

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MATTHEW S. KAPLAN
(CRD No. 2714169),

Respondent.

Disciplinary Proceeding
No. 20070077587

Hearing Officer – AWH

HEARING PANEL DECISION

June 20, 2008

Respondent is barred from associating with any FINRA member in any capacity for (1) conversion of firm funds, in violation of NASD Conduct Rule 2110, and (2) falsifying expense reports, causing the firm to have false books and records, in violation of NASD Conduct Rules 3110 and 2110 and SEC Rule 17a-3. Respondent is also assessed costs.

Appearances:

Robin W. Sardegna, Esq., and Jeffrey S. Evans, Esq., for the Department of Enforcement.

Matthew S. Kaplan, *pro se*.

DECISION

I. Background

On June 27, 2007, the Department of Enforcement filed the original three-cause complaint against Respondent Matthew Kaplan, alleging (1) conversion and misuse of firm funds for personal expenses; (2) giving something of value in excess of \$100 to a representative of his client in relation to his business; and (3) falsifying expense reports, thereby causing the firm to have false books and records. By Order dated October 31, 2007, Enforcement's Motion to Amend the Complaint was granted, allowing Enforcement to omit the Second Cause of the Complaint which had been pled in the

alternative. On November 6, 2007, Respondent filed an Answer to the Amended Complaint, admitting a number of the factual allegations, and asserting as an affirmative defense, *inter alia*, that his alleged conduct was a direct result of psychological disorders and was not committed with the intent to convert and/or misappropriate firm funds. On March 11 and 12, 2008, a hearing was held in New York, New York, before an Extended Hearing Panel composed of the Hearing Officer, a current member of the District 9 Committee, and a former member of the District 11 Committee. The parties filed post-hearing submissions on April 28, 2008.

II. The Violations

The material facts of the violations are not in dispute, as evidenced by Respondent's Answer, the Stipulations filed by the parties, and the documents that have been admitted into evidence without objection.¹

Matthew Kaplan first entered the securities industry after his graduation from college in 1995. As pertinent to the Complaint, he was employed as a research salesman for the institutional trading desk at Lazard Freres & Co. LLC, n/k/a Lazard Capital Markets LLC ("Lazard") from December 1, 1997, through December 9, 2005, when he was terminated by Lazard. Kaplan then held, and currently holds, Series 7 and 63 licenses. As a research salesman, Kaplan was issued a corporate American Express credit card to pay for business travel and entertainment expenses he incurred while entertaining clients of Lazard for whom he was responsible for servicing and conducting business. Lazard maintained a business expense reporting system that enabled Kaplan to

¹ References to the Department of Enforcement's exhibits are designated C-; Respondent's exhibits, as R-; factual stipulations, as Stip_; and the transcript of the hearing, as Tr._.

submit business-related charges on the corporate credit card for payment by the firm.²

Between October 2001 and June 2003, Kaplan used his firm American Express charge card on the following four occasions to pay for an escort service he patronized called Exotica 2000:

1. October 1, 2001

On October 1, 2001, Kaplan used the firm American Express card to pay for his personal use of an escort service. Although he was alone with the escort when he utilized the services provided, he falsified the Lazard expense report to conceal the true nature of the escort service charges that appeared under the name “Ce Soir of New York.” Kaplan claimed that the charges were for clients’ tickets to a Broadway show and a rock concert, which would have been appropriate business expenses. He believed that an expense reviewer would assume that “Ce Soir of New York” was a ticket broker. Lazard paid the charges, which totaled \$3,700.³

2. June 13, 2002

Kaplan again used the escort service on June 13, 2002, charging the expense on the firm American Express card. The charge was a personal expense with no business purpose. However, on the expense report that he submitted to Lazard, he claimed that the \$3,300 Ce Soir charge was for Bruce Springsteen concert tickets given to three traders who were employed by one of his clients. Lazard paid the expense.⁴

3. August 17, 2002

Kaplan used the escort service for a third time on August 17, 2002. The charge was a personal, non-business expense. However, on the expense report he submitted to

² Stip. ¶¶ 1-6; C-1, p. 4; C-17, p. 9.

³ Tr. 85-92; C-2, pp. 5, 9, 13; Stip. ¶¶ 7, 8, 21.

⁴ Tr. 100-04; C-3, pp. 1, 3, 5, 7; Stip. ¶¶ 9, 10, 21.

Lazard, he claimed that the \$5,000 charge from Ce Soir was for U. S. Open tickets for himself, his wife, and clients. Lazard paid the expense.⁵

4. June 18, 2003

On June 18, 2003, Kaplan had dinner and drinks with MP, a friend who also was a portfolio manager for one of Kaplan's clients at Lazard. They discussed MP's marital difficulties, and Kaplan suggested using an escort service as a solution to MP's problems. Kaplan agreed to pay for the service, although MP did not know that Kaplan intended to pay for it with his Lazard charge card. Kaplan made the arrangements for the escort service and then met MP at a hotel where they availed themselves of the services offered by Exotica/Ce Soir. Although the charge was personal and not an appropriate business expense, Kaplan claimed that the \$4,950 Ce Soir charge was for concert tickets for MP to see Bruce Springsteen at Giants Stadium. Lazard paid the charge.⁶

During the relevant time period, Lazard permitted the use of the firm American Express card for personal expenses, provided that the individual declared the expense to be personal and eventually reimbursed the firm pursuant to the procedure it put in place for that purpose. Kaplan used that procedure at least once, in January 2002, when he reimbursed Lazard \$1,623.00 for November 2001 expenses described in his expense report as personal. He also charged a number of other personal expenses during the 2001-2003 time period, running up a balance of between \$2,000 to \$4,000.⁷

⁵ Tr. 106-11; C-4, pp. 1, 3, 5; Stip. ¶¶ 11, 12, 21.

⁶ Tr. 113-18; Stip. ¶¶ 13, 14, 21.

⁷ Tr. 75-80; 100, 126-27; C-2, pp. 3, 5, 6. Although the reimbursement check in the amount of \$1,623 appears to be dated January 7, 2001, the check was actually written in January 2002 to reimburse expenses incurred in November 2001. Tr. 139-43. The memo line on the check is blank, and the Lazard journal entry shows only that the check was reimbursement for unspecified personal charges.

At some time in early 2005, Lazard employees, including Kaplan, were instructed to review their expense reports for personal expenses that had been submitted as business expenses. Kaplan did not identify the four escort expenses as personal. In December 2005, after his conduct had been discovered, he offered to reimburse Lazard for the escort service charges. He actually reimbursed Lazard, by check dated May 12, 2006, for the \$16,950 he charged for the personal use of the escort service on the four occasions described above.⁸

III. Evidence Concerning Psychological Disorders

In May 2006, Kaplan's former attorney referred him to clinical psychologist Dr. Barry Rosenfeld for an evaluation of Kaplan's psychological functioning. Dr. Rosenfeld diagnosed Kaplan as having a chronic, generalized anxiety disorder, in addition to a transient depressive disorder that arose after Kaplan had been terminated by Lazard. He described the anxiety disorder as mild – a general sense of nervousness and insecurity – and not disabling. He found no personality disorder. Dr. Rosenfeld concluded that Kaplan's use of the escort service stemmed from stresses and insecurity that arose out of his relationship with his wife. He also concluded that Kaplan's falsification of the expense reports was motivated by his desire to hide his indiscretions from his wife who oversaw their finances and would have detected the charges if he had paid with his own credit card or withdrawn cash. Dr. Rosenfeld explained that Kaplan's falsification of the expense reports was "something he thought he could do and get away with."⁹ Dr. Rosenfeld did not testify, nor did his report state, that Kaplan's falsification of his expense reports was a result of any mental disorder, disease, or defect.

⁸ Tr. 105-06, 126-28; C-14; Stip. ¶ 22.

⁹ Tr. 222-24, 226, 231, 247-49, 254-55, 273; R-1.

The Department of Enforcement retained the services of forensic psychiatrist Dr. Jeffrey S. Janofsky to assess Kaplan's mental state at the time he submitted the false expense reports, to assess his mental state at the time Dr. Janofsky interviewed him for a psychiatric evaluation in January 2008, and to comment on Dr. Rosenfeld's report. Dr. Janofsky concluded that there is no data to support a conclusion that Kaplan was suffering from any mental disorder during the time he submitted the false expense reports; and that, while he was suffering from mild symptoms of depression and anxiety at the time of the January 2008 interview, those symptoms were not of sufficient severity to make a mental illness diagnosis.¹⁰ Dr. Janofsky's report concluded as follows:

Mr. Kaplan weighed the risk of identifying the expenses he incurred as personal on his Lazard expense reports (repaying Lazard and having his wife question the expenses) against the risk of Lazard discovering the true nature of his American Express charges. After completing a risk:benefit analysis, Mr. Kaplan simply determined that the risk to his marital relationship outweighed the risk that Lazard would discover his expense reports were false.

Mr. Kaplan was fully in control of his thinking and behaviors at all times when he falsely filled out his expense reports. He simply did not expect to be caught, as he routinely used his Lazard provided American Express card to charge up to \$25,000.00 per month of legitimate entertainment expenses. There is no data that Mr. Kaplan was suffering from depression, anxiety or any other psychological symptoms around the times he filled out his false expense reports.¹¹

Dr. Janofsky noted that Dr. Rosenfeld did not attempt to collect any collateral data, such as Kaplan's current and former treatment records or personnel records. He opined that, even if he were to assume that all of Dr. Rosenfeld's diagnostic hypotheses were correct, none of them explains how or why any psychological factors affected

¹⁰ Tr. 303, 306-07; C-23.

¹¹ C-23, p. 31. *See also* Tr. 318-21.

Kaplan's ability to submit truthful expense reports.¹² Dr. Janofsky's report states:

. . . Dr. Rosenfeld does not explain how Mr. Kaplan's anger, hostility, anxiety or any other psychological factors affected his ability to submit truthful expense reports. There is no evidence that if such psychological factors existed, they reached a clinically significant level of severity. Dr. Rosenfeld's report provides no support for the premise that at the time of the expense account falsifications, Mr. Kaplan lacked the capacity to know or appreciate the wrongfulness of his actions or lacked capacity to behave in an appropriate fashion.¹³

IV. Conclusions of Law

Conversion is the wrongful exercise of dominion over the personal property of another.¹⁴ Kaplan admitted that he used firm funds for personal expenses and falsely claimed that the funds were used for appropriate business expenses. By so doing, he intended the firm to pay those personal expenses, without having to reimburse the firm as required by its procedures. Accordingly, he converted firm funds, in violation of NASD Conduct Rule 2110, when he charged personal expenses to the firm credit card and falsely claimed the expenses to be appropriate business expenses.¹⁵ Even where the conversion is not in connection with a securities transaction, it "constitute[s] unethical business-related conduct and calls into question [a respondent's] ability to fulfill his fiduciary duties in handling other people's money."¹⁶

¹² Tr. 322-27.

¹³ C-23, p. 33.

¹⁴ *Dep't. of Enforcement v. Paratore*, 2008 FINRA Discip. LEXIS 1, *10 (NAC Mar. 7, 2008) (citing Restatement (Second) of Torts § 222A(1) (1965)). *See also* FINRA SANCTION GUIDELINES, at 38 n.2 (Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.").

¹⁵ *See, e.g., Dep't of Enforcement v. Zulick*, 2001 NASD Discip. LEXIS 22, *30 (OHO Feb. 27, 2001) (charging personal expenses to firm credit card to pay personal expenses constituted conversion, in violation of NASD Rule 2110).

¹⁶ *Daniel D. Manoff*, Exchange Act Release No. 46,708, 2002 SEC LEXIS 2684 (Oct. 23, 2002) (unauthorized use of co-worker's credit card numbers).

NASD Rule 3110 requires member firms to keep books and records as prescribed by SEC Rule 17a-3. Section 17(a) of the Exchange Act and Rule 17a-3 thereunder require members to make and keep current “[l]edgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.” Because Kaplan intentionally submitted false expense reports, disguising his personal expenses as legitimate business expenses, he caused his firm to violate SEC Rule 17a-3 and NASD Rules 3110 and 2110.¹⁷

V. Sanctions

According to the FINRA Sanction Guidelines, a bar is standard for conversion, regardless of the amount converted.¹⁸ For egregious recordkeeping violations, a bar may also be the appropriate sanction.¹⁹ Here, the two violations are intertwined, and there are no material mitigating factors that warrant sanctions less than bars in all capacities. The Principal Considerations in Determining Sanctions also support the conclusion that bars are the appropriate sanctions in this case.²⁰

Principal Consideration No. 2 is whether the respondent accepted responsibility for and acknowledged the misconduct to his employer or a regulator prior to detection and intervention by the firm or a regulator. Kaplan did not. Notwithstanding the opportunity to admit his misconduct when the firm asked its employees specifically to identify any personal expenses that had been claimed as business expenses, he failed to identify any of the four personal expenses he had charged.

¹⁷ Violations of federal securities laws and other NASD Conduct Rules also violate NASD Conduct Rule 2110. *Dep’t of Enforcement v. Shvarts*, 2000 NASD Discip. LEXIS 6, **12-13 (NAC June 2, 2000). NASD General Provision 0115(a) applies the obligations of member firms to individuals associated with those firms.

¹⁸ FINRA SANCTION GUIDELINES at 38.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 6-7.

Principal Consideration No. 4 is whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct. Kaplan did not. He did not attempt to repay Lazard until December 1995, after the firm had discovered his misconduct and confronted him with it. He finally reimbursed Lazard for the \$16,950 in personal expenses in May 2006, almost three years after the last time he charged Ce Soir expenses to the firm, and after he had received a *Wells* notice from the Department of Enforcement, notifying him that it intended to bring a disciplinary action against him.²¹

Principal Consideration No's. 8 and 9 are whether the respondent engaged in numerous acts and/or a pattern of misconduct, over an extended period of time. Kaplan did. He committed four separate acts of conversion over a period of 20 months.

Principal Consideration No. 10 is whether the respondent attempted to conceal his misconduct or to lull into inactivity, mislead, or deceive the member firm with which he was associated. Kaplan did. He filed the false expense reports precisely to conceal the personal nature of the escort service charges, and he thought he could get away with doing so.

Principal Consideration No. 13 is whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence. Kaplan's misconduct was admittedly intentional.

Finally, Principal Consideration No. 17 is whether the respondent's misconduct resulted in the potential for his monetary or other gain. Kaplan's misconduct resulted in his actual gain of the \$16,950 his firm paid for his personal expenses.

²¹ C-13, C-14.

Because there is some authority for consideration of extreme emotional distress as a mitigating factor, the Extended Hearing Panel has considered the expert evidence offered by both Kaplan and Enforcement.²² However, the Extended Hearing Panel does not find that the evidence supports a finding that Kaplan's misconduct resulted from or was exacerbated by any emotional distress or psychological disorder.²³

Although Dr. Rosenfeld explained how stresses and insecurity arising out of Kaplan's relationship with his wife impacted Kaplan's decision to use the escort service, that issue is not material to the Complaint in this case. The relevant issue is the falsification of the expense reports. As to that issue, neither Dr. Rosenfeld nor Dr. Janofsky found that Kaplan's falsification of expense reports resulted from any mental disorder, disease, or defect. Both experts agreed that Kaplan merely thought he could successfully hide his indiscretions from his wife and elude detection by Lazard if he falsified the nature of the expenses. The Extended Hearing Panel finds persuasive Dr. Janofsky's testimony that Kaplan rationally engaged in a risk/benefit analysis to determine his course of conduct.

The Extended Hearing Panel also concludes that Kaplan did not falsify his expense reports merely to hide his conduct from his wife. Kaplan could have used his own checking account to reimburse Lazard for unspecified personal expenses, as he had done in the past. In addition, with the exception of the June 13, 2003 use of the escort service, which was a spur of the moment decision, he could have arranged for a cash

²² See, e.g., *District Bus. Conduct Comm. v. Klein*, No. C02940041, 1995 NASD Discip. LEXIS 229, at *13 (NBCC June 20, 1995) (extreme emotional distress considered, but not found sufficient to reduce sanction to less than a bar for conversion). See also *Joel Eugene Shaw*, Exchange Act Release No. 34,509, 1994 SEC LEXIS 2493 (Aug. 10, 1994).

²³ See *District Bus. Conduct Comm. v. Kwikkel-Elliott*, 1998 NASD Discip. LEXIS 4, at *14 (Jan. 16, 1998) (no indication that misconduct resulted from or was exacerbated by personal or work-related stress).

advance to pay the charges. Finally, he could have requested that Lazard deduct his tab of personal expenses from his yearly six-figure bonus that he was earning.²⁴ Falsification of the expense reports was the only method by which he could avoid ultimate payment of those expenses.

VI. Conclusion

Matthew S. Kaplan is barred from associating with any FINRA member in any capacity for conversion of firm funds, in violation of NASD Conduct Rule 2110, and falsifying expense reports, causing the firm to maintain false records, in violation of Section 17(a) of the Exchange Act, Rule 17a-3 thereunder, and NASD Rules 2110 and 3110.²⁵ He is also assessed costs in the total amount of \$3,884.66, consisting of a \$750 administrative fee and a \$3,234.66 transcript fee. If this decision becomes FINRA's final disciplinary action, the bars shall become effective immediately.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Extended Hearing Panel

Copies to:

Matthew S. Kaplan (*via overnight courier & first class mail*)
Jeffery S. Evans, Esq. (*via electronic & first class mail*)
Robin Sardegna, Esq. (*via electronic & first class mail*)
David R. Sonnenberg, Esq. (*via electronic & first class mail*)

²⁴ With a base salary of \$100,000, Kaplan's total compensation in 2001 was \$600,000; in 2002, \$650,000; and in 2003, \$565,000. Tr. 123-24.

²⁵ The Extended Hearing Panel has considered and rejects without discussion all other arguments of the parties.