

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KEILEN DIMONE WILEY
(CRD No. 4259612),

Respondent.

Disciplinary Proceeding
No. 2011028061001

Hearing Officer - MC

HEARING PANEL DECISION

April 29, 2014

Respondent Keilen Dimone Wiley violated FINRA Rule 2010 when he converted customer insurance premiums to his own use. He violated FINRA Rules 8210 and 2010 when he provided false testimony to FINRA. He is barred from associating with any FINRA member in any capacity. One Panelist dissents.

Appearances

Carolyn J. Craig, Esq., and Jacqueline Perrell, Esq., Rockville, Maryland, for the Department of Enforcement.

Dawn R. Meade, Esq., The Spencer Law Firm, Houston, Texas, for Respondent.

I. Introduction

Respondent Keilen Dimone Wiley was registered with FINRA through member firm Farmers Financial Solutions, LLC from April 2002 through June 7, 2011.¹ But he was primarily employed as an insurance agent doing business as Wiley Insurance Agency and Associates (“WIA”). He operated WIA in Houston, Texas, as an agent of Farmers Insurance Group.²

¹ Stipulations of Fact Between the Department of Enforcement and Respondent Keilen Dimone Wiley (“Stip.”) ¶ 1. Wiley has not been registered with FINRA since Farmers Financial Solutions, LLC terminated his registration on June 7, 2011. FINRA retains jurisdiction over him for the purposes of this disciplinary proceeding because the Complaint was filed on February 13, 2013, less than two years after his registration was terminated, and charges him with misconduct occurring while he was registered and with failing to provide truthful testimony within two years of the termination of his registration. FINRA By-Laws, Article V, Section 4(a).

² Farmers Insurance Group is an affiliate of Farmers Financial Solutions, LLC. Stip. ¶ 3.

From March through April 2011, the relevant period for this case, Wiley collected over \$6,000 in insurance premium payments from customers. He did not deposit the premiums into the Farmers Insurance Group bank account where the company required its agents to place them. Instead, Wiley deposited them into his WIA business bank account and used the funds to pay personal and business expenses.³ In early May 2011, when Wiley learned that he would be audited by Farmers Insurance Group, he quickly transferred funds from the WIA account into the Farmers Insurance Group account to bring himself current with the premium payments he owed to the company.

In the course of the audit, Wiley admitted that he had used premiums to meet personal needs, and followed up with an e-mail to his manager explaining why he had done so. However, a year later, testifying at a FINRA on-the-record interview, Wiley denied making personal use of the funds.

The Complaint's first cause of action charges Wiley with conversion of customer insurance premiums in violation of FINRA Rule 2010. The second cause of action charges him with giving false and misleading testimony at his on-the-record interview, in violation of FINRA Rules 8210 and 2010. Enforcement seeks a bar.

Based upon a careful review of the testimony and exhibits presented at the hearing, as set forth below, the Hearing Panel majority finds that the evidence supports the charges.⁴ Under the circumstances, the Panel majority agrees with Enforcement's recommendation that it is necessary to impose a bar for Wiley's conversion of funds. In light of this, the Panel majority does not find it necessary to impose any additional sanctions for Wiley's false testimony.

³ Stip. ¶¶ 8, 10.

⁴ One member of the Hearing Panel disagrees, and has filed the dissent which follows the Hearing Panel Majority's Decision.

II. Findings of Fact and Conclusions of Law

A. Farmers Insurance Group Procedures

When Wiley became an insurance agent, he signed an Agent Appointment Agreement with Farmers Insurance Group providing, among other things, that he would sell insurance “in accordance with” company rules, and would collect and promptly remit premiums owed to Farmers Insurance Group.⁵

During the relevant period, Farmers Insurance Group required its agents to utilize a computer program called Agents Credit Advice (“ACA”) to process insurance premiums.⁶ Farmers Insurance Group manuals explicitly instructed agents on how to use the program. One manual directed that “all insured remittances will be processed” through the ACA system.⁷ Another stated that agents were to “Submit an ACA ... on a daily basis as [a] premium is received.”⁸

When an agent submitted an ACA report recording customer premium payments, Farmers Insurance Group credited the policies, and activated or renewed them as appropriate. Farmers Insurance Group required the agent, within one business day, to deposit the premiums into a special account Farmers Insurance Group characterized as a co-bank account, from which the company collected the premiums. The agent could make deposits into the account, but not

⁵ JX-2, at 1 ¶ B.1-2. Exhibits offered jointly by the Parties are referred to as “JX-.” Enforcement’s exhibits are referred to as “CX-” and Respondent’s exhibits as “RX-.” References to the hearing transcript are referred to as “Tr.” followed by name of the witness testifying and the page cited.

⁶ Tr. (Edmonds) 33-34. The Farmers Insurance Group of Companies Agency Operations – Agents Guide (“Agents’ Guide”) stated that, with the exception of a particular flood insurance, “all insured remittances will be processed in an agent’s office through this [ACA] system.” JX-3, at 2.

⁷ *Id.*

⁸ JX-4, at 28 [eAgent ACA Co/Banking User Guide & Fastpath Manual (“ACA Manual”)].

withdrawals.⁹ The manuals clearly delineated the requirement to deposit premiums promptly into the co-bank account.¹⁰

If an agent failed to deposit premiums within a week of entering them into the ACA system, the system generated an e-mail alert, or report, to the agent, the agent's manager, and the company's accounting department. The system generated additional reports if deposits remained unmade.¹¹ If an agent failed to make the deposits within two weeks, and if the premiums due totaled \$3,000 or more, the agent could be the subject of another report and then an audit.¹²

B. The Farmers Insurance Group Alerts Wiley to an Audit

The system generated a report concerning Wiley in late April 2011. The report indicated that Wiley had failed to deposit over \$6,000 in premiums he had received from insurance customers from March 10 through April 26, 2011.¹³ This triggered an audit. The audit was assigned to Daniel Edmonds, an experienced Farmers Insurance Group auditor.¹⁴

In late April or early May 2011, Wiley's manager called to announce that he was going to visit the WIA office to discuss premium payments. He advised Wiley to make sure to deposit all receipts he had reported in the ACA system to the co-bank account.¹⁵

After the call, Wiley acted quickly to make up the shortfall in his deposits. On May 3, 2011, he deposited a check for \$1,690.64 drawn on his WIA bank account into the co-bank

⁹ Tr. (Edmonds) 39.

¹⁰ *Id.* at 41-43. JX-3 at 16, stated "Deposit all cash collections, which balance to the ACA, within one business day" and defined "cash" to include currency, checks, and credit cards. *Id.* at 2. The ACA Manual stated "All monies receipted by you must appear on your ACA ... any agent submitting an ACA must deposit all checks and cash reported ... within one business day after that ACA is closed." JX-4, at 30.

¹¹ Tr. (Edmonds) 44-45.

¹² *Id.* at 45-46.

¹³ *Id.* at 49.

¹⁴ *Id.* at 26, 45; JX-5.

¹⁵ Tr. (Wiley) 167-68.

account. Wiley's notations on the deposit slip showed that the check was for premiums he had collected and entered into the ACA system, in some instances more than a month before.¹⁶ On May 5, Wiley deposited another check drawn on his WIA account, this one for \$1,954.52, into the co-bank account to cover additional insurance premiums that he had entered into the ACA system but not deposited.¹⁷ On May 6, Wiley withdrew \$2,250.94 from his WIA bank account and added the cash to the co-bank account.¹⁸

C. The Audit

On May 11, 2011, Wiley's manager accompanied Edmonds, the senior auditor, to Wiley's office. Edmonds explained that he was there to inquire about Wiley's late premium deposits.¹⁹ He brought a Farmers Insurance Group report indicating that Wiley had failed to promptly deposit premiums he had obtained from 54 customers from March 11 through May 5, 2011.²⁰

Edmonds and Wiley reviewed the co-bank account statements. Edmonds asked Wiley to explain the \$2,250.94 cash deposit he had made to the co-bank account on May 6. Wiley initially claimed that he had collected the cash from customers, placed it into a desk drawer and then had forgotten he had done so. Approximately a month later, he explained, he remembered that the cash was still in the drawer, so he then deposited it in the co-bank account.²¹

A few minutes after Wiley gave this explanation, Edmonds, reviewing Wiley's WIA account statements, saw the May 6 withdrawal of \$2,250.94, the exact amount Wiley deposited

¹⁶ *Id.* at 172-73; CX-16, at 1-2.

¹⁷ Tr. (Wiley) 173-74; CX-16, at 3, 7.

¹⁸ Tr. (Wiley) 174; CX-16, at 10, 13.

¹⁹ Tr. (Edmonds) 52.

²⁰ Wiley received \$3,751 of the total in cash, and \$2,782 in checks. Tr. (Edmonds) 49-50, 73; JX-5, at 12; CX-1.

²¹ Tr. (Edmonds) 120.

to the co-bank account on the same day. Edmonds asked Wiley about it and Wiley recanted the story about the desk drawer. He had made the deposit from his personal and business account, not from cash received from customers.²²

The WIA bank account statements showed that there were negative daily balances in Wiley's account during the relevant period.²³

Edmonds made handwritten notes of the interview.²⁴ Edmonds testified that when he conducts an audit, it is his practice to try to create an accurate statement for the person interviewed to communicate his version of events, if he wishes, "to the higher ups who are going to make the decisions." Because Wiley indicated that this was his wish, Edmonds typed the notes into his laptop computer in the form of a statement by Wiley. Edmonds printed the statement out and gave it to Wiley. Edmonds invited Wiley to make any changes he wanted to make, to add to or correct what Edmonds had written, and, if he chose, to sign the statement.²⁵

The statement is a single page, written in the first person as if by Wiley, and begins "My name is Keilen Wiley." It states that Wiley knew that there were shortages in premium deposits to the co-bank account in March and April, 2011. It states that Wiley believed two ex-employees "may have taken some insureds' premiums," but that he had no evidence of this and did not know how much they may have taken.²⁶ It states that Wiley placed the premiums in his WIA

²² *Id.* at 136-37.

²³ *Id.* at 65-69.

²⁴ *Id.* at 63.

²⁵ *Id.* at 57-59. Edmonds stressed that he followed this practice to avoid misinterpretation, and that signing the statement was voluntary and "strictly optional."

²⁶ JX-6.

account as a service to his insurance customers so that, if Farmers Insurance Group rejected or cancelled a policy, he could refund the customer's premium immediately.²⁷

The statement goes on to say that "As time went on, I needed funds" and "delayed depositing the insureds' cash collections" to the co-bank account for "a month or more." The statement acknowledges that the WIA account had negative balances during the relevant period and concludes: "While customer collections did end up being used to pay for my personal and business expenses, this was not my intent."²⁸ The statement explains that when Wiley became aware that "the ACA shortages were becoming a noticeable issue" and he received "increased communications on the shortages" from Farmers Insurance Group, he wrote checks and withdrew cash from the WIA account "to reimburse" the company for the shortages.

Edmonds testified that Wiley "took a little while" to review the statement, leading Edmonds to anticipate that Wiley might want to make a number of changes.²⁹ Instead, Wiley made no corrections or additions, but signed his name under an attestation that "I have read the above statement and it is true to the best of my knowledge."³⁰

Wiley disclosed to Edmonds that he had additional cash and money orders on hand totaling \$637 from other premiums he had collected. He turned them over to Edmonds to deposit.³¹ When added to the deposits Wiley made from May 3 to May 6,³² this brought the total

²⁷ Tr. (Edmonds) 54; JX-6.

²⁸ JX-6.

²⁹ Tr. (Edmonds) 60.

³⁰ JX-6. Edmonds testified that as Wiley signed the statement, he said to him words to the effect of "you nailed it." Tr. (Edmonds) 60.

³¹ Tr. (Edmonds) 57.

³² Tr. (Wiley) 172-74. Wiley deposited \$2,250.94 in cash he withdrew from the WIA account, in addition to two checks he wrote on the WIA account, into the Farmers Insurance co-bank account.

of overdue premiums Wiley paid to Farmers Insurance Group to \$6,533.10, and reconciled the shortage.³³

D. Wiley's E-Mail to His Manager

The day after the audit, Wiley sent his manager a lengthy e-mail. In it, he wrote that “in addition to the statement that I gave yesterday ... I would like to add a few more words about my ACA depositing delay problem.” He asserted that “I do not owe Farmers any money” and that he did not consider his actions “a big deal” because Farmers Insurance Group could have withheld from his monthly commissions any unpaid premiums he owed the company. Wiley wrote that in May, prompted by the accumulation of e-mail alerts from Farmers Insurance Group about the ACA shortages, he decided to bring the co-bank account current even though this meant that he would have to take a payday loan to cover his business and personal expenses for the remainder of the month. Wiley wrote that he had been trying to cure the “problem” of overdue ACA deposits since November 2010.³⁴ He explained that “several factors” had “forced” him to deposit customer payments into his WIA account: a “bitter divorce,” the loss of his house to foreclosure, and bad credit. He wrote that when he “started using customer payments and repaying Farmers later,” he knew that he “would be walking a fine line. It was a risk I was willing to take.”³⁵ Wiley insisted that he had “accounted for all the money that Farmers was missing in my delayed deposits” and had “balanced out my ACA deposits and will start making deposits on-time. My method of doing this was questionable [to] say the least, but my business did NOT fold due to the financial storm I had. I take full responsibility.”³⁶

³³ Tr. (Edmonds) 132-33.

³⁴ JX-7, at 1.

³⁵ *Id.* at 2.

³⁶ *Id.* at 3.

On June 7, 2011, Farmers Financial Solutions, LLC terminated Wiley's registration after completing an internal review, which it described as follows: "The firm received notice ... that the Agent/RR, in his capacity as an insurance agent, allegedly used property and casualty insurance premiums for personal use. The Agent/RR has subsequently remitted the property and casualty insurance premiums to the insurance company."³⁷

E. Wiley's On-The-Record Testimony

Almost exactly a year after the Farmers Insurance Group audit, Wiley testified in an on-the-record interview pursuant to a FINRA Rule 8210 request. In the course of the interview, Wiley recanted the admissions he made during and immediately after the audit.

First, he denied that he had delayed depositing premiums because he needed funds for his business. Wiley testified, "That's ... [Edmonds'] interpreting what I was saying."³⁸ When asked directly whether he had used customer premiums to pay personal and business expenses, Wiley flatly denied doing so, stating, "No. And this is ... [what] I have the most problem with No, because I say the money was always there from the customers' payments that we collected."³⁹ Notwithstanding that he had made no corrections to the statement when he signed it, and that he had affirmed its truth and accuracy at the audit, Wiley testified that the statement was "very inaccurate."⁴⁰

F. Wiley's Defenses at the Hearing

At the hearing, Wiley raised a number of claims in an effort to show that he had done nothing wrong. First, he argued that under Texas law, his use of the premiums did not constitute

³⁷ JX-1, at 1, 5.

³⁸ CX-17, at 60.

³⁹ *Id.* at 74.

⁴⁰ *Id.* at 76.

conversion. Second, he claimed that his independent contractor relationship with Farmers Insurance Group allowed him to deposit premiums to the co-bank account when he chose to do so. Third, he testified that he had been processing premiums in the same manner for years, and Farmers Insurance Group had not previously objected. Fourth, he claimed that because the company would inevitably receive the premiums due, he was free to use them before turning them over to the company. Finally, he attempted to substantially retract his admissions to Edmonds and his manager that he made personal use of the premiums.

Under Texas law, Wiley argued, no conversion occurs until a person refuses a demand to return funds to the rightful owner.⁴¹ Here, Wiley claimed, he never refused a demand to pay the company its premiums, and Farmers Insurance Group received all of the premiums owed to it.⁴²

His independent contractor status with Farmers Insurance Group, Wiley contended, excused him from having to abide by company rules requiring prompt deposit of premiums collected from customers into the co-bank account. In his view, “under my agent agreement ... I’m not required to do anything.” He stated that Farmers Insurance Group’s policy regarding use of the ACA system was a “mere suggestion,” not mandatory.⁴³ He cited provisions in the Agent Appointment Agreement which he claimed supported his argument that Farmers Insurance Group “cannot impose any ... control [over] how I run my business.”⁴⁴ According to Wiley, these provisions meant that he could make the deposits whenever he chose.⁴⁵ As for whether

⁴¹ Tr. 356-57.

⁴² Tr. (Wiley) 296-97.

⁴³ *Id.* at 149.

⁴⁴ *Id.* at 276-77. The provisions of the agreement he specifically cited state “The time to be expended by the Agent is solely within the Agent’s discretion, and the persons to be solicited and the area wherein solicitation shall be conducted is at the election of the Agent” and “The Agent shall, as an independent contractor, exercise the sole right to determine the time, place, and manner in which the objectives of this Agreement are carried out.” JX-2, at 3 ¶ J.

⁴⁵ Tr. (Wiley) 151.

company policy allowed him to use premiums to pay personal expenses, Wiley stated that Farmers Insurance Group “had no control over that.”⁴⁶

Wiley asserted at the hearing that for his entire 10 years as a Farmers Insurance Group agent, he had engaged in the same practice he employed during the relevant period – depositing premiums to his WIA account, making use of the funds, and later reimbursing the company.⁴⁷ He testified that he usually tried to pay Farmers Insurance Group before its monitoring system generated a second e-mail alert of an arrearage. Wiley claimed that the company had never previously objected, and that the first time he learned that the company frowned on the practice was during Edmonds’ audit.⁴⁸

Wiley also argued that even though his WIA account had negative balances during the relevant period, he had access to a line of credit with which he could have paid the premiums at any time.⁴⁹ In addition, he testified that Farmers Insurance Group paid him monthly commissions, based on a percentage of what his customers paid to the company each month, implying that the company could simply have withheld funds from his monthly commission check to recoup unpaid premiums.⁵⁰ Wiley testified that because Farmers would be paid, and because he felt he had discretion as to when to deposit the premiums with Farmers Insurance

⁴⁶ *Id.* at 155.

⁴⁷ *Id.* at 284-85.

⁴⁸ *Id.* at 285-88. This testimony was consistent with Wiley’s audit admissions to Edmonds, but contradictory to his on-the-record testimony. At the hearing, Wiley also claimed that his use of premiums was not the real reason that Farmers Insurance Group terminated his agency agreement. Rather, he claimed, Farmers Insurance Group wanted to reduce the number of its agents, and used the audit for the late deposited premiums as an excuse to get rid of him. *Id.* at 161-62, 207. He presented no corroborative evidence to support this claim.

⁴⁹ *Id.* at 294.

⁵⁰ *Id.* at 210-12. Edmonds, however, testified it was not company policy to withhold commissions to offset premiums agents owed the company.

Group, he believed he was “entitled” to deposit premiums into his WIA account and use them as needed during what he called his “hardships.”⁵¹

Wiley also attempted to diminish the import of his admissions to Edmonds and the e-mail he sent to his manager after the audit. Wiley claimed that he did not remember Edmonds giving him an opportunity to make changes before he signed the statement. Even though Wiley attested to its accuracy when he signed the statement, at the hearing he disagreed that the statement was true,⁵² and he insisted it was not *his* statement.⁵³

As for the e-mail, Wiley testified that when he referred to taking a “risk” when he spent premiums instead of depositing them promptly, the “risk” was merely the “risk of operating an agency.”⁵⁴ Wiley claimed that when he described his actions as “questionable to say the least,” he was *not* conceding that he had done anything questionable.⁵⁵

When asked about his on-the-record interview, Wiley insisted that he had testified truthfully. He claimed that when he denied using premiums for personal and business expenses at the on-the-record interview, what he meant was that all of the premiums were “accounted for”⁵⁶ and that he had promptly reported his receipt of premiums into the ACA. He stated: “So whether I used customer money, I would say no.”⁵⁷

⁵¹ Tr. (Wiley) at 287-88.

⁵² *Id.* at 179-82. The dissent concludes that Wiley’s signed statement was coerced and therefore gives it no weight. The Panel majority disagrees, and finds credible Edmonds testimony that Wiley voluntarily signed it and was given the opportunity to make any changes he wished. Tr. (Edmonds) 59-60. The Panel majority finds that Wiley’s attestation that the statement was accurate, and the e-mail he voluntarily sent to his manager the following day which reiterates much of the statement and expands on it, corroborate Edmonds’ testimony.

⁵³ Nonetheless, he testified that he agrees with “the bulk” of its contents, even though “it gives you the wrong impression.” Tr. (Wiley) 181-86.

⁵⁴ *Id.* at 304-05.

⁵⁵ *Id.* at 314-17.

⁵⁶ *Id.* at 195.

⁵⁷ *Id.* at 197-98.

G. Wiley Converted Customer Premium Payments to His Own Use

The Hearing Panel majority disagrees with Wiley's contention that Texas law controls in this case. FINRA Rules, not Texas law, governed Wiley's obligations.⁵⁸ He was registered with a FINRA member firm and thus subject to FINRA rules.

FINRA's definition of 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."⁵⁹ Conversion occurs when a person uses another's funds for personal benefit, instead of for the purpose for which the funds are intended.⁶⁰ Wiley was not the "owner" of the premiums, and his entitlement to possess them was transitory because he was obligated to deposit them into the co-bank account within a business day after receiving them. He had "no right to exercise ownership over these funds"⁶¹ or to use the premiums for his own benefit for more than a month. It has been previously held that an insurance agent converted funds when, as

⁵⁸ Wiley's state law argument is consistent with his Answer to the Complaint, which included a Motion for More Definite Statement, in which he insisted that Enforcement should be required to specify under which of several Texas criminal or civil law definitions of conversion it was proceeding. But Texas criminal law is not relevant because "FINRA proceedings are not criminal matters" and "standards from state criminal law conversion statutes are not applicable" to a conversion charge alleging violation of the high ethical standards mandated by NASD Rule 2110. *John Edward Mullins*, Complaint Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *28 (N.A.C. Feb. 24, 2011), *aff'd in part*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012). As in *Mullins*, the Complaint here charges Wiley with conversion in violation of the high ethical standards mandated by FINRA Rule 2010, identical to NASD Rule 2110. Furthermore, to the extent that Texas law, civil or criminal, may conflict with FINRA rules, "SRO Rules approved by the Commission ... preempt state law when the two are in conflict." *Credit Suisse First Boston v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005); *see also Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009) ("[A]ny ... state law claims that challenge the existence or operation of the [SRO] program or its rules are federally preempted."); *Whistler Invs., Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1168 (9th Cir. 2008) ("[Plaintiff's state law claim] is a direct challenge to Commission-approved [SRO] rules and is also preempted.").

⁵⁹ *Dep't of Enforcement v. Smith*, No. 2011029152401, 2014 FINRA Discip. LEXIS 2, at *12 (N.A.C. Feb. 21, 2014) (citing *FINRA Sanction Guidelines* 36 n.2 (2011)).

⁶⁰ *John Edward Mullins*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464, at *33, *37 (Feb. 10, 2012) (citing *Mission Sec. Corp.*, Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010)) (finding conversion when persons intentionally deprived owner of property, even though they made efforts to return it after an investigation began).

⁶¹ *Smith*, 2014 FINRA Discip. LEXIS 2, at *12-13 (respondent converted funds when he had "no right to exercise ownership" over funds, and used them "for his own benefit").

Wiley did here, he collected premiums and failed to forward them to his agency.⁶² It does not matter if, as Wiley claims, he had sufficient funds in his line of credit to make up any shortages in his co-bank deposits.⁶³ What matters is that during the relevant period Wiley used customer insurance premiums, payable to Farmers Insurance Group, for personal purposes.⁶⁴

The Hearing Panel majority also rejects Wiley's other contentions. His claim that as an independent contractor the rules set forth in Farmers Insurance Group's manuals did not apply to him is without merit.⁶⁵ Wiley's independent contractor status did not allow him to ignore the company's policies and procedures for remittance of premiums. When he signed the Agent Appointment Agreement, he consented to submit the Farmers Insurance Group policies he wrote to the company in accordance with its rules and procedures, and to remit premiums promptly to the company.⁶⁶

Similarly, the Hearing Panel majority rejects Wiley's argument that Farmers Insurance Group's rules and guidelines were merely advisory, allowing him to make personal use of premiums he collected and to pay the company at his "convenience." As noted above, the Agents' Guide uses mandatory language, stating that insureds' premiums "will be processed"

⁶² *Ernest A. Cipriani*, 51 S.E.C. 1004, 1006 (1994).

⁶³ Tr. (Wiley) 294. Enforcement presented evidence that through much of the relevant period, Wiley's bank accounts had a cumulative negative balance. CX-20. Enforcement did not include Wiley's line of credit in its analysis. Tr. (Peso) 238-39. However, Wiley did not resort to his line of credit to pay overdue premiums to Farmers Insurance Group. In *Cipriani*, in an argument similar to Wiley's, the respondent claimed to have had \$5,000 in his bank account, more than enough for Cipriani to pay the \$566.30 insurance premiums he collected from a customer and failed to deposit to his company as required. Cipriani later paid the company to reinstate the customer's policy. Nonetheless, the respondent was found to have misappropriated customer funds. 51 S.E.C. 1004, 1005-06, 1006 n.8.

⁶⁴ Tr. (Peso) 217-29; CX-20.

⁶⁵ Tr. 355. He also argues that Farmers Insurance Group did not consider his conduct to be embezzlement, because if it had, pursuant to provisions in his agent's agreement, it would not have paid him for his book of business. Tr. (Wiley) 275-76.

⁶⁶ *Id.* at 142-43.

daily through the ACA system, and directing agents to “Deposit all cash collections within one business day.”

Wiley’s claim that he had followed the same practice for 10 years is also unpersuasive.⁶⁷ Wiley provided no evidence to support his contention that he had done so.⁶⁸ Furthermore, this claim contradicts Wiley’s statement in the e-mail to his manager, which he testified was truthful,⁶⁹ that his arrearages began in November 2010, and he had been “trying to fix” the problem since then.⁷⁰

Finally, Wiley’s actions and words reflect his own awareness that his conduct was wrong. When he learned that his manager was coming to his office, he acted quickly to deposit overdue premiums into the co-bank account. Wiley’s assertion in his written statement that he did not intend to use premiums for personal expenses, the assertion in his e-mail that his actions were “questionable,” and his e-mail reference to his “depositing delay problem,” taken together show that he understood that the company’s procedures for processing premiums applied to him, and constitute implicit admissions that his conduct was wrongful.

H. Wiley Testified Untruthfully at His On-the-Record Interview

The Hearing Panel majority also rejects Wiley’s claim that he testified truthfully at his sworn on-the-record interview. When asked at the interview “Did customer collections end up being used to pay for personal and business expenses?” he said “No.”⁷¹ At the hearing, he claimed that this answer was truthful because “when I said this, I was saying that everything was

⁶⁷ *Id.* at 207, 307 (“This is a practice that I’ve been doing since I started.”).

⁶⁸ A party has the burden of producing evidence to support claimed defenses. *Mullins*, 2012 SEC LEXIS 464, at *34 (citing *Kirlin Sec.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168, at *64 n.87 (Dec. 10, 2009)).

⁶⁹ Tr. (Wiley) 190-91.

⁷⁰ JX-7, at 1.

⁷¹ CX-17, at 74.

accounted for.”⁷² The Hearing Panel finds his claim not to be credible. His words conveyed a clear denial that he used premiums for his business and personal purposes, contrary to the record, which establishes conclusively that he did so.

Associated persons are, as Wiley acknowledged in the interview, obligated to answer questions fully, accurately, and truthfully when requested pursuant to FINRA Rule 8210. Wiley did not fulfill his obligation to do so.

III. Sanctions

A. Conversion

FINRA’s Sanction Guidelines provide that a bar is the standard sanction for conversion, without regard to the amount converted.⁷³ This is because it is well established that misuse of the funds of others “is extremely serious and patently antithetical to the ‘high standards of commercial honor and just and equitable principles of trade’ that [FINRA] seeks to promote.”⁷⁴

In attempting to fashion sanctions for a particular case, it is necessary to consider the circumstances surrounding the misconduct.⁷⁵ In this case, the Hearing Panel majority finds as an aggravating circumstance that Wiley has given inconsistent, and at times untruthful, explanations of his conduct.

⁷² Tr. (Wiley) 195.

⁷³ *Guidelines* at 36. Enforcement points out that respondents found to have converted relatively small customer insurance premiums have been barred, e.g., *Dep’t of Enforcement v. Thomas*, No. C10030082, 2004 NASD Discip. LEXIS 49 (O.H.O. June 30, 2004) (barring respondent who accepted a premium payment from one customer in the amount of \$50, and from another in the amount of \$100, failed to remit the premiums to the insurance company, and made no effort for several months to return the funds); and *Dep’t of Enforcement v. Grimes*, No. C05010033, 2002 NASD Discip. LEXIS 45 (O.H.O. March 25, 2002) (barring respondent who accepted a premium payment of \$323, failed to apply it as directed, and misused the funds). We note, however, that “The appropriate sanction . . . depends on the facts and circumstances of each particular case.” *Raghavan Sathianathan*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006), *aff’d*, 304 F. App’x 883 (D.C. Cir. 2008).

⁷⁴ *Mullins*, 2012 SEC LEXIS 464, at *73 (quoting *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976)).

⁷⁵ *Id.* at *75.

For example, during the audit, when Edmonds asked Wiley about the cash deposit of \$2,250.94 into the co-bank account days prior to the audit, Wiley initially claimed that he had kept the cash in an office drawer, forgot about it for a month, then remembered and deposited the premiums in the co-bank account. This was, however, untrue, as Wiley conceded when Edmonds confronted him with the WIA bank account withdrawal record.⁷⁶

Wiley's e-mail to his manager provides persuasive evidence that Wiley's decision to convert premiums was intentional and purposeful, not a mistake or a result of negligence. In the e-mail, Wiley gave an apparently credible description of the causes of the financial stresses that led him to expend customer premiums for his personal and business expenses: his "bitter divorce;" the loss of his home; and his "shot" credit.⁷⁷ Wiley's account supports the conclusion that he consciously decided to appropriate the funds to his own use, a conclusion corroborated by his admissions that he realized that by doing so he "would be walking a fine line" and that it "was a risk I was willing to take."⁷⁸

There are several other aggravating factors relevant to sanctions. Wiley's misuse of premiums extended over a period of approximately two months and involved repeated deposits of premiums to his WIA account,⁷⁹ which he spent in their entirety, leaving his WIA account with negative balances. Furthermore, Wiley attempted, albeit unsuccessfully, to conceal what he had done when he gave misleading information first to Edmonds, and then to FINRA at his on-the-record interview. And at the hearing he refused to take responsibility, insisting that he was entitled to act as he did.⁸⁰

⁷⁶ Tr. (Edmonds) 136-37.

⁷⁷ JX-7, at 2.

⁷⁸ *Id.*

⁷⁹ *Guidelines* at 6 (Principal Consideration Nos. 8-9).

⁸⁰ *Id.* at 6 (Principal Considerations No. 10).

Wiley argues in mitigation that he paid Farmers Insurance Group in full, and that no insurance customers suffered any harm. However, he paid Farmers Insurance Group only after his misconduct was detected, when he knew he would be audited.⁸¹ Furthermore, the fact that no customers were harmed is not mitigating.⁸²

B. False Testimony

Providing untruthful testimony to FINRA is also a serious matter. It has been held that “failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry” and that in the absence of “factors mitigating the risk of future harm” a bar is the proper sanction.⁸³ This is because “supplying false information to [FINRA] during an investigation ... ‘mislead[s] [FINRA] and can conceal wrongdoing’” and impede FINRA’s discharge of its regulatory responsibilities.⁸⁴

The Sanction Guidelines inform adjudicators that a Principal Consideration in Determining Sanctions for a failure to respond truthfully is the “[i]mportance of the information requested as viewed from FINRA’s perspective.” The Guidelines recommend fines ranging from \$25,000 to \$50,000, and a suspension if mitigating circumstances are present.⁸⁵

In this instance, Wiley’s denial that he had used premiums for personal and business purposes was transparently false and did not appear to mislead FINRA or impede its investigation. Enforcement possessed Wiley’s prior admissions and documentary evidence clearly establishing that he had done precisely what he denied doing in his on-the-record

⁸¹ *Id.* at 6 (Principal Consideration No. 4).

⁸² “[T]here is no authority for the proposition that the absence of harm to customers is mitigating.” *Dep’t of Enforcement v. Mizenko*, No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (N.A.C. Dec. 21, 2004), *aff’d*, 58 S.E.C. 846 (2005).

⁸³ *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

⁸⁴ *Id.* at *32 (quoting *Michael A. Rooms*, Exchange Act Rel. No. 51467, 85 SEC Docket 444, 450 (Apr. 1, 2005), *aff’d*, 444 F.3d 1208 (10th Cir. 2006)).

⁸⁵ *Guidelines* at 33.

interview. His denial was unpersuasive, but weighs against him for the purposes of sanctions because it reflects a refusal to accept responsibility.⁸⁶

IV. Order

Respondent Keilen Dimone Wiley is barred from associating with any FINRA member firm in any capacity for converting customer insurance premiums in violation of FINRA Rule 2010. In light of the bar, the Hearing Panel majority imposes no further sanctions for providing false testimony to FINRA in violation of FINRA Rules 8210 and 2010.⁸⁷

FOR HEARING PANEL MAJORITY.

By: Matthew Campbell
Hearing Officer

DISSENT

Panelist, dissenting from the findings of the Hearing Panel majority:

I disagree that Enforcement proved that Wiley converted funds. Wiley routinely deposited premiums into the WIA account to facilitate his insurance business. As an independent contractor, the premiums belonged to WIA and WIA owed a debt to Farmers Insurance Group for the customer premiums Wiley collected.⁸⁸ Wiley did not deceive Farmers Insurance Group.

⁸⁶*Id.* at 6. Because of the bar imposed for conversion, the Hearing Panel majority finds it unnecessary to impose an additional sanction for providing FINRA with untruthful testimony. If we were to impose a separate sanction, we would not find it necessary to bar Wiley for his untruthful testimony. Instead, because it was immediately apparent to FINRA that Wiley's testimony was false, and the falsehood did not mislead investigators or conceal the truth, we conclude that imposing a suspension from associating with any FINRA member firm in any capacity for six months for his untruthful testimony would suffice to achieve the remedial objectives set forth by the Sanction Guidelines.

⁸⁷ The Hearing Panel majority has considered and rejects without discussion all other arguments of the parties.

⁸⁸ Tr. (Edmonds) 109-11, Tr. (Wiley) 149.

He informed Farmers Insurance Group when he collected premiums, and the customers' insurance policies were not in jeopardy of lapsing.⁸⁹

Furthermore, Wiley testified that he had been doing business in the same manner from the inception of his agency agreement with Farmers Insurance Group.⁹⁰ I find Wiley's testimony was credible as there was no evidence presented to contradict it.

I do not believe the testimony or the exhibits prove that Wiley was required to use the Farmers Insurance Group co-bank account.⁹¹ The ACA Manual only recommends that agents deposit premiums daily and refers to this as a "good business practice."⁹² Enforcement provided no documentation that Wiley was required to pay premiums into the co-bank account, and there is no signed acknowledgment by Wiley that the Farmers Insurance Group policy on paying premiums within a business day of receipt was anything more than a guideline applicable to him as an independent contractor.

I do not give weight to Wiley's written statement, which was taken by Edmonds, because I believe he was coerced to sign it under duress.

Furthermore, I find it significant that Farmers Insurance Group did not conclude that Wiley embezzled funds. Evidence of this is that Farmers Insurance Group placed a value on and purchased Wiley's book of business.⁹³ The Agent Appointment Agreement specifically states that "[i]n the event termination is because of embezzlement, there is no Contract Value."⁹⁴ If Farmers Insurance Group had concluded that Wiley embezzled, it would not have paid Wiley for

⁸⁹ Tr. (Edmonds) 79-81.

⁹⁰ Tr. (Wiley) 207, 284-86.

⁹¹ *Id.* at 149.

⁹² JX-4, at 28.

⁹³ Tr. (Wiley) 272-75; JX-2, at 2.

⁹⁴ JX-2, at 2.

his book of business. Finally, the Form U5 filed by Farmers Financial Solutions, LLC gives “Other” as the reason for Wiley’s termination and states that the “Firm has elected not to maintain registration.”⁹⁵

Because Wiley did not convert the premiums, I do not find that he misled FINRA when he provided his on-the-record testimony.

For these reasons, I would dismiss both causes of action.

Copies to:

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⁹⁵ JX-1, at 2.