Chatham, Massachusetts ("the West Chatham property"), owned by Respondent's mother.

1. The Commodities Fund and Progressive Asset Development

Beginning in about 2002, Respondent began efforts to form a commodities fund for sophisticated and wealthy investors. CX-6; CX-26 at 15-17; Tr. 216-217. Ameriprise policies prohibited all outside business activities except with the firm's written permission. CX-9 at 1; Tr. 39-40. Respondent asked Ameriprise to approve his participation in the commodities fund. CX-6; Tr. 217. Although Respondent claims that he never received a clear response from

Ameriprise, the firm, in fact, consistently denied Respondent's request.[2] On March 17, 2003, and August 4, 2003, Ameriprise informed him that he would not be permitted to engage in the commodities trading business. CX-6.[3] Respondent testified that his supervisor told him informally, "I don't think they'll let you do that …." Tr. 221. Even if Respondent did not believe that he had received a clear refusal from Ameriprise, he admits that the firm never approved his participation in the commodities fund or any outside business activity. CX-25 at 27; Tr. 216-217, 258. Respondent used the name "Progressive Asset Development" in connection with his proposed commodities fund. CX-3; Tr. 283-284. However, there was no actual entity bearing that name until after Respondent left Ameriprise. CX-12 at 6, 9; CX-16; CX-17; Tr. 283-284.

2. The West Chatham Property

Respondent's mother owned adjoining properties in West Chatham, Massachusetts, upon which were a motel and restaurant, as well as her residence. CX-25 at 11; CX-26 at 11, 52; Tr. 240-241. Respondent testified that the property had been bought by his parents and put into a trust of which he was the beneficiary, but that he had transferred complete ownership of the property to his mother for no consideration several years before the transactions at issue in this matter. CX-25 at 4-5, 11-12; CX-26 at 56; Tr. 336-337. While Respondent had no formal interest in the property, he expected that when his mother sold the property he would get a share

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[2] The Hearing Panel generally found Respondent's testimony not to be reliable. Respondent's testimony was frequently inconsistent with documents and prior testimony, as noted below. Respondent's demeanor also raised questions about his veracity. He was frequently evasive, and appeared to be searching for favorable answers rather than truthful answers.

[3] Respondent has objected to the admission of the e-mails relating to the approval of the commodities fund as not authenticated and hearsay. While the documents were not authenticated in the manner that complied with the Federal Rules of Evidence, there are sufficient indicia of authenticity to establish the reliability of the e-mails as evidence. All were obtained by FINRA from the Office of the Secretary of the Commonwealth Securities Division of the Commonwealth of Massachusetts, which had investigated Respondent's conduct. All appear to be regular, and all relate to the subject matter that Respondent and Ameriprise were discussing. There is no reason to suspect that Ameriprise would have falsified the e-mails that were produced to the Commonwealth.

of the proceeds and, as his mother's only heir, that ultimately he would inherit the property or any remaining proceeds of the sale. CX-25 at 12-13, 32.

The West Chatham property was encumbered by several mortgages. According to Respondent, there was a first mortgage, from a bank; two mortgages that secured loans to his mother and are unrelated to this case; and mortgages that secured loans from Respondent's customers EP and G & SM, that are the subject of this case. CX-25 at 13. Respondent estimated that the total of the indebtedness secured by the mortgages is about $800,000 – $850,000. CX-25 at 13, 39.

Respondent's testimony about the financial condition and viability of the West Chatham property was inconsistent, but there were clearly financial problems. Respondent testified in June 2006 that the property was operating and was "a going concern … [his] mom's sole source of income." CX-26 at 5, 52. Respondent testified at the hearing that: in 2005 the motel was operating "on a limited basis"; the restaurant was not operating; the property was incurring expenses and in financial difficulty; and from the beginning of 2005 until the time of Respondent's termination from Ameriprise in April 2006, it generated no income. Tr. 241, 325-327.[4]

Respondent's mother filed for bankruptcy protection at some point. Tr. 334-335. At the hearing, Respondent testified that his mother was not in bankruptcy at the time of the transactions that are the subject of this case, but he could not remember when she was in bankruptcy. Tr. 334-335. Respondent testified in an on-the-record interview ("OTR") taken by the Commonwealth of Massachusetts that his mother filed something to stop foreclosure in about January 2006, although his testimony was unclear as to what was filed. CX-26 at 77.

[4] According to Respondent's counsel, Respondent's mother "had mortgage to pay, insurance, and she was in real financial difficulty." Tr. 21.

C. TD Banknorth Bank Account

The ownership and use of a bank account at TD Banknorth[5] is relevant to all four causes of action of the Complaint. During the time of the events that are the subject of the Complaint, there were three names on the account: Respondent; KS, Respondent's girlfriend;[6] and DS, Respondent's mother. CX-4 at 8, et seq. Although Respondent seeks to emphasize his mother's co-ownership of the account, the account was clearly Respondent's. Respondent has described the account in OTRs as "my checking account," and he has admitted that he controlled the account. CX-25 at 22, 31; CX-26 at 52-53. Respondent used the account for living expenses as well as business expenses. CX-25 at 22, 31; CX-26 at 6. He frequently used the account for routine expenditures such as books, food, car payments, travel, sports gear, restaurants, credit card payments, entertainment, and a dating service. CX-4; CX-25 at 31-32; CX-26 at 79; CX-27 – CX-45. The account was also used, at times, for payments on behalf of Respondent's girlfriend. CX-26 at 73; Tr. 272-273. Respondent's testimony was inconsistent with respect to his mother's use of the account. CX-25 at 22, 33; CX-26 at 6, 70; Tr. 209. From April 2005 until at least March 2006, the account was regularly overdrawn, often drawing on overdraft protection lines of credit. CX-33 – CX-43.

D. The Challenged Transactions

The Complaint charges Respondent with violations in connection with four transactions. Cause One charges that Respondent misused customer funds by depositing customer funds intended for investments into his personal bank account. Causes Two, Three, and Four charge that Respondent borrowed funds from customers.

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[5] TD Banknorth acquired Cape Cod Bank & Trust. Tr. 83. Respondent had a single account at the bank. For convenience, this decision refers to the account as the TD Banknorth account, although some documents refer to the institution as Cape Cod Bank & Trust. See, e.g., CX-22.

[6] Respondent explained that he and KS were "together" in a "long-term relationship." CX-25 at 22; CX-26 at 2, 4.

1. Transaction with Customers HS and PB (First Cause of Action)

HS and her husband were Respondent's clients at Ameriprise, starting in about 2000. CX-26 at 37-38; Tr. 209. HS was not a sophisticated investor. CX-3; CX-26 at 46; Tr. 259. PB, HS's mother, was born in 1921 and was confined to a nursing home. HS managed PB's investments.[7] CX-5 at 1, 14; CX-25 at 16; CX-26 at 37-38; Tr. 210. In 2002, PB sold her home and sought a place to invest the proceeds. Tr. 209-210. HS used the proceeds of the sale of PB's home to open an Ameriprise account with Respondent, with HS managing the account for PB pursuant to a power of attorney. CX-5; CX-26 at 38; Tr. 209-210. PB's investments were supposed to provide for her care in the nursing home. CX-26 at 39-40.

HS invested some of PB's money in a fund known as the Neural Fair Value Trading Program ("Neural Program" or "Program"). Tr. 211-214. In about April 2004, the Neural Program was going to impose a $100,000 minimum. PB had a balance of $71,000 in the Program, and, according to Respondent, would need to withdraw the investment because it did not meet the new minimum. Tr. 214. Respondent spoke to HS about what she should do with the $71,000, including investing in the commodities fund that he allegedly anticipated establishing.[8] CX-11; CX-25 at 16-18; Tr. 214-215, 224-225.

In April 2005, HS withdrew $71,000, the proceeds of the sale of PB's investment in the Neural Program, from PB's Ameriprise account, and endorsed the check she had received from Ameriprise over to Respondent. CX-4; Tr. 228-229. Respondent provided only a receipt as documentation of the transaction. Although it was not an Ameriprise form receipt, the receipt would have led HS to conclude that it came from Ameriprise because it included Respondent's

[7] PB died some time after February 2006. Tr. 85.

[8] Respondent has testified inconsistently on whether he ever met PB. Respondent testified at his FINRA OTR that he met with both HS and PB four times. CX-25 at 21, 23. He testified at the hearing and at an OTR taken by the Commonwealth of Massachusetts that he had never met PB. CX-26 at 39; Tr. 210.

Ameriprise advisor number, had the notation "new account," and was faxed to HS from Respondent's Ameriprise fax machine. CX-3 at 3; CX-25 at 24-25; Tr. 30. HS believed that the funds would be invested with Ameriprise. CX-10A; CX-11; Tr. 86-87.[9] Respondent testified that he told HS that $25,000 would be invested in the commodities fund and that PB would receive a return of at least 5% on the balance. Tr. 226, 230. See also CX-11; CX-25 at 20.[10] Respondent testified at the hearing that HS gave him the funds with the understanding that they would be invested in the commodities fund once it was formed. Tr. 261. Respondent also told HS that she would not be able to withdraw the funds for a year. CX-3; Tr. 230. Respondent testified that the purpose of the one-year requirement was that he thought he would have had the commodities fund "up and running within that year's time." Tr. 230-231. Respondent never disclosed this transaction when he submitted his annual Outside Business Activities Disclosure Form to Ameriprise. CX-10.

PB's money was immediately deposited into Respondent's TD Banknorth account. CX-4 at 8; CX-25 at 22; CX-26 at 48, 52-53; Tr. 230-231, 262. Respondent never told HS or PB that the funds were in his TD Banknorth account. CX-25 at 23.[11] When HS called Ameriprise to complain, she told the Ameriprise field compliance manager that "[s]he didn't have any paperwork other than the receipt and cancelled check, and she didn't know where the money was, and she needed it for her mother's nursing home." Tr. 29. See also Tr. 86-87. Respondent

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[9] Respondent claims that he told HS that the commodities fund would not be an Ameriprise investment. Tr. 215. Although Respondent's testimony is the only direct evidence of what he told HS, Respondent's testimony is so generally lacking in credibility that the Hearing Panel finds the hearsay statements as to what HS believed to be more reliable than Respondent's testimony.

[10] Respondent's statements were inconsistent as to what he told HS about how the $46,000 not invested in the commodities fund would actually be invested. At his Massachusetts OTR, he testified that he told her the money might be invested in "bonds or treasuries." CX-26 at 47-48. He later testified at his FINRA OTR that he did not tell HS how the money would be invested. CX-25 at 20.

[11] Respondent answered this question evasively at the hearing. He first testified that he told HS that the money was in his personal checking account. Then, when confronted with his OTR transcript where he had testified that he did not know if HS knew where he had deposited her mother's funds, Respondent backtracked by saying, "As far as maybe what exactly bank account or whatever, but she knew that I was responsible for those funds until they were invested." Tr. 262-263.

did not inform Ameriprise that he had received the check from HS, and Ameriprise did not approve the transaction with HS. CX-8A at 17.

PB's $71,000 was the only money in the TD Banknorth account. In the month after the deposit of the check, $54,210.60 was spent out of the account, leaving a balance of $18,673.06. There were no additional deposits. CX-4 at 8, 13. In addition to expenditures for Respondent's personal expenses, a check for $23,924.38 was written to JF, an Ameriprise customer from whom Respondent had borrowed money, as discussed below. CX-33; Tr. 263-273. Within about six weeks, the money was gone, and the account was funded solely by overdraft protection. CX-34; Tr. 275-277. Respondent never set up a separate account for PB's funds, and none of the $71,000 was ever invested. CX-25 at 23; Tr. 261.

In February 2006, HS contacted Ameriprise by telephone and letter concerning the $71,000 that had been entrusted to Respondent, complaining that she had not received a statement for the account in almost a year "despite my repeated requests to Shane for some kind of verification as to where the money had gone…." She stated that Respondent had returned her telephone calls "with conflicting explanations as to why no forms [had] been sent…." She also said, "He has told me that the money is in a product (Progressive Asset Development) similar to a certificate of deposit that cannot be touched for a year and will not generate a tax until it is sold." CX-3; Tr. 28-29.

On March 14, 2006, an Ameriprise compliance officer and Respondent's Ameriprise supervisor interviewed Respondent concerning the HS/PB transaction. Tr. 32. Respondent was uncooperative and failed to respond to several of their questions. CX-8A at 17; Tr. 32-33. On April 3, Ameriprise repaid HS and PB the $71,000 plus interest. CX-8A at 6.

After FINRA contacted Respondent asking for information about the transaction with HS and PB, Respondent sent a check to HS for $74,815. CX-11; CX-15; Tr. 280-281. The funding for the check came from money borrowed from EP, who had been Respondent's customer at Ameriprise. CX-25 at 38. The check was drawn on the Progressive Asset Development account at Sovereign Bank, and states that it is for "full redemption" in the memo line, even though there was nothing to redeem. CX-15. The check is dated May 1, 2006, and Respondent testified in his Massachusetts OTR that he wrote the check on May 1, but that was one week before the account was opened. CX-14; CX-15; CX-26 at 55. Respondent testified at the hearing that he might have backdated the check. Tr. 236. The circumstances suggest that Respondent intended to deceive HS into believing that the funds had been invested in Progressive Asset Development.

HS returned the check to Respondent because HS and PB had already been reimbursed by Ameriprise. On July 21, 2006, by check payable to Ameriprise's law firm, Respondent reimbursed Ameriprise for the payment that the firm had made to HS and PB. CX-14 at 12.

E. Loan Transactions

1. Loan from Customers GM and SM (Second Cause of Action)

Ameriprise assigned G & SM to Respondent as his clients. Respondent took over their account from another representative. Tr. 239, 309. GM is about 60 years old. CX-25 at 30; Tr. 309. G & SM are not members of Respondent's immediate family.[12] Tr. 325.

In December 2005 and January 2006, SM wrote a series of checks payable to TD Banknorth, totaling about $50,000. CX-23. Respondent contends that the checks were loans from G & SM to his mother and not to him. Tr. 239-240, 310. The evidence refutes this contention. The checks were deposited into Respondent's TD Banknorth account. CX-23;

[12] Ameriprise's written policy permitted borrowing from customers only if they were immediate family members. CX-9 at 8.

CX-42 at 12; Tr. 242-243, 310. The loan, $55,000 in total, was secured by a mortgage between Respondent's mother and GM that recites that it is "made this 24th day of May, 2006," but was not signed by Respondent's mother until July 7, 2006. CX-24; Tr. 329.

Respondent's contention is inconsistent with his previous testimony. At his FINRA OTR, he agreed that he had told G & SM "you could loan money to me and it could be secured by this property and you'll receive 11 percent interest." CX-25 at 31. Similarly, at his Massachusetts OTR, when asked if "all of that money [from G & SM] represents proceeds directed to you secured by this note," Respondent responded affirmatively. CX-26 at 74.[13] Respondent contends that the money was used to pay expenses for the West Chatham property. Tr. 310. On cross-examination, he could identify only $12,800 that he contended was used to pay expenses for the Chatham property. Tr. 313-319.

G & SM filed a complaint against Ameriprise as a result of the loan transaction with Respondent. Tr. 138, 140-141. They were repaid by Ameriprise. Tr. 338. Neither Respondent nor his mother repaid G & SM. Nor have they reimbursed Ameriprise for the payment to G & SM. Tr. 338-339.

2. Loan from Customer EP (Third Cause of Action)

EP was Respondent's customer at Ameriprise beginning in about 2001 or 2002. Tr. 288. EP is a friend of Respondent, but he is not a member of Respondent's immediate family. Tr. 294, 324-325. EP is an elderly retired fisherman, and an unsophisticated investor. Tr. 287-288.

During October and November 2004, Respondent borrowed approximately $55,000 from EP. CX-18; CX-25 at 32. At the hearing, Respondent testified the transaction was a loan to his

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[13] Additionally, Respondent testified at his FINRA OTR that JF was the only one of his customers who had lent money to his mother. CX-25 at 35.

mother, and that his mother received the proceeds of the loan from EP. Tr. 247-248. Respondent's testimony was not credible and is contradicted by substantial evidence. The funds borrowed from EP were deposited into the TD Banknorth account. CX-19; CX-26 at 62. As noted above (see footnote 13), Respondent previously testified that JF was the only one of his customers from whom his mother had borrowed. CX-25 at 35. Respondent executed as borrower a promissory note dated October 1, 2004, in favor of EP. CX-18 at 1.

At some point, a mortgage was created as security for the loan. The mortgage recites that it is "made this 1st day of October, 2004." According to the notary's acknowledgement, Respondent and his mother signed the mortgage as borrowers on July 12, 2006. CX-18 at 6. At the hearing, Respondent explained the discrepancy in dates by asserting that the mortgage executed in July 2006 was a replacement because EP had lost the original. Tr. 248-249. Respondent claims that he had not signed the original mortgage, but signed the replacement because the notary at the bank asked him to sign, an explanation that is not credible, especially for someone with Respondent's education and experience. Tr. 249-250.

Respondent testified that EP was repaid for the $55,000 loan. Tr. 248, 295. Respondent "repaid" the $55,000 to EP in a sham transaction. On July 18, 2006, Respondent wrote a check for $65,037.50 from the Progressive Asset Development account at Sovereign Bank, for the purchase of a cashier's check payable to EP. Sovereign Bank also issued its cashier's check on July 18, and on the same date, EP endorsed that check back over to Respondent, who immediately deposited the funds back into the Progressive Asset Development account at Sovereign Bank. CX-21; Tr. 122-126, 295-298. The original note evidencing the loan from EP is marked as paid in full on July 18, 2006. CX-20 at 3. The mortgage is also marked as "satisfied in full," as of July 18, 2006. CX-20 at 8. Thus, by the end of the day on July 18, the

net effect was that EP, who started the day with a secured note for $55,000 plus interest, no longer had any security interest in the West Chatham property, and had not genuinely been repaid.[14]

Moreover, EP had lent Respondent $75,000 on May 1, 2006, about two weeks after Respondent's employment at Ameriprise was terminated. The loan is evidenced by a note, but is not secured by a mortgage. CX-21A; CX-25 at 38; CX-26 at 34, 67. Respondent deposited the $75,000 into the newly opened Progressive Asset Development bank account on May 9. CX-14.

Ameriprise entered into a consent order with the Commonwealth of Massachusetts and was ordered to repay customer EP "for losses attributed to any outside business activity conducted with Selewach." CX-47 at 13. There is no evidence in the record to indicate whether Ameriprise has made any payments to EP.

3. Loan from Customer JF (Fourth Cause of Action)

JF was a client of Respondent's whom Respondent described as a "very very good family friend," although he also testified that his mother barely knew JF.[15] Tr. 243, 302, 306. JF was not a member of Respondent's immediate family. Tr. 325.

According to Respondent, in early 2005, JF was looking for a higher return on money that was in a checking account. Respondent suggested that JF lend the money to Respondent's mother. Tr. 244-245. On or about February 17, 2005, JF wrote a check payable to Respondent for $48,500. CX-22. The check was deposited into Respondent's mother's account on the following day. CX-22.

[14] Respondent claims that EP did not want his money back, but that the transaction was done to pay off the note. Tr. 298-300. The note was not due for more than a year. Tr. 299. Respondent explained this somewhat unclearly, but apparently intended to say that he wanted to put Ameriprise matters behind him. Tr. 299-300. This testimony is inconsistent with his stated reasons for not repaying JF and G & SM (discussed below).

[15] JF, then in his 80s, died in 2006. CX-25 at 34; Tr. 302.

Respondent testified at the hearing that the transaction with JF was a loan to his mother and not to him, and that it was evidenced by a promissory note between JF and Respondent's mother, although no note was ever produced to FINRA or at the hearing. Tr. 244-246, 307-308. Respondent's testimony at the hearing was inconsistent with his testimony in his OTR for Massachusetts, where Respondent testified that "I had a promissory note with [JF]." CX-26 at 72. Respondent testified at his Massachusetts OTR that he had a copy of the note, but he has never produced it. CX-26 at 72; Tr. 308.

Within three days of the deposit of JF's check into Respondent's mother's bank account, she had written Respondent three checks, totaling $37,500, all of which were deposited into the TD Banknorth account. CX-30; CX-31; Tr. 303-305.

Respondent testified at his FINRA OTR that the money was repaid to JF. CX-25 at 34 In fact, JF was only partially repaid. On May 20, 2005, Respondent repaid JF $23,924.38 with a check drawn on his TD Banknorth account. CX-22; Tr. 245-246. The source of the funds was the money received from HS and PB, the only money in the account at that time, as noted above. In fact, this payment left $25,000 outstanding on the original loan. Respondent testified that the full loan from JF has not been repaid to JF's heirs because payment is not due until February 2009. Tr. 308-309.

The consent order with the Commonwealth of Massachusetts required Ameriprise to repay customer JF "for losses attributed to any outside business activity conducted with Selewach." CX-47 at 13. There is no evidence in the record as to whether Ameriprise repaid JF, his heirs, or his estate the remaining balance on the loan.

F. The Investigations

Three entities have investigated the matters that are the subject of the Complaint: Ameriprise, the Commonwealth of Massachusetts, and FINRA.

Ameriprise investigated the HS/PB transaction upon receiving HS's complaint concerning not having received any information from Respondent about her account. CX-8A; Tr. 26-33. On March 15, 2006, David Kaufman, Respondent's supervisor at Ameriprise, and Siobhan Fitzgerald, Field Risk Manager at Ameriprise, visited Respondent to question him concerning the transaction. During this interview, Respondent was uncooperative and failed to respond to several of the questions concerning the HS/PB transaction. CX-8A at 3, 16-17; Tr. 32-33. Ameriprise later returned to Respondent's office to remove client files, take Respondent's key to the office, and change his voicemail. Tr. 36.

The Office of the Secretary of the Commonwealth Securities Division of the Commonwealth of Massachusetts also investigated Respondent's conduct. CX-2; CX-13. FINRA began its investigation of the Respondent's activities in about April 2006, as a result of receiving a Form U5 filing concerning the HS/PB transaction. CX-8A; Tr. 51.

II. Conclusions of Law

A. FINRA Has Jurisdiction Over Respondent

Although Respondent is not currently associated with any FINRA member, he remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Art. V, § 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of his last registration, and it charges him with misconduct while registered.

B. Respondent Violated Conduct Rules 2330(a) and 2110 by Making Improper Use of Customer Funds in the Transaction with HS and PB

On behalf of her mother, PB, HS entrusted $71,000 to Respondent, expecting that the money would be invested for her mother's benefit. She had a right to expect that Respondent would handle the money professionally, using the money for investments consistent with HS's

direction and with sound practices. Instead of investing the funds, Respondent deposited his customer's money into his personal checking account, spending most of it within a few weeks.

In the first month after the money was deposited, it was spent for a variety of Respondent's personal expenses. Respondent used some to make a partial payment on the loan from customer JF. Respondent and his girlfriend used the money for restaurants, car payments, travel, credit card payments, and other personal expenses. In less than two months, all of PB's money had been spent. None of the money was ever invested.

NASD Conduct 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." Conduct Rule 2110 requires members and persons associated with members to "observe high standards of commercial honor and just and equitable principles of trade." The misuse of customer funds in violation of Rule 2330 also violates Rule 2110. Dep't of Enforcement v. Thomas, No. C10030082, 2004 NASD Discip. LEXIS 49, at *6 n.10 (O.H.O. June 30, 2004); Dep't of Enforcement v. Patel, No. C02990052, 2001 NASD Discip. LEXIS 42, at **24-25 (N.A.C. May 23, 2001) (affirming the decision of a Hearing Panel barring a representative for misuse of customer funds by depositing customer funds into his own account rather than investing them as directed by the customers). "An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer." Id.

Respondent attempts to minimize the seriousness of his violation by characterizing his actions as "commingling." Commingling of funds has been held to be wrongful conduct sufficient to warrant a permanent bar. Kevin Lee Otto, Exchange Act Rel. No. 43296, 2000 SEC LEXIS 1932 (Sept. 15, 2000). In Otto, the SEC upheld an NASD decision barring a

representative in circumstances very similar to those alleged here. There, a customer paid the respondent for an investment that he claimed to be forming, but he deposited the funds in a personal account and used them for personal matters. The fund was never formed, and the respondent deceived the customer concerning the status of her investment. The money was later returned to the customer. The SEC held that the representative's behavior violated NASD Conduct Rule 2110. The Commission noted that it was undisputed that the respondent had "co-mingled his and [his customer's] funds for the sake of his personal convenience and use, and deprived her of the opportunity to invest those funds in a legitimate investment." Id. at *18. It held that the sanctions – a bar and a $35,000 fine – were not excessive under the circumstances. See also Henry E. Vail, Exchange Act Rel. No. 35872, 1995 SEC LEXIS 1514, at *9 (June 20, 1995) (affirming NASD decision imposing a bar and $20,000 fine where it was "undisputed that [a respondent] commingled … funds for the sake of his own personal convenience.").

In Prime Investors, Inc., Exchange Act Rel. No. 38487, 1997 SEC LEXIS 761 (Apr. 8, 1997), the respondent had sold "Guaranteed Return on Investment Contracts," soliciting investors to place funds with him that would pay a guaranteed yield of 12%. The funds would purportedly be invested in the respondent's name. The investments were subsequently characterized as loans to the respondent. After finding that the transactions were unregistered securities and there had been misrepresentations in their sale, the SEC went on to find that the respondent had misused customer funds when he used most of the funds to pay his personal expenses and his firm's expenses. Id. at **25-26. In affirming NASD's finding that the respondent had violated NASD rules on the misuse of funds, the SEC held, in words that are equally applicable to Mr. Selewach,

> [Respondents] contend that investors knowingly entrusted their funds to [the individual respondent] for use as he saw fit and, from

> this faulty premise, conclude that the use of the investors' funds here was proper. No reasonable investor could have concluded, based on applicants' marketing of the program, that his or her funds would be used to fund [the individual respondent's] personal expenses or bankroll [his] friends.

Id.

Ameriprise's policies also expressly prohibited depositing client funds into an account under the control of the representative. CX-9 at 8. In a section entitled "Commingling Funds," the procedures stated,

> You must never mix a client's money with your own. Client funds may not be deposited in any personal account under your control. Client checks must be made out to [Ameriprise] **only** by the client and then submitted directly to the corporate office.

CX-9 (emphasis in original).

The Hearing Panel finds that Respondent misused the funds entrusted to him by customers HS and PB, in violation of Conduct Rules 2330(a) and 2110, when he deposited those funds into his personal account.

C. Respondent Violated Conduct Rules 2370 and 2110 by Borrowing from Customers

Since 2003, Conduct Rule 2370(a) has expressly prohibited associated persons from borrowing from customers, except in very limited circumstances not applicable here, and then only if the member firm has written procedures allowing the borrowing. Conduct Rule 2370 was adopted because of FINRA's concern that borrowing from customers had the potential for misconduct:

> Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct. NASD has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers.

NASD Notice to Members 3-62, October 2003.[16] The Ameriprise Compliance Resource Guide expressly prohibited its representatives from borrowing from customers. CX-9 at 8; Tr. 39. Respondent never requested permission from Ameriprise to borrow from clients and never notified anyone at Ameriprise that he had borrowed money from clients. CX-25 at 26; Tr. 324.

Respondent's defense is that he did not borrow from customers, and that he had arranged the loans on his mother's behalf.[17] The evidence strongly refutes Respondent's contention. The Department of Enforcement has proven that Respondent, and not his mother, was the borrower for all three loans. The Hearing Panel finds that Respondent borrowed from the three customers in violation of Conduct Rules 2370 and 2110.

Customers G & SM lent $55,000 to Respondent. The funds were provided to Respondent in a series of checks that were deposited into the TD Banknorth account. While the loan was allegedly secured by a mortgage on his mother's property, Respondent was very heavily involved in his mother's financial affairs. Given the other evidence that the loan was made to Respondent, it is more likely that his mother signed the mortgage as an accommodation to her son than that she was the actual borrower. Additionally, the mortgage was dated more than a month after Respondent had been terminated by Ameriprise, and his mother did not sign the mortgage for two months after its date, suggesting that regulatory concerns may have played a part in the drafting of the mortgage. While Respondent testified that the money was used to pay

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[16] FINRA expressed this concern in a proposed rule as early as 1994. NASD Notice to Members 94-93, 1994 NASD LEXIS 116. In that Notice, FINRA also noted that there had been cases involving loans from customers, citing Terry Wayne White, Exchange Act Rel. No. 34-27895, 1990 SEC LEXIS 669, at *8 (Apr. 11, 1990) (finding that respondent "completely ignored his fundamental obligation of fair dealing" when he "took advantage of his elderly client by inducing him to make substantial, unsecured, high-risk loans to [respondent], one of which was not even evidenced by documentation."); and William Louis Morgan, Exchange Act Rel. No. 32744, 1993 SEC LEXIS 2027 (Aug. 12, 1993) (representative barred who failed to disclose and concealed loans from member firm, used a fictitious firm as a borrower, and failed to repay customers).

[17] Respondent does not argue, even in the alternative, that these transactions could have been approved by Ameriprise. The loans would have been prohibited by Ameriprise's written policy, which prohibits borrowing from customers unless those customers are immediate family members. CX-9. None of the three customers was a member of Respondent's immediate family. Tr. 294, 324-325.

expenses for the West Chatham property, he could identify only $12,800 that was paid out of the TD Banknorth account that was allegedly used for expenses for the property. Finally, at both his Massachusetts and FINRA OTRs, Respondent effectively admitted that the transaction was a loan to him from G & SM.

Respondent also borrowed $55,000 from EP. Respondent signed the note as the borrower, and he and his mother signed the mortgage as the borrowers. Respondent's mother's signature would have been required on the mortgage since the property was in her name, but his signature was not required. The funds were deposited into the TD Banknorth account that Respondent used for his personal expenses and for which he has admitted responsibility. Although the transaction was essentially a sham, Respondent repaid the loan to EP. Additionally, he admitted that the loan from EP was a loan to him and not to his mother when he testified that the only loan to his mother was from JF.

Respondent borrowed $48,500 from customer JF. Initially, the funds were paid directly to Respondent, which shows that JF and Respondent regarded the transaction as being between them at the time, or JF would have made the check payable to Respondent's mother. Although Respondent endorsed the checks over to his mother and the funds were deposited into his mother's account, his mother paid him $37,500 within three days. Respondent partially repaid JF for his loan with funds that had been entrusted to him by customers HS and PB, further establishing that it was his debt, and not his mother's, to repay. Respondent's mother barely knew JF, although Respondent described JF as "like a second father to me." CX-25 at 34. Finally, Respondent testified in his OTR for the Commonwealth of Massachusetts that he had a promissory note with JF.

In sum, the Hearing Panel finds that Respondent violated Conduct Rules 2370 and 2110 by borrowing from customers EP, JF, and G & SM.

III. Sanctions

As has been noted in many decisions, the securities industry "'presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants.'" Patel, 2001 NASD Discip. LEXIS 42, at *27, quoting from Bernard D. Gorniak, Exchange Act Rel. No. 35996, 52 S.E.C. 371, 373 (July 20, 1995). The Department of Enforcement has proven that Respondent engaged in multiple acts of abuse and overreaching, and does not possess the integrity that is the foundation of the securities industry. The Hearing Panel bars Respondent from associating with any member firm in any capacity, and orders Respondent to pay restitution to injured customers.

A. Respondent is Barred for Improper Use of Customer Funds

The Sanction Guidelines recommend the consideration of a bar as the sanction for the improper use of customer funds unless the improper use resulted from a respondent's misunderstanding of his customer's intended use of the funds or other mitigation exists. FINRA Sanction Guidelines at 38 (2007) ("Sanction Guidelines"). Respondent's handling of the HS/PB transaction was an egregious misuse of client funds, and a bar is the appropriate sanction for this conduct. There was no misunderstanding here. Rather, Respondent put his customer's money into his personal account and promptly used all of the funds to pay a variety of personal expenses. None of the money was used in any way for the benefit of the customer.

There are no mitigating factors, but there are several aggravating factors under the Principal Considerations in the Sanction Guidelines. Respondent has a recent history of disciplinary problems. The Consent Order with the Commonwealth of Massachusetts finds that Respondent committed violations in addition to those that are charged in FINRA's Complaint.

The Consent Order finds that Respondent recommended unsuitable transactions to his clients, including transactions that are not the subject of FINRA's Complaint; he defrauded clients; he converted client funds; and he received prohibited loans from clients. CX-2.

Respondent did not acknowledge any responsibility for his conduct until he was questioned by Ameriprise, and then he was uncooperative. Even at the hearing he did not acknowledge the severity of his transgression, attempting to minimize the violation as an innocent case of commingling. Respondent attempts to excuse his conduct claiming that it resulted from his lack of knowledge of NASD Rules and Ameriprise policies on handling client funds. Even if true,[18] "Ignorance of the requirements of NASD rules … is not an excuse for violative conduct." Dep't of Enforcement v. Siegel, No. C05020055, 2007 NASD Discip. LEXIS 20, at *21 (N.A.C. May 11, 2007) (citation omitted). In fact, Respondent's attitude toward compliance with NASD and his firm's rules supports the need for a permanent bar. Respondent seems to be proud of his ignorance of the requirements of both the NASD Conduct Rules and Ameriprise policies. Respondent admitted at his OTR that he had not read the Ameriprise Compliance Resource Guide, and had a casual, if not disdainful, attitude toward knowledge of Ameriprise's policies. CX-25 at 8-10. Respondent claimed that he was not aware that Ameriprise had a policy that prohibited borrowing money from customers, or a policy against private securities transactions. CX-25 at 14-15; CX-26 at 83. Ameriprise had policies on both. CX-9. Ameriprise also had policies on outside business activities and commingling of funds. CX-9. Respondent certified to Ameriprise that he had received and read its policies, and

[18] The Hearing Panel does not find Respondent's testimony that he did not understand that he should not commingle a client's funds with his own funds to be credible. Respondent testified that he holds three securities licenses: Series 63 (Uniform Securities Agent); Series 24 (General Securities Principal); and Series 7 (General Securities Representative). Tr. 204. He holds an insurance license, and is also a Certified Financial Planner. CX-26 at 10. He studied for his CFP at Boston University, and testified that he always took more continuing education courses than required. CX-26 at 11. With all of this training, education, and experience, it is simply not credible that he did not know that it was improper to deposit a customer's funds into his personal bank account.

would have to abide by them. CX-7. He also demonstrated a lack of familiarity with NASD rules. CX-26 at 83. The Hearing Panel regards this cavalier attitude toward the rules that protect the investing public as an aggravating factor. See Sanction Guidelines, Principal Consideration #13 ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.") Respondent's actions were at least reckless, and likely intentional, violations of the Ameriprise policies and the NASD Rules of Conduct.

Respondent took no corrective action. He attempted to pay restitution only after he had been terminated by Ameriprise and learned that FINRA was investigating his conduct. Respondent also attempted to conceal the situation from his customer. HS's letter to Ameriprise evidences Respondent's pattern of evasion over a substantial period of time, and shows that he represented to HS that the funds were in Progressive Asset Development, which did not yet exist. Even when he made his belated repayment to HS, he characterized the repayment as "redemption" and used a Progressive Asset Development check, when in fact PB's money had never been invested in Progressive Asset Development and there was nothing to redeem because the money had been deposited into his personal account and spent.

Respondent's actions had clear potential to injure his customers, and may have resulted in actual injury to his customers. HS was led to believe that PB's funds would be invested in a commodities fund. There is no evidence of the rate of return for commodities funds during the year that Respondent held his customer's funds, but it could have substantially exceeded the 5% that was paid to the customer.[19]

Respondent did not provide substantial assistance to FINRA. His testimony at his FINRA OTR was at times inconsistent with the documents and his testimony at his

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[19] The suitability of an investment in a commodities fund by an 83-year-old customer in a nursing home was not an issue put before the Hearing Panel.

Massachusetts OTR. The FINRA OTR shows that Respondent was evasive until, and often even after, he was shown documents. Respondent testified at the hearing that one answer during his testimony at his FINRA OTR was "perhaps not entirely truthful," explaining that he wanted to protect his mother and his girlfriend. Tr. 208-209. His lawyer was more forthright in describing Respondent's conduct, saying, "So he did lie. He lied to protect his mother and [his girlfriend]." Tr. 353. In fact, the Hearing Panel believes that Respondent lied at the hearing and that his OTR testimony on the ownership of the TD Banknorth account was truthful and far more consistent with his other testimony to FINRA and the Commonwealth of Massachusetts, as well as to the documentary evidence. Moreover, lying at an OTR is a violation of Procedural Rule 8210 and Conduct Rule 2110. Dep't of Enforcement v. Ortiz, No. E0220030425-01, 2007 NASD Discip. LEXIS 28, at *32 (N.A.C. Oct. 10, 2007).

Respondent's conduct resulted in monetary gain for himself. It enabled him to use PB's funds while providing no security and paying only 5% interest, terms that he could not have gotten elsewhere. In fact, Respondent was continually overdrawn on his TD Banknorth account. The APR for the automatic loans from TD Banknorth to cover overdrafts was 18%. See, e.g., CX-4 at 12. Finally, Respondent's customer was unsophisticated, and placed her trust in Respondent to handle her mother's funds fairly and responsibly.

Respondent betrayed HS and PB's trust. He knew that the funds were intended to provide for the care of his elderly customer who was in a nursing home. He misused the funds by putting them into his personal account, spent the funds almost immediately after receiving them, and deceived his customers about what he had done. The Hearing Panel finds that the appropriate sanction for Respondent's conduct is a bar.

B. In Light of the Bar No Additional Fine or Suspension is Necessary for Borrowing from Customers, but Respondent is Ordered to Pay Restitution

Because the Hearing Panel has ordered a bar for Respondent's improper use of customer funds, it does not decide whether a suspension, a bar, or a fine would be appropriate for Respondent's borrowing from customers in violation of Conduct Rules 2370 and 2110. To the extent that Respondent's customers have been injured by his conduct, restitution is appropriate. "Where quantifiable customer harm has been demonstrated, or a respondent has been unjustly enriched, [FINRA] generally will order restitution or disgorgement." NASD Notice to Members 99-86 (October 1999).

HS and PB and G & SM have been reimbursed by Ameriprise, and Respondent has reimbursed Ameriprise for his improper use of PB's funds. No restitution is ordered for those transactions. The Hearing Panel takes no position on Respondent's liability to Ameriprise for its payment to G & SM.

Respondent testified that as of the date of his partial payment to customer JF, $25,000 remained on the loan. Respondent is ordered to repay JF's estate or heirs $25,000 plus interest at 6% (Tr. 309) from May 20, 2005.

The repayment of $55,000 to customer EP was a sham transaction, apparently designed to fool regulators. Respondent is ordered to repay customer EP $55,000 plus 10% interest, the note rate that was promised to EP, from October 1, 2004, the date of the original transaction. No restitution is ordered with respect to the loan of $75,000 from customer EP because the transaction occurred when Respondent was no longer associated with any FINRA member, and because the Complaint did not allege that the transaction was a violation of any FINRA rules.

IV. Conclusion

Respondent Shane A. Selewach is barred from associating with any FINRA member in any capacity for improper use of customer funds, in violation of NASD Conduct Rules 2330 and 2110. In light of the bar, no fine or suspension is imposed for borrowing from customers in violation of NASD Conduct Rules 2370 and 2110. In addition to the bar, Respondent is ordered to provide full restitution to the customers from whom he borrowed funds to the extent those customers have not already been repaid. Respondent is also ordered to pay costs of $3,227.75, which includes an administrative fee of $750 and the cost of the hearing transcript.

These sanctions shall become effective on a date set by FINRA, but not sooner than 30 days after this Decision becomes the final disciplinary action of FINRA, except that if this Decision becomes FINRA's final disciplinary action, the bar shall become effective immediately.

HEARING PANEL

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By: Lawrence B. Bernard
Hearing Officer

Copies to:
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