FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT Complainant, v. WILLIAM JAMES POTTER (CRD No. 1281826), Respondent.	Disciplinary Proceeding No. 2017052871401 Hearing Officer–MC **EXTENDED HEARING PANEL DECISION** August 7, 2019

Respondent is barred from associating with any member firm in any capacity for conversion and unethical business conduct, including misuse of funds. He is ordered to pay $250,000 in restitution, and hearing costs.

Appearances

For the Complainant: Kevin Hartzell, Esq., Payne L. Templeton, Esq., Jessica Brach, Esq., and Kay Lackey, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Mark J. Astarita, Esq., and Michael Handelsman, Esq., Sallah Astarita Cox LLC.

DECISION

I. Introduction

This case concerns the ethical obligations FINRA Rule 2010 imposes on a registered person entrusted with others' money even when his conduct is unrelated to the purchase or sale of securities. The Complaint's first cause of action alleges that Respondent William James Potter converted a portion of funds entrusted to him as a third party to a business agreement between two other parties. The second cause of action alleges that Potter acted unethically and misused another portion of the entrusted funds when one of the parties failed to perform as the agreement required.

The critical events described in the Complaint occurred over a brief span of time in March 2013. However, the genesis of those events dates back to 1998 when a group of investors

bought a valuable commercial property in Chicago, referred to as the Chicago Parcel, with an ambitious plan to develop it.[1]

Development of the Chicago Parcel was a complex, multifaceted project. In the aftermath of the 2007–2008 financial crisis, the developers had to refinance the Chicago Parcel under new, less favorable terms. They eventually fell behind on their obligations and in early 2013, their mortgage lender prepared to foreclose. The developers, by this time organized as Old Prairie Block Owner, LLC ("OPBO"), struggled to find a new source of financing to intervene and take over the mortgage under terms that would permit the development to proceed. Business contacts referred them to the representative of an investment company, American Capital Group LTD ("American Capital"), based in Germany.

American Capital agreed to negotiate a settlement with the lender to forestall the foreclosure and save the project for OPBO. For its part, OPBO agreed to provide a $2 million retainer to American Capital. If American Capital failed to reach a settlement, it was to return the $2 million to OPBO.

OPBO insisted that the retainer be deposited in a third party's account in the United States until American Capital fulfilled certain conditions. RD, a Swiss businessman acting as American Capital's agent, invited Potter, with whom he had a years-long business relationship, to facilitate the transaction as the third party who would hold the retainer.

Unknown to OPBO, RD was substantially indebted to Potter. RD told Potter that he could keep $250,000 of the retainer for himself to defray the debt. Also unknown to OPBO, Potter and his business had been experiencing serious financial difficulties. On the day Potter received the $2 million retainer, he began spending it for personal and business purposes. Three days later, Potter wired most of the money to an entity affiliated with American Capital and to RD. Potter kept and used the rest of the funds.

American Capital did not achieve the settlement OPBO hired it to reach. The foreclosure sale of the Chicago Parcel proceeded. OPBO lost the property and all of its equity in it. OPBO demanded return of the retainer, but American Capital refused to return it. After unsuccessful attempts to seek legal redress, OPBO's principals complained to the U.S. Postal Inspection Service. A Postal Inspection Service agent subsequently contacted FINRA.[2]

A FINRA investigation ensued and led the Department of Enforcement to file the two-cause Complaint in this case. It charges Potter with conversion and unethical business conduct, including misuse of OPBO's deposit, in violation of FINRA Rule 2010. Potter denies the charges.

[1] Hearing Transcript ("Tr.") 529.

[2] Tr. 725–26, 737–38, 824, 933, 979, 981.

II. Respondent's Background and FINRA's Jurisdiction

After completing his undergraduate education in 1970 and earning an MBA from Harvard Business School in 1974, Potter gained experience in international corporate finance working for banks and broker-dealers in London, New York, and Toronto.[3]

Potter first registered with FINRA in 1991.[4] In 2004, Potter, with others, acquired three affiliated companies:[5] Meredith Financial Group ("MFG"), a holding company; Robert R. Meredith & Co. ("Broker-Dealer"); and Meredith Portfolio Management, Inc. ("Investment Advisor").[6] Potter became president and director of MFG,[7] chairman, president, and chief compliance officer of the Broker-Dealer,[8] and chairman of the Investment Advisor.[9] In 2006, Potter registered with FINRA through the Broker-Dealer as a General Securities Representative and General Securities Principal.[10]

FINRA suspended Potter's registration in June 2016.[11] Potter's registration and association with the Broker-Dealer terminated on August 18, 2016.[12] Pursuant to Article V, Section 4 of FINRA's By-Laws, FINRA retains jurisdiction over Potter for the purposes of this disciplinary proceeding because Enforcement filed the Complaint within two years of the termination of Potter's registration and the Complaint charges him with misconduct that occurred while he was registered and associated with the Broker-Dealer.[13]

III. Facts

A. The Chicago Parcel

PG, a real estate developer, was the principal initiator of the Chicago Parcel project.[14] In 1998 PG, her husband, and several others formed a partnership to purchase and develop a

[3] Tr. 70–76.

[4] Tr. 77.

[5] Tr. 85.

[6] Tr. 85, 95, 1047–49.

[7] Tr. 90, 96.

[8] Tr. 93; Complainant's Exhibit ("CX")-4.

[9] Joint Exhibit ("JX")-1, at 2.

[10] Tr. 78.

[11] FINRA suspended Potter for failure to comply with an arbitration award. Tr. 79–80; CX-1. FINRA also suspended the Broker-Dealer in September 2016, and expelled the firm in June 2018 when it failed to request termination of the suspension within three months of receiving notification. Tr. 82–83; CX-7; CX-8.

[12] JX-1, at 2.

[13] Enforcement filed the Complaint on August 14, 2018, four days before FINRA would have lost jurisdiction over Potter.

[14] Tr. 524–25.

property with historic and industrial buildings located near Lake Shore Drive in Chicago.[15] The partnership paid about $12 million for the initial acquisition, putting up several million dollars in cash and financing the rest.[16] Over time, the project grew in size and complexity, with purchases and sales of additional parcels, and expanded plans for residential and commercial development, all of which incurred mounting costs but also increased the value of the Chicago Parcel. The partnership owning the Chicago Parcel became OPBO.[17]

During the national financial crisis of 2007–2008, OPBO's lender experienced what PG called a "great difficulty." OPBO decided to refinance with another bank. It obtained a commitment from a consortium that included Lehman Brothers, but before the refinancing deal closed, Lehman Brothers collapsed.[18]

OPBO eventually replaced the consortium with CentrePoint, a real estate investment trust owned by CalPERS, the California state pension fund.[19] CentrePoint initially offered the same terms for refinancing as the consortium, but at the closing, it changed the terms and drove a much harder bargain. Because of the continuing financial crisis, borrowing had become difficult. OPBO concluded it had no viable alternative, and reluctantly accepted the changed terms.[20]

Despite the worsening economy, OPBO kept current on its mortgage payments for more than a year. Then, as OPBO fell behind, its relationship with CentrePoint deteriorated. CentrePoint began foreclosure proceedings, and OPBO responded by filing for bankruptcy. That bankruptcy petition was dismissed and OPBO filed a second time. The second petition was dismissed in January 2013.[21]

Given its considerable investment of time and money in the Chicago Parcel,[22] OPBO sought alternative sources of refinancing to save the project.[23] In October 2012, while its second bankruptcy petition was pending and OPBO was in the midst of negotiating with several potential funding sources, a Chicago broker introduced some associates of American Capital to OPBO. American Capital was headquartered in Frankfurt, Germany, and its principal, BV, lived

[15] Tr. 529–32.

[16] Tr. 531.

[17] Tr. 533–43.

[18] Tr. 546–47.

[19] Tr. 548.

[20] Tr. 550–51.

[21] Tr. 552–54.

[22] Tr. 656–57.

[23] Tr. 746–47.

in London. Chicago associates of BV told PG that American Capital "was looking for projects like [theirs]."[24]

In the meantime, after OPBO's second bankruptcy petition was dismissed, CentrePoint proceeded with the foreclosure process. A forced sale of the Chicago Parcel was about to be scheduled.[25]

B. American Capital's Offer

Some of PG's business contacts provided background information on American Capital and BV, and described how American Capital could rescue the Chicago Parcel for OPBO. First, American Capital would replace CentrePoint by purchasing or assuming the loan, and give OPBO new terms. Then it would fund the continued development of the Chicago Parcel.[26]

PG convened a meeting to introduce American Capital to the development team working on the project, including architects, lawyers, planning consultants, a major hotel company, and representatives of the city government.[27] Five American Capital representatives attended. Three were owners or executives,[28] including BV, American Capital's principal.[29] Another attendee, described as American Capital's financial backer, was introduced as "a man of extraordinary wealth."[30] The representatives touted American Capital's substantial assets, claiming the firm had worked internationally with major financial institutions.[31] They proposed what PG described as "a grand funding program." American Capital wanted $5 million for its services.[32]

OPBO initially declined American Capital's offer as too pricey. Other potential backers were willing to work for a fee of approximately $2 million.[33] But in early 2013 BV repeatedly approached OPBO with modified offers, eventually offering to reduce American Capital's fee to

[24] Tr. 555, 565.

[25] Tr. 554–55.

[26] Tr. 555–56.

[27] Tr. 556–558.

[28] Tr. 557–59.

[29] Tr. 168, 557.

[30] Tr. 559.

[31] Tr. 559–60.

[32] Tr. 561.

[33] Tr. 561.

$2 million.[34] With the foreclosure sale looming[35]—date as yet unannounced—OPBO needed to act quickly. It accepted American Capital's offer.[36]

C. The Consulting Agreement

PG was OPBO's principal representative negotiating the contract with BV, which the parties called a "Consulting Agreement."[37] Potter also had a role in drafting the contract,[38] although he downplayed it in his hearing testimony.[39] The Consulting Agreement is a seven-page document which includes a "Timetable for Settlement" setting deadlines for steps the parties were to take leading to settlement with CentrePoint. It also contains a one-page, single-paragraph section titled "Agreement of Release of the US $2,000,000 (two million US dollars)" ("Release Agreement") spelling out the circumstances under which OPBO would pay American Capital's fee.[40] The Consulting Agreement called for OPBO to provide a $2 million retainer to engage BV and American Capital to purchase or assume the mortgage from CentrePoint by April 1,[41] before the foreclosure auction.[42] After taking CentrePoint's place, American Capital would provide OPBO with financing to complete the Chicago Parcel project.[43] If the effort succeeded, the retainer would become part of American Capital's compensation; if it failed, BV was to return the money to OPBO.[44]

OPBO insisted that BV provide collateral to guarantee the return of the deposit. BV agreed to give OPBO a "bond power" entitling OPBO to a $3 million interest in a bond BV owned, issued by a company called Golden State Petroleum Transport Corp. ("Golden State bond"). BV represented that the Golden State bond was worth $75 million, and that he would provide codes issued by the Depository Trust & Clearing Corporation ("DTC access codes") that OPBO could use to acquire its ownership interest in the bond, if necessary.[45] PG felt it was essential that someone legitimate and trustworthy would be "taking care of [their] money and

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[34] Tr. 562.

[35] Tr. 554–55, 637.

[36] Tr. 762–63.

[37] Tr. 570.

[38] Tr. 171–73; JX-3.

[39] Tr. 127. When asked about the contract's terms, Potter demurred, testifying that he had not "memorized each line." He claimed that he did not know the details of the settlement American Capital was to reach with CentrePoint, or that the goal of the settlement was for American Capital to acquire or pay off the CentrePoint mortgage. Tr. 174–75.

[40] JX-4.

[41] JX-4, ¶¶ 1–2.

[42] Tr. 637–38.

[43] JX-4, ¶ 1.

[44] JX-4, ¶ 2.

[45] JX-4, ¶¶ 6–7.

getting [them] the security and the collateral."[46] PG therefore also insisted that a third party in the United States hold the deposit, preferably OPBO's law firm or bank in Chicago,[47] but BV objected.[48]

Purportedly in response to this concern, BV proposed Potter as an intermediary to effect the transfer of the bond power to OPBO and the retainer to American Capital. PG testified that BV described Potter's company, MFG, as "substantial," and represented that Potter, a graduate of Harvard Business School, a member of influential boards, and experienced in the securities and financial industry, was "a man of integrity," who could be trusted with the task.[49] The Consulting Agreement required that MFG hold the retainer until (i) American Capital issued the bond power to OPBO; (ii) American Capital provided Potter with six of the twelve DTC access codes[50] required to release the bond power; and (iii) OPBO confirmed to Potter that it had received the other six DTC access codes from American Capital. Only then was MFG to release the retainer to American Capital. If American Capital failed to issue the bond power or provide the DTC access codes, MFG was required to return the funds to OPBO within 24 hours.[51]

D. Potter's Role

Potter testified that RD, the Swiss businessman, acting as American Capital's agent, asked him if MFG would "facilitate the exchange of some documents and some money" between OPBO and American Capital, two parties to a real estate transaction.[52] Potter understood that RD had a relationship with American Capital and represented the firm in dealing with OPBO.[53] Potter had known RD since 2007. He described theirs as a business, not a social, relationship.[54] Potter described RD as the "principal spokesman" for an entity called Adenta and an affiliated company, Level Up, with which MFG had an established business relationship. By March 2013, the relationship had led to Level Up owing Potter more than $250,000.[55] According to Potter,

[46] Tr. 565–66.

[47] Tr. 564–65.

[48] Tr. 768.

[49] Tr. 566–67.

[50] Potter testified that the DTC codes "gave access" to the bond. Tr. 118, 126–27, 130. The DTC is a central securities repository, a member of the Federal Reserve System, and a registered clearing agency with the Securities and Exchange Commission. *See* www.dtcc.com/about/businesses-and-subsidiaries/dtc.

[51] Tr. 153–57; JX-4, at 6.

[52] Tr. 114–15, 167.

[53] Tr. 219.

[54] Tr. 500–01.

[55] Tr. 121.

RD said that BV had a background in real estate and insurance.[56] RD introduced BV to Potter in February 2013.[57]

RD also introduced Potter to PG. Potter understood that OPBO wanted a U.S.-based entity to handle the parties' exchange of the retainer and the bond power with its DTC access codes. Potter surmised there was "a trust factor," "an independence factor," in being selected as the facilitator: he was to ensure the codes, bond power, and money were exchanged simultaneously.[58]

In an on-the-record interview ("OTR") with FINRA during the investigation of this matter, Potter claimed that he agreed to facilitate the transaction "mainly . . . as a favor" to RD.[59] He did not inform OPBO that Level Up owed MFG a substantial amount of money or that MFG would keep a portion of OPBO's retainer.[60] But in both the OTR and in his hearing testimony, Potter conceded that he understood his involvement in the transaction would help Level Up financially. Consequently, he "assumed" Level Up would "start paying back our debt," although he claimed that he "didn't know the amount."[61] Repayment, he said, "was implied."[62]

Before agreeing to entrust the retainer to MFG, PG and OPBO's attorney researched Potter's background. What they found seemed to confirm BV's representations that Potter was trustworthy and, in PG's words, Potter and MFG "passed all the tests that we had."[63] PG learned that MFG was the parent of other companies connected to the securities industry, and was a "regulated kind of operation." She found no significant negative information. She took comfort in the knowledge that Potter was a broker, reinforcing her impression that his business was therefore "legitimate, regulated," and OPBO was placing its deposit "someplace where it was under the supervision of competent, regulated people."[64] She thought that since MFG "was regulated more or less," it was an "acceptable place" to deposit the retainer, and even though the money was not going into an escrow account, MFG's account was "more or less" equivalent.[65]

[56] Tr. 503.

[57] Tr. 498.

[58] Tr. 118–20.

[59] Tr. 122–23; CX-69, at 58.

[60] Tr. 124–25, 716–18.

[61] Tr. 122–23.

[62] Tr. 123.

[63] Tr. 567–68.

[64] Tr. 851–53.

[65] Tr. 844.

According to Potter, he normally would not deposit funds from other persons in MFG's business account, but this was an "unusual circumstance." Potter testified "expediency" was the reason for holding the retainer in the account.[66] The foreclosure date was impending.[67]

E. The Poor Financial Condition of Potter and His Companies in March 2013

Potter had good reason to agree to facilitate the transaction between OPBO and American Capital. It gave him access to $250,000, cash he desperately needed to meet pressing financial obligations. Potter and his companies had been struggling financially for years.

Evidence shows that Potter's financial straits had caused him to dip into other peoples' money on other occasions. For example, in March of 2010, SS, an investor, entrusted Potter to hold $200,000 in MFG's account to fund a project.[68] Three months later, SS asked Potter to return the money because he needed it for another business opportunity.[69] Potter put SS off, telling SS the money was unavailable because he had placed it in six-month notes with unspecified "rollover dates" that would dictate when he could return it.[70] In fact, Potter admitted at the hearing, there were no notes. Potter testified that "notes" was just his term for "internal accounting documents to keep track of this particular transaction."[71]

In November and December of that same year, SS renewed his request for the return of his money and Potter put him off again with the excuse that he had moved the money into notes "to preserve the interest rate" and would let SS know when the money became available.[72]

This went on for nearly two years. Finally, in March 2012, SS's attorney sent Potter a demand letter and filed court actions to recover the money. Through counsel, Potter responded that MFG was "prepared to make payment to the appropriate party."[73] On April 11, 2012, Potter signed a settlement agreement, obligating MFG to pay $240,000 within five days.[74]

Potter did not honor the settlement.[75] He could not; he did not have SS's money because he had spent it. In a February 2014 statement he gave in response to a FINRA information

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[66] Tr. 498.

[67] Tr. 762.

[68] Tr. 326, 340–41; CX-49.

[69] Tr. 351; CX-35.

[70] Tr. 352; CX-35.

[71] Tr. 347–48, 352.

[72] Tr. 352–54; CX-37, at 1–2.

[73] Tr. 355.

[74] CX-43, at 37–39.

[75] At the hearing, Potter took umbrage at the suggestion that the settlement agreement created a contractual obligation. According to Potter, it did not represent a commitment to repay SS. He said, "there was no obligation to

request, Potter explained, "Before the payment could be made, MFG unexpectedly lost one of its major funding streams, preventing MFG from making the payment."[76] That major funding source had been MFG's largest shareholder, an entity called MOMA Trust, which had provided MFG with a $2 million line of credit.[77] Potter testified in his OTR that the trust went bankrupt in 2012 leaving MFG without access to the line of credit he had depended on. At that time, the line of credit still held more than $800,000.[78]

SS filed a court motion to impose sanctions on Potter, MFG, and the Broker-Dealer. In response, Potter filed a sworn declaration dated April 28, 2014, stating that MFG and the Broker-Dealer managed no assets, had no employees, and had not earned any profits since 2010. He stated he did not receive a salary for managing the companies and that he, MFG, and the Broker-Dealer did not file tax returns from 2010 through 2013.[79]

There is other evidence Potter was strapped for cash. In a separate matter, on March 8, 2013, the day the OPBO/American Capital Consulting Agreement was signed, Potter and MFG settled another suit filed against them for $51,000 to collect unpaid legal services rendered from 2006 through 2009.[80] In addition, shortly thereafter, in August 2013, the Internal Revenue Service filed a tax levy against Potter for unpaid taxes dating back to 2002.[81]

F. The $2 Million Deposit

On March 7, 2013, Potter, RD, BV, and OPBO's attorney discussed the imminent transfer of funds to MFG. The attorney sent an email to BV in which she described the conversation as "informative and reassuring," and noted that she had "added details and clarifications" to the Consulting Agreement at Potter's suggestion.[82]

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make this payment." Rather, since MFG tried but could not raise the funds, the settlement simply required MFG "to try and settle this issue." Tr. 408–10.

[76] Tr. 357–58; CX-49.

[77] Tr. 321–22, 360–61.

[78] CX-68, at 261–62. Potter changed this account at the hearing, when equivocating as to whether the lost funding stream was the MOMA Trust line of credit. He stated that "[t]here were other sources" of funds available to him. Tr. 358. He testified that he believed the MOMA Trust line of credit actually became unavailable in late 2013 or early 2014, when the trust filed for bankruptcy. It was this, Potter testified, that led him to decide to let the Broker-Dealer "go dormant." Tr. 322–23. However, at his OTR, when asked what the "major funding" stream for MFG was, he testified unequivocally that it was the trust. Tr. 361–62; CX-68, at 261–62. During the hearing, at the conclusion of his cross-examination on this point, Potter affirmed that his OTR testimony was true. For these reasons, the Panel concludes that Potter's unequivocal written statement and OTR testimony are more credible. We reject his hearing testimony on this point as an effort to persuade the Panel that he had ample financial resources in March 2012 and therefore had no motive to take funds from SS to which he was not entitled.

[79] CX-52.

[80] Tr. 426–28; JX-104.

[81] Potter testified that he paid off the levy for the delinquent taxes "within a matter of months." Tr. 435–36.

[82] JX-3, at 1.

On March 8, Potter, BV, and PG's husband signed the Consulting Agreement. On March 11, RD alerted Potter he was sending him the DTC access codes. He also informed Potter that upon receiving OPBO's funds, he should "release $250,000 to [MFG] to pay amounts due from Level Up."[83]

On March 12, Potter and OPBO exchanged emails in anticipation of the deposit.[84] Potter informed OPBO's attorney that "the Swiss," a reference to RD, had provided him with the DTC access codes and he would send them to her after the receipt of the wire transfer. Potter asked OPBO's attorney to send him "the wire reference number" so that he could "track" the incoming wire transfer, claiming:

> We handle a number of wires at the middle of the month for a number of clients and for our principal activities and it is easier for our administrative staff to confirm receipt with Citibank with the reference number from the sending Bank for the wire.[85]

Potter's claims were untrue, and convey his eagerness to receive the funds. Throughout the first quarter of 2013, the only wire transfer to MFG's bank account was OPBO's. Moreover, there were few deposits into the account. In January and February 2013 there were only three deposits, totaling $20,500. There was another in March for $410.[86] By March 12, the MFG business account balance was only $89.52.[87] There were no "wires for a number of clients" at any time in the first quarter of 2013, so Potter needed no help to "track" OPBO's deposit into the MFG account.[88]

OPBO did not have $2 million to pay American Capital's retainer.[89] To make the deposit, PG asked KS, a friend and one of OPBO's owners, to make a $2 million short-term loan to OPBO. KS agreed, and sent the money to OPBO's attorney's account. She, in turn, wired the funds to MFG's account on March 12,[90] bringing the account balance to $2,000,089.52.[91] The following day, Potter emailed OPBO's lawyer to confirm he received the $2 million. Potter attached a copy of a letter from BV to RD confirming that BV had agreed to issue OPBO the

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[83] JX-6, at 1. RD added that he expected "to have the full balance due to [MFG] soon."

[84] JX-9.

[85] JX-9, at 2.

[86] Tr. 232; JX-94, at 2; JX-95, at 2; JX-96, at 2.

[87] JX-96.

[88] JX-9, at 2; JX-94–96.

[89] Tr. 595–96.

[90] Tr. 544, 595–96.

[91] JX-96, at 1.

bond power for $3 million of the Golden State bond, with six DTC access codes.[92] Potter forwarded all twelve DTC access codes to OPBO.[93]

According to the Consulting Agreement, OPBO was supposed to receive only six of the DTC access codes, and Potter was to retain the other six until instructed to send them to OPBO.[94] When asked why he sent all twelve to OPBO on March 13, Potter claimed, "[the parties] wanted to accelerate this whole process" because "there was some urgency" to complete the transaction, and both sides told him to send all twelve codes.[95] He did not explain how doing so could "accelerate" the release of the funds to American Capital.

G. Potter's Disbursements

Immediately after receiving OPBO's wire on March 12, Potter began to withdraw funds from MFG's bank account for personal and business purposes. Potter made three ATM cash withdrawals, for which the account was debited $23, $42, and $201.99, reducing the account balance below $2 million.[96] Also on that day, Potter paid $10,000 from the account to a consultant for services rendered to MFG.[97] Potter admitted at the hearing that he made these withdrawals before he sent the DTC access codes to OPBO, and before American Capital issued the bond power to OPBO—that is, he released the funds before the required conditions were met.[98] Nothing in the Consulting Agreement authorized him to spend the funds on himself or pay MFG's obligations.

On March 13, Potter spent additional funds from MFG's account, further depleting OPBO's deposit. This expenditure was in the form of a check for $15,000 made payable to the Broker-Dealer's FINOP for services rendered to the Broker-Dealer.[99] This check brought the total of OPBO funds Potter spent for personal and business purposes on March 12 and 13 to

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[92] Tr. 202–07; CX-29.

[93] CX-29.

[94] JX-4, ¶ 2, ¶ 7.

[95] Tr. 492–93, 509–12. No documentary evidence corroborates Potter on this point. Potter claims the parties orally communicated the urgency. If they sent any emails on the subject, he did not keep them. Tr. 510–11. PG contradicts Potter. She testified that she did not tell Potter that OPBO needed to receive all twelve codes immediately. Tr. 586–87. Importantly, sending all twelve DTC access codes at once to OPBO would not "accelerate" the release of the funds; by the terms of the Consulting Agreement, Potter was to release the funds to American Capital as soon as OPBO received the bond power and both he and OPBO each received six codes.

[96] JX-96, at 2. Potter testified that he did not know if he made the withdrawals, claiming that "[t]here were other [debit] cards." Tr. 192. But there is no evidence that other people used account cards to make withdrawals from MFG's account in March 2013.

[97] Tr. 193–94; JX-98, at 1.

[98] Tr. 194–95.

[99] Tr. 196; JX-96, at 2. Potter testified that the check "was actually" paid to the Broker-Dealer.

$25,177.47.[100] Late in the afternoon of March 13, OPBO's attorney emailed Potter asking him to confirm that BV had issued the bond power.[101]

The next day, March 14, Potter helped himself to more of the retainer. He purchased two bank checks to pay a total of $21,602.50 to the Monroe County Tax Claim Bureau.[102] He also made a withdrawal from an ATM in New York City, causing a debit of $201.99, and wrote a check for $8,000.[103]

On March 15, RD asked Potter to transfer $1.7 million to a bank account belonging to Cristal Asset Management Limited, a London-based company, and $50,000 to a bank account of Level Up in Switzerland.[104] Potter testified that he believed Cristal Asset Management was affiliated with BV.[105] These withdrawals left $115,092.32 in MFG's business account.[106]

Potter did as RD asked. He did not inform OPBO when he transferred the funds, or disclose where he wired them; he testified that the Consulting Agreement contained "no requirement" that he do so.[107] Potter was untroubled that the Consulting Agreement identified only American Capital, and not Cristal Asset Management or Level Up, as the intended recipient of the retainer. Potter, entrusted with the retainer as an intermediary in the transaction, knew OPBO would want the funds returned if American Capital failed in its assignment. Nonetheless, he did not ask anyone whether wiring the funds to these entities would make it more difficult for OPBO to recover its $2 million if needed.[108]

To summarize, two days after OPBO wired Potter the funds, he disbursed them, moving quickly, he claimed, because "various people involved in these two companies indicated that they wanted to accelerate this whole process."[109] Other than OPBO's attorney, Potter could not identify who told him of the need to "accelerate" the disbursements.[110]

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[100] JX-96, at 2. Potter caused three debits from MFG's account on March 12, for $23, $42, and $201.99, for a total of $266.99. JX-96, at 2. The account balance before OPBO's deposit was $89.52, which Enforcement did not include in its calculation of the amount converted. Thus, Potter converted a total of $25,266.99, less $89.52, or $25,177.47. Enforcement calculated the total to be $25,176.48, because it calculated the third debit on March 12 to be a flat $201, instead of $201.99. Complaint ("Compl.") ¶ 27.

[101] Tr. 206–07; JX-12.

[102] Potter owns a vacation property in Monroe County, Pennsylvania. Tr. 434–35; JX-98, at 1.

[103] JX-96, at 2.

[104] JX-13.

[105] Tr. 218–20.

[106] JX-96, at 2. A $50 international funds transfer fee was charged against the account for each wire.

[107] Tr. 220–21.

[108] Tr. 222–23.

[109] Tr. 510.

[110] Tr. 511–12.

H. Potter's Use of Remaining Funds

Potter quickly spent the remaining funds. On March 15, he wrote checks for $10,000 each to two attorneys who had performed work for MFG, and $5,000 to a country club located near Potter's home in Glen Ridge, NJ.[111] The same day, Potter made two transfers, the first for $3,000, and the second for $45,000, from the MFG account into the account of the Broker-Dealer.[112] In addition, he made a debit card purchase for $644, another withdrawal for $6,579.72, and wrote a check for $15,000.[113] On March 18, 2013, Potter wrote two more checks, depleting the account by an additional $28,726.75.[114]

In many instances, Potter clearly used the money for personal expenses. On March 18, he used the MFG account debit card at a sushi restaurant in Montclair, New Jersey, located near Glen Ridge.[115] From March 19 through 25, Potter used the account's debit card to pay a variety of expenses incurred during a trip to Grand Cayman Beach, including ATM withdrawals, payments to airlines, restaurants, and a car rental.[116] On his return, he wrote checks and made various debit card purchases, including a purchase at a Best Buy near his home, at restaurants, and at a nearby supermarket.[117] In his hearing testimony, even though Potter claimed he did not know if all the transactions in the account were his, he conceded that they "probably were."[118] There is no evidence anyone else was taking money from the account.

By April 1, less than a month after Potter signed the Consulting Agreement, the MFG account had a balance of $391.20. He had spent the entire $250,000 of the OPBO deposit he had kept for himself: $25,177.47 that he converted to his own use on March 12 and 13, and then all of the $224,822.53 that remained.[119]

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[111] Tr. 225–26; JX-98, at 7; CX-2, at 1.

[112] Tr. 226–29; JX-96, at 2; JX-101, at 3.

[113] JX-96, at 2.

[114] JX-96, at 2.

[115] Tr. 229–30.

[116] Tr. 230; JX-96, at 2–3.

[117] Tr. 231-32; JX-96 at 3.

[118] Tr. 230–32.

[119] JX-97, at 1.

I. The Aftermath

1. Initial Representations of Progress

PG assumed that American Capital began negotiating with CentrePoint promptly after the retainer was deposited,[120] as the Consulting Agreement's Timetable for Settlement required.[121] Communications from BV reassured her. For example, on March 18, BV emailed PG and KS, claiming he had started negotiating with CentrePoint.[122] PG forwarded the message to Potter, to keep him "in the loop."[123]

Soon thereafter, around March 30, BV again reassured OPBO. He told PG in a phone call that settlement was "very close," but he needed a short extension to complete negotiations. He followed up with a letter dated March 30, explaining that "an agreement to settle with CentrePoint" was set for April 5, and asked for an extension of the Consulting Agreement deadline of April 1 to April 5, "to achieve the desired result."[124] OPBO agreed. PG believed settlement would be achieved on April 5.[125] On April 5, BV reported to PG that American Capital and CentrePoint had reached an agreement in principle. He told PG that American Capital's purchase of the mortgage from CentrePoint would proceed, subject to approval by CentrePoint's Investment Committee.[126] PG replied to confirm the details.[127] PG testified that she also stressed to BV that it was important to complete the settlement before the foreclosure auction scheduled for April 22.[128]

2. The Foreclosure Sale

Then, it seemed, nothing happened. In the following days, the OPBO team grew increasingly anxious, and repeatedly inquired if American Capital was making progress. BV was unresponsive. On April 17, KS emailed BV, copying Potter. KS asked BV for an opportunity for "dialog," explaining that a new entity, Eight/88 Partners, would succeed OPBO to develop the Chicago Parcel, and that he was its CEO. [129]

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[120] Tr. 625.

[121] JX-4, at 2.

[122] JX-14.

[123] Tr. 625–27.

[124] Tr. 629–31; JX-16.

[125] Tr. 631–32.

[126] Tr. 635–36.

[127] JX-21.

[128] Tr. 638.

[129] JX-24. OPBO's team created Eight/88 Partners at BV's urging because OPBO had gone through bankruptcy, and he felt it would be preferable for American Capital to develop the Chicago Parcel with an entity that did not have the stain of bankruptcy in its background. Tr. 828.

On April 19, three days before the foreclosure sale, BV announced that, contrary to what he said on April 5, he and CentrePoint had not reached a settlement. In fact, CentrePoint had broken off negotiations. BV disclosed that he was not going to attend the foreclosure auction.[130] He promised PG he would continue working to reach a settlement.[131]

Disappointed, PG responded by email, copying Potter, urging BV to pay off CentrePoint in full. She told BV he must attend the auction, and asked for an opportunity to discuss the situation.[132]

PG sought Potter's help.[133] Potter, facilitating communication between OPBO and BV, responded to PG's plea for "a conversation," by writing that he would "convey the message." PG, who was "very, very, very worried,"[134] thanked Potter "for continuing to be a source of information." She emphasized that OPBO had invested itself in the project for 17 years, and she wanted "to be assured that [American Capital] will perform."[135] In her words, PG and OPBO were now "panicked and very fearful" that they would lose the Chicago Parcel.[136]

In a phone call on April 21, BV informed OPBO that American Capital's attorney would attend the auction instead of him. PG told BV what the attorney would have to do to bid.[137] In an email that morning, BV tried to reassure PG and KS. He claimed that American Capital had "developed a strategy . . . to control the outcome of the auction and/or the post auction situation."[138]

PG attended the auction. American Capital's attorney arrived after it was over, and refused to speak with PG. CentrePoint entered the only bid, around $60 million. Because of personal guarantees PG and her husband had made over the years, the outcome meant they owed CentrePoint approximately $13 million.[139]

After the auction, BV told PG that he would continue to negotiate with CentrePoint.[140] On April 24, PG received a notice of a court hearing confirming the sale, scheduled for May 7,

[130] Tr. 642.

[131] Tr. 643.

[132] JX-25, at 3–5.

[133] JX-25, at 2.

[134] Tr. 647.

[135] JX-25, at 1.

[136] Tr. 647.

[137] Tr. 649.

[138] JX-26.

[139] Tr. 651–53.

[140] Tr. 654.

2013.[141] This was the deadline for OPBO to pay off the mortgage before the court approved CentrePoint's bid.[142]

Near the end of May, BV informed KS that the court postponed the hearing to June 6, and that CentrePoint refused to negotiate any more until after the hearing. KS told BV that other Chicago developers had advised OPBO to pay off CentrePoint's note and obtain the property prior to the hearing. KS also outlined steps OPBO had taken, in anticipation of settlement, to line up a buyer for part of the Chicago Parcel and a major hotel developer's interest in acquiring a lease. As usual, Potter was copied on the emails.[143]

OPBO's concerns and frustration continued to grow. In June, it was impossible to reach BV. PG testified that she called the phone numbers he had provided, but got no response.[144] KS emailed BV in mid-June, copying Potter, expressing his dismay over not being able to learn the status of the negotiations with CentrePoint after the hearing.[145]

Then, on July 1, 2013, OPBO's attorney sent BV a letter demanding return of the retainer because American Capital had "been unable to fulfill" its obligations under the Consulting Agreement. The letter pointed out that OPBO had granted extensions of the April 1, 2013 deadline for achieving the settlement to a final deadline of July 1.[146] BV did not return the retainer. Instead, he continued to try to make OPBO believe he was negotiating effectively on its behalf. At the end of August, he emailed PG claiming he was going to place a bid on the entire Chicago Parcel but was waiting for CentrePoint to issue bid instructions. PG replied, copying Potter and others, questioning whether this made sense, and again urging BV to meet with CentrePoint in Chicago.[147]

3. Potter's Optimistic Reassurances

Frustrated at being unable to reach BV, PG and KS continued to ask Potter for help in getting through to BV. Potter agreed to assist, while conveying the impression that he was distanced from BV and RD. Potter asserted that he did "not have an interest financially in the transaction." He assured PG that he would "continue to be available to assist in facilitating communication between the parties." If PG could not get answers from BV, he promised, he

[141] Tr. 659; JX-27, at 3.

[142] Tr. 659.

[143] JX-30.

[144] Tr. 665.

[145] JX-33.

[146] JX-35.

[147] JX-43.

would do his "best to get a response."[148] Thus, through the end of 2013,[149] according to Potter, he "facilitated . . . trying to get [BV] to communicate effectively with [OPBO] and . . . keep the dialogue open."[150]

PG complained to Potter that American Capital was providing "no transparency," no proof that it had the substantial assets BV claimed enabled it to acquire the mortgage and fund the development of the Chicago Parcel. She confided her fear that BV might be a fraud. She told Potter that BV should return $1 million of KS's money to restore OPBO's confidence, and insisted that BV travel to Chicago.[151]

In late October, Potter once again held out hope to OPBO. He informed PG that CalPERS, owner of CentrePoint, had accepted OPBO's bid, giving American Capital a brief window of time to prove it possessed the necessary funds to acquire the mortgage and to open an account at the title company.[152]

On November 19, 2013, PG reported to Potter that BV said he had just returned from Albania[153] with $800 million available for the project, and that CentrePoint was setting up an escrow account in preparation for American Capital to fund it. As so often before, BV warned there might be a delay. This time it was because it would take Credit Suisse Bank five days to transfer the funds. PG was puzzled. She confided to Potter that she did not understand this, since BV had previously said the funds were coming from another bank.[154]

Confused by the inconsistencies in BV's representations, PG demanded a conference call with Potter, BV, RD, and KS. Potter replied that he was unavailable, but continued to vouch for RD's credibility, assuring her that OPBO could trust BV and RD.[155] In the meantime, PG reminded Potter that KS needed his $2 million and would have to lay off employees if it were not returned to him soon.[156] Potter reiterated that the money was on the way, and that BV and RD

[148] JX-46, at 3; Tr. 266–67.

[149] Tr. 235–36.

[150] Tr. 258.

[151] JX-46, at 1–2.

[152] Tr. 672–74; JX-47.

[153] JX-49. Albania was the country of origin for the person American Capital introduced to OPBO as a "man of extraordinary wealth" associated with American Capital. Tr. 559.

[154] Tr. 676–77; JX-49.

[155] Tr. 681–82; JX-49.

[156] Tr. 684–85.

were working to have it returned.[157] Potter continued to reassure PG "not to worry," that it would be just a few more days.[158]

As did PG, KS looked to Potter to provide answers to his concerns. And as he did with PG, Potter reassured KS that "things were going to be okay."[159]

4. The End of Communication

In October 2013, seven months after OPBO wired the $2 million to MFG, KS flew to London to meet personally with BV. Meeting on a Friday, BV assured KS that negotiations with CentrePoint were ongoing and he would return the $2 million to KS the following Monday. He did not.[160]

In November, BV called KS and said he had completed the sale of the Golden State bond and Credit Suisse Bank was holding the money—$800 million, he claimed—for five days. KS asked RD to confirm this and tell him when he could expect to receive the money. RD replied that he did not know when the transfer of funds to KS would occur. KS demanded to know if the Golden State bond had really been sold.[161] On November 25, 2013, BV told KS of a new delay: Swiss banks were concerned about "onerous" IRS requirements on transactions in the United States and there was nothing to do but "wait for their process to be completed." KS asked Potter if this "further delay" made any sense. Potter suggested KS consult with his accountant.[162]

On December 2, BV called PG and painted a newly bright picture. He said he had made another deal with CentrePoint and funding would take place the following Wednesday. BV said he would send new documents, and asked PG to arrange for "everyone" to be available for a call on Wednesday. Greatly relieved, PG described the call to Potter and thanked him effusively for his help, crediting him with having "[m]any times . . . made the difference in keeping the deal together."[163] Potter had convinced her that he was motivated simply by a desire to help the parties conclude the deal successfully. Potter knew, because PG often told him, that failure would be "devastating" to OPBO.[164]

But there was no new deal. On December 17, 2013, a frustrated KS emailed BV to "[p]lease call," and reiterated that he needed to know when he could "expect the return of part of my funds I put [in] 10 months ago." PG forwarded the message to Potter, asking for his help.

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[157] Tr. 687.

[158] Tr. 685.

[159] Tr. 907–08.

[160] Tr. 926–27.

[161] Tr. 693–94; JX-50.

[162] JX-52.

[163] JX-53.

[164] Tr. 700–01.

Potter responded, "I will without guarantee see what I can do to assist." Later that day, Potter wrote that he had sent the messages to RD and asked him to encourage BV to call. PG replied "[m]uch appreciation" and said Potter's "thoughts, explanation and guidance have made a big difference for us." On December 20, Potter emailed PG to inform her that BV "should be in a position to wire [KS's] funds in a matter of days."[165] The same day, BV left a voice message and emailed KS saying that the funds could be transferred in a day, but a "compliance issue" might delay the transfer.[166]

In February 2014, OPBO learned that CentrePoint had finalized agreements for the development of the Chicago Parcel, but not with American Capital.[167]

On February 7, almost a year after signing the Consulting Agreement, PG emailed Potter and RD, stating, "Commitments, communication and collateral appear to have vaporized." She hoped that Potter and RD might help rescue the project. Potter responded that he was just "a secondary communication conduit with [RD] who in turn is a contracted service supplier to the project" but promised that they would try to get BV to "resolve the problems ASAP."[168]

In September 2014, OPBO's attorney made her second formal demand on BV, this time for the Golden State bond, and threatened to sue.[169] The demand was futile. OPBO then consulted law firms about suing BV and RD. The law firms asked for retainers OPBO could not afford to pay, and none would take the case on a contingency basis.[170]

5. The Unsuccessful Effort to Access the Golden State Bond

Unable to recover the retainer, OPBO asked Potter to help it understand how to employ the DTC access codes for the Golden State bond. Because the bond was traded in Europe, Potter suggested that OPBO should try to redeem it there. Potter explained that there were ships associated with the bond, one of which had just been sold, and OPBO could track down information on the ships and find out how much cash was generated from the sale.[171]

Potter told PG that he had a buyer for the Golden State bond.[172] PG told Potter to proceed.[173] OPBO's attorney concluded that since BV had defaulted on his obligations under the Consulting Agreement by failing to achieve settlement and not returning the retainer, OPBO

[165] Tr. 702–03; JX-57.

[166] JX-58.

[167] Tr. 704; JX-65.

[168] JX-65, at 1.

[169] Tr. 721–23; JX-91.

[170] Tr. 723–24, 803–06.

[171] Tr. 689–90.

[172] Tr. 706.

[173] JX-67.

could claim the entire value of the bond.[174] The partnership formalized an agreement with Potter and RD to sell the bond for its full value,[175] not just the $3 million portion that had been American Capital's guarantee for the return of the retainer.[176]

OPBO tried without success to use the DTC access codes. PG contacted a Dutch friend who was a bond professional, provided him with the DTC access codes, and asked him to help. The Dutch friend met with BV in London and learned what BV had not disclosed previously: the codes would not transfer possession of the bond without BV's express permission, and he would not give it.[177] Thus, the bond power and DTC access codes proved, in the end, to provide OPBO with no security at all for the return of the retainer.

6. Potter's Unresponsiveness

In 2016, KS separately retained a London law firm to sue BV and RD to recover his money. At the lawyers' request, KS asked Potter to whom he had wired the retainer. Potter demurred, saying that he would search his records.[178] Then Potter completely stopped responding to KS. KS tried repeatedly without success to contact Potter,[179] despite trying multiple phone numbers, including a home number, and emails.[180]

At the hearing, when asked why he did not respond to KS's question, Potter claimed that he thought he had left "a message on [KS's] cell phone or something." Potter implied that he was not sure KS was a person entitled to an answer: he "knew [KS] had a relationship . . . but the whole train went back to OPB [sic] and the lawyers." Potter claimed that he would have answered if KS had made his request in writing "through a proper way."[181]

KS later dropped his effort to sue because of the cost.[182]

IV. The Law

A. The Scope of FINRA Rule 2010, the "J&E" Rule

As the facts demonstrate, this case centers on alleged FINRA Rule 2010 ethical violations arising from a context that had nothing to do with securities transactions. MFG was not a broker-

[174] Tr. 691.

[175] Tr. 710–11; JX-73.

[176] Tr. 706–07.

[177] Tr. 721, 798–801.

[178] JX-93.

[179] Tr. 908–09.

[180] Tr. 943–44.

[181] Tr. 307–08; JX-93.

[182] Tr. 925.

dealer. The parties who called on Potter to aid in the transaction—OPBO, American Capital, BV, RD, and Level Up—were not customers of Potter's broker-dealer. The $2 million retainer that OPBO transferred into MFG's account had no nexus to a securities transaction. Although Potter did not address this, the facts raise the question of whether Rule 2010 applies to his conduct as intermediary for the parties. For the reasons discussed below, we believe it does.

FINRA Rule 2010 states, in its entirety: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." The focus on "just and equitable principles of trade" has led to a shorthand reference to Rule 2010 as the "J&E Rule."[183] A central purpose of Rule 2010 is to serve "as a tool to prohibit dishonest practices."[184] The Securities and Exchange Commission has described the rule as setting forth "a standard intended to encompass 'a wide variety of conduct that may operate as an injustice to investors *or other participants in the marketplace.*'"[185] Rule 2010 "prohibits dishonest practices even if those practices may not be illegal or violate a specific rule."[186]

Rule 2010's reach extends to "all unethical business-related conduct"[187] that may reflect upon an associated person's ability to follow the requirements of the industry's rules and regulations, and the person's fitness to handle other people's money. It is "concerned with enforcing ethical standards of practice in the securities industry," and has long been characterized as a "something of a catch-all" whose purpose is to provide FINRA with the authority to address "a wide variety of misconduct" involving even "merely unethical behavior."[188] The language of the rule does not restrict it to a person's securities business, nor does it confine it to the conduct of business with brokerage customers. Rather, it requires associated persons to conduct their business affairs honestly and honorably, consistent with the industry's "standards of fair dealing."[189]

This is why disciplinary cases for violations of Rule 2010 have imposed sanctions for misconduct arising from a wide range of non-securities business contexts, for example when a registered representative:

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[183] *See, e.g.*, *Heath v. SEC*, 586 F.3d 122, 123 (2d Cir. 2009). *Heath* arose from violations of the New York Stock Exchange's J&E Rule, Rule 476(a)(6), which, like Rule 2010, "prohibits conduct inconsistent with just and equitable principles of trade." *Id*. at 127.

[184] *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *27 (June 2, 2016).

[185] *Id*. at 23 (quoting *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *18 (Jan. 6, 2012) (quoting *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *14–15, n.13 (Jan. 9, 2009) (emphasis added), *aff'd* 586 F.3d 122).

[186] *Butler*, 2016 SEC LEXIS 1989, at *25–26.

[187] *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *17 (NAC June 2, 2000).

[188] *Heath*, 586 F. 3d at 131, 134.

[189] *Heath*, 586 F. 3d at 140; *Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957) ("The Rule states a broad ethical principle and the question presented thereunder is whether the member's conduct in question violates standards of fair dealing.").

- refused to comply with a state court order requiring him to pay attorney fees and costs incurred in a customer-initiated arbitration proceeding;[190]

- misapplied premiums paid by insurance agency clients who were not customers of his broker-dealer;[191]

- falsely represented that he had donated personal funds to his daughter's private school to receive a grant from his firm's program matching charitable gifts;[192]

- passed bad checks to an employer;[193]

- misappropriated funds from a private club while serving as its treasurer;[194] and

- knowingly assisted another person attempting to conceal funds from creditors.[195]

It is a fundamental requirement of the securities industry that people must be able to confidently entrust their money to a securities professional. That is the rationale for concluding that a person who knowingly misappropriates funds entrusted to him or her is unfit for the securities industry.[196]

B. Conversion

FINRA's Sanction Guidelines define conversion as "an intentional and unauthorized taking of and/or exercise of ownership of property by one who neither owns the property nor is entitled to possess it."[197] As the National Adjudicatory Council has held, conversion occurs when one wrongfully exercises "dominion over the personal property of another,"[198] "in denial

[190] *Shvarts*, 2000 NASD Discip. LEXIS 6, at *1.

[191] *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *1 (Dec. 4, 2015), *aff'd*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952 (Dec. 4, 2015); *Ernest A. Cipriani*, 51 S.E.C. 1004 (1994).

[192] *James A. Goetz*, 53 S.E.C. 472 (1998).

[193] *George R. Beall*, 50 S.E.C. 230 (1990).

[194] *Vail v. SEC*, 101 F.3d 37 (5th Cir. 1996).

[195] *Dist. Bus. Conduct Comm. v. Bayview Sec., Inc.*, No. SEA-437, 1989 NASD Discip. LEXIS 3, at *12 (Bd. of Governors Jan. 3, 1989).

[196] *Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 (Mar. 29, 2016) (quoting *Charles C. Fawcett, IV*, Exchange Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007)).

[197] FINRA Sanction Guidelines ("Guidelines") at 36 n.2 (2019), http://www.finra.org /industry/sanction-guidelines.

[198] *Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (NAC Mar. 7, 2008).

or repudiation of that person's rights" to the property.[199] Conversion violates Rule 2010 because it "indicates a troubling disregard for basic principles of ethics and honesty."[200]

It is conversion when an associated person, entrusted with funds for a particular purpose, places the funds into an account he controls, and uses the funds for his own purposes. Thus, an associated person who collected insurance premiums, placed them in his business account and, rather than pay the premiums, used the money for his own purposes converted the funds in violation of Rule 2010, even though the insurance customers were not customers of his broker-dealer and he eventually paid the premiums.[201] Similarly, the SEC found that an associated person converted funds entrusted to him when he placed investors' funds into an investment account he controlled and, after properly investing most of the funds, transferred the remainder to his broker-dealer to remedy a net capital deficiency.[202]

C. Unethical Business Conduct Including Misuse of Funds

In some cases, as in this one, the distinction between conversion and misuse may blur, and a finding of misuse may not rule out a finding of conversion.[203] An associated person misuses the funds of another in violation of Rule 2010 when he is entrusted with funds to hold for a specific purpose for the owner, then uses a portion of the deposit for personal purposes.[204] Misuse of another's funds is "patently antithetical" to the Rule 2010's high standards of commercial honor and just and equitable principles of trade.[205]

As discussed above, Rule 2010 required Potter to conform his conduct to its high ethical standards. As also noted above, the J&E Rule imposes more than just conformity to legal requirements, but compliance with general rules of fair dealing consistent with the reasonable expectations of affected parties, and honorable marketplace practices.[206]

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[199] *Id.* (quoting *Shulman v. Vouyou, L.L.C.*, 251 F. Supp. 2d 166, 170 (D.D.C. 2003)).

[200] *Dep't of Enforcement v Wiley*, No. 2011028061001, 2015 FINRA Discip. LEXIS 21, at *12 (NAC Feb. 27, 2015), *aff'd*, 2015 SEC LEXIS 4952 (2015).

[201] *Wiley*, 2015 SEC LEXIS 4952, at *16–22.

[202] *Grivas*, 2016 SEC LEXIS 1173, at *9–12.

[203] *Dist. Bus. Conduct Comm. v. Hoganson*, No. C8A920095, 1993 NASD Discip. LEXIS 242, at *11 (NBCC Aug. 26, 1993).

[204] *Dep't of Enforcement v. West*, 2014 FINRA Discip. LEXIS 1, at *18, 21 (NAC Feb. 20, 2014), *aff'd*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102 (Jan. 9, 2015).

[205] *Id.* at *22 (quoting *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *25 (NAC May 23, 2001)).

[206] *Shvarts*, 2000 NASD Discip. LEXIS 6, at *12.

V. Discussion

A. FINRA Rule 2010 Applies to Potter's Conduct

Potter is an experienced registered representative and securities professional, who for years ran a broker-dealer, its parent company, and an investment advisor. As such, he has "knowledge of the ethical standards of his profession," and should understand "so central a principle" as the duty not to misuse funds entrusted to him by others.[207] Any reasonable person would know this.

Potter's conduct occurred in the context of his business activities as a securities professional. RD recommended Potter and MFG because he knew them from business dealings over the years. OPBO trusted Potter with its deposit to MFG because its investigation of Potter led it to conclude he was a successful professional with international banking and financial experience and a licensed member of a regulated industry. OPBO trusted Potter to treat it fairly and honorably, and to perform his obligations under the Consulting Agreement ethically. Even Potter conceded that his role as intermediary involved a "trust factor." And, Potter funneled some of the funds to his broker-dealer: on March 14, 2013, he paid the Broker-Dealer's FINOP $15,000 for services rendered, and on March 15 made two transfers totaling $48,000 to the Broker-Dealer's account. These transactions benefitted the Broker-Dealer directly, placing them "squarely within the conduct" of his securities business.[208]

Under these circumstances, we conclude that when Potter agreed to take custody of OPBO's $2 million retainer pursuant to the Consulting Agreement, he was required to conform his conduct to the high ethical standards of FINRA Rule 2010, and if he acted unethically, he violated the rule.

B. Potter's Credibility

Potter testified at length at the hearing, providing the Panel with ample opportunity to assess his credibility as we observed his demeanor and considered the substance of his hearing testimony, his OTR testimony, written statements he provided to FINRA, and other statements of his introduced into evidence. All contributed to our appraisal of his reliability as a witness and influenced our factual determinations. Below we address some of the key issues on which Potter's credibility was tested and found wanting.

1. Potter's Financial Interest in Facilitating the Transaction

PG testified that Potter told her he was acting as an intermediary between American Capital and OPBO, "trying to be a helper" to the parties, a facilitator, and that he repeatedly told

[207] *Heath*, 586 F.3d at 140 (quoting *Crimmins v. Am. Stock Exch., Inc*., 503 F.2d 560 (2d Cir. 1974) (*per curiam*)).

[208] *Grivas*, 2016 SEC LEXIS 1173, at *14–15.

PG he "did not work for" American Capital and "wasn't being paid by them."[209] PG did not expect him to be compensated or to receive any portion of the $2 million; he "completely assured" her that his was an "arm's length" role.[210] Potter also denied that RD promised him before he received OPBO's deposit that he would be compensated.[211]

The evidence casts doubt on Potter's representations to OPBO that he was an uninterested third party. In truth, RD and Potter had a long-term business relationship and RD owed a large debt to Potter. RD's March 11, 2013 email inviting Potter to allocate $250,000 of the deposit towards repaying the debt is evidence that before receiving the deposit, Potter knew he would obtain a significant infusion of much-needed cash.[212] He had, therefore, a financial interest in the transaction. His representations to PG that he did not were untrue and misleading.

2. Potter's Need for Cash

The Complaint alleges that in March 2013 Potter and his companies were experiencing "serious financial difficulties."[213] On March 11, MFG's bank account balance was only $89.52.[214] Yet Potter maintains that MFG "had sufficient assets and sources of funds," if it had been necessary "to cover any potential shortfall."[215] At the hearing, Potter claimed his financial resources included shares in an entity in the United Kingdom, an equity line of credit, and an interest in the Investment Advisor.[216] When asked about a negative balance in MFG's account, Potter implied that it did not matter as he had access to funds in other accounts.[217] But he provided no evidence of such resources.

The evidence strongly establishes that by March 2013 Potter was hard-pressed financially. As described above, he spent $200,000 entrusted to him by SS in 2010, and was unable to repay it for years. On April 12, 2012, he signed a settlement to resolve SS's suit with a commitment to pay $240,000 within five days. He could not honor the commitment. He later explained in a written statement to FINRA that before he could pay it, his "major funding stream" evaporated, "preventing MFG from making the payment."[218] He submitted a declaration

[209] Tr. 863.

[210] Tr. 716–17.

[211] Tr. 121–22.

[212] JX-6.

[213] Compl. ¶ 1.

[214] *Id.* ¶ 26.

[215] Respondent's Post-Hr'g Br., at 15.

[216] Tr. 394–95.

[217] Tr. 255. When confronted with the negative balance in the account, Potter said it was in "the checking account," implying that other accounts held funds. When Enforcement pointed out that he had not produced statements for any other MFG accounts, Potter replied that he was asked to provide only records of the one MFG account. That reply does not explain why, if he had records showing his access to other resources, he did not present them at the hearing.

[218] Tr. 355–58; CX-49, at 3.

to a federal court stating that his major funding source had disappeared. In addition, the IRS filed tax levies against him. His companies had made no profits, had no employees, and paid no taxes for several years leading up to March 2013.[219]

3. Potter's Denial That He Knew the Terms of the Consulting Agreement

Attempting to minimize his part in the transaction for which he was to have been a trusted intermediary, Potter claims ignorance of the terms of the Consulting Agreement. Asked to confirm whether the Consulting Agreement provided for OPBO's deposit to convert into a retainer if American Capital succeeded, Potter replied, "I'm 70 years old. I haven't memorized each line."[220] When asked if he helped to write some of the terms of the Consulting Agreement, initially he flatly denied it, then he hedged by saying he "had very little input."[221] He claimed that he did not understand the details of the settlement that BV was supposed to obtain for OPBO. Potter claimed he thought the "settlement" the Consulting Agreement referred to was the exchange of money for the bond power and DTC access codes, not American Capital's acquisition of the CentrePoint mortgage. He testified that the mortgage acquisition was a "separate arrangement" between American Capital and OPBO, as if it were something he would not know about.[222] In the same vein, when Potter was asked in his OTR, "What is a bond power?" he replied "I don't know what the connotation is here."[223] Similarly, in his OTR he was asked what a DTC access code is, and replied, "I don't know the exact definition of a DTC code."[224]

The evidence shows these claims are not credible. In fact, Potter helped OPBO's lawyer draft some of the Consulting Agreement's key language. OPBO's lawyer wrote that Potter participated in a call "which helped clarify the instructions given to [MFG]," as a result of which OPBO's lawyer "added an addendum agreement clarifying the release of the retainer fee and DTC codes/bond power." The lawyer wrote that she "added details and clarifications to paragraph 2 pursuant to our conversation with [Potter]."[225] That paragraph details the terms of paying the retainer to American Capital and issuing the bond power. Clearly, Potter helped craft an essential provision of the Consulting Agreement.

The Consulting Agreement incorporates the Release Agreement[226] and both express Potter's responsibilities involving the return of the retainer if American Capital failed to

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[219] CX-52.

[220] Tr. 127.

[221] Tr. 169.

[222] Tr. 174–75.

[223] Tr. 177–78.

[224] Tr. 183.

[225] Tr. 171–72; JX-3.

[226] JX-4, ¶ 2.

perform.[227] The Consulting Agreement plainly explains the settlement terms American Capital was to obtain for OPBO.[228] It strains credulity that Potter, with his high level of education and extensive experience in banking transactions, would not have understood his responsibilities under the Consulting Agreement, and how the bond power and DTC access codes would serve as OPBO's collateral security for the return of its deposit.

4. Potter's Refusal to Tell KS Where He Wired the Funds

As noted above, on January 24, 2016, KS, at the request of his lawyers, wrote Potter, asking him directly where he had wired the $2 million retainer.[229] When Potter replied on January 25, he did not answer the question; instead, he told KS that he would "check."[230] But Potter did not respond to KS's follow-up emails and phone calls, even though KS tried every phone number he had previously used to contact Potter.[231]

Potter's explanation for not answering KS's inquiry does not withstand scrutiny. Potter suggests that he would have answered, but that KS needed to ask for the information "in a proper way," i.e., via OPBO's lawyer. As if he were unaware of KS's role as a principal of OPBO, Potter claims that he did not answer him because "[KS] is just [KS]. We knew he had a relationship there, but the whole train went back to OPB [sic] and the lawyers. And we said do something in writing, and then we'll respond."[232]

Potter knew that KS had more than "a relationship there." As described above, KS and Potter had exchanged numerous emails,[233] Potter was copied on emails KS sent directly to BV,[234] KS was copied on emails Potter and PG exchanged,[235] and Potter knew that KS loaned the $2 million to OPBO.[236] Potter knew KS needed his money returned. On these facts, we must conclude that Potter simply did not want KS to know, and therefore never disclosed to KS, where he wired the funds and that he spent $250,000 of the deposit for personal and business purposes.

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[227] JX-4, ¶ 2, and at 6.

[228] JX-4, ¶¶ 1, 3, 4.

[229] Tr. 305; JX-93, at 1.

[230] Tr. 307; JX-93, at 1.

[231] Tr. 972–73.

[232] Tr. 307. No documentation in evidence supports Potter's claim that he asked KS to make his request in writing through OPBO's lawyer.

[233] *See, e.g.*, JX-63, at 1.

[234] *See, e.g.*, JX-24; JX-25, at 2.

[235] *See, e.g.*, JX-25, at 1.

[236] JX-57; JX-25, at 2.

VI. Conclusions

A. Potter Converted OPBO's Funds

The first cause of action is straightforward. It charges Potter with converting $25,177.47 of OPBO's funds by making ATM withdrawals, writing a certified check for $10,000 to a consultant for MFG on March 12, 2013, and writing a $15,000 check for business purposes on March 13.[237]

Enforcement argues that the funds were not Potter's and he had no authorization to use them for his personal and business purposes. Potter was only authorized, Enforcement argues, to hold and then release the $2 million deposit after the three preconditions the Consulting Agreement set had been satisfied, and then only to American Capital. To review, the preconditions were: (i) issuance of a bond power by American Capital to OPBO; (ii) receipt of six of twelve DTC access codes by MFG; and (iii) receipt of confirmation from OPBO that it received the other six DTC access codes.[238] If the DTC access codes were not released or the bond power not issued, MFG was to return the $2 million to OPBO immediately.[239]

In his Answer, Potter admits making the withdrawals on March 12, but claims they were authorized because there was no restriction on the use he could make of the funds.[240] He simply denies the allegation of conversion on March 13.[241] His Answer fails to justify the expenditures on March 12 and 13. At the hearing, however, Potter offered an alternative explanation for signing the two checks that withdrew $25,000 from OPBO's deposit: he claimed they were inadvertent overdrafts.

Potter testified that his secretary routinely brought him checks to sign around the middle of each month. He testified that he recalled signing these two checks just after he returned from a trip to Singapore to attend board meetings for three of his "New York Stock Exchange closed-end funds."[242] According to Potter's testimony, when his secretary presented him with the checks to sign, he assumed that she or MFG's bookkeeper, who both had access to and signature authority for MFG's accounts, had checked the account balance to ensure it was sufficient. Potter testified that he assumed that if the balance was insufficient, "they would draw down funds to make sure the accounts were solvent, and the checks would not bounce."[243]

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[237] Compl. ¶¶ 27, 31. As explained above, the amount charged in the complaint contains a miscalculation. *See* fn. 100.

[238] Enforcement's Post-Hr'g Br., at 7–8, 12.

[239] JX-4, at 6.

[240] Answer ("Ans.".) ¶ 27.

[241] Ans. ¶ 31.

[242] Tr. 1107–08.

[243] Tr. 1115–17.

Based on this, Potter argues that the withdrawal of $25,000 of OPBO's deposit on March 12 and 13 merely "amounts to an overdraft" and not a conversion, because there was "no intentional conduct . . . to deprive anybody of their money."[244] Potter contends that he was "not responsible for checking the balances" of MFG's accounts,[245] so he did not know the account held insufficient funds to cover the checks without depleting OPBO's deposit. Had he known, he argues through counsel, he had sufficient funds elsewhere "to cover that money" and "make sure that nobody was deprived of their money."[246]

Potter insists that he "did not exercise dominion over anyone's property in derogation of their rights," but simply "released the funds as directed."[247] Potter argues that once American Capital provided OPBO with the bond power and DTC access codes, "the funds belonged to American Capital, and there were no conditions on how American Capital distributed the funds—once American Capital was entitled to the funds, they could spend it as they saw fit."[248] Thus, Potter reasons, when RD, as an agent for American Capital, instructed him he could keep $250,000, send $50,000 to RD and the remainder to Cristal Asset Management, he acted properly by doing so.

But the preconditions specified in the Consulting Agreement had not been met when Potter received the deposit on March 12. The bond power was not issued to OPBO until March 14, when BV provided a copy of it by email to both OPBO and to Potter.[249] Thus, Potter's ATM withdrawals, and the checks he signed, on March 12 and 13 were premature and unauthorized.

OPBO sent its deposit to Potter pursuant to the Consulting Agreement, whose terms Potter accepted by signing the Release Agreement. Contrary to Potter's claim, the Consulting Agreement did not give Potter unfettered use of the funds. The Consulting Agreement authorized Potter to hold the funds until the preconditions for releasing them were met, and then to release the funds to American Capital. It did not authorize Potter to withdraw at any time any part of the deposit for his personal or business use, and Potter neither sought nor obtained permission to do so. He therefore had no right to use the funds for himself. As the record makes clear, OPBO did

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[244] Tr. 1221–22.

[245] Respondent's Post-Hr'g Br., at 15.

[246] Tr. 1222; Respondent's Post-Hr'g Br., at 15. However, even if Potter intended to, or actually did, return the funds he spent to OPBO, it would not constitute a defense to a charge of conversion or misuse. In *Blair Alexander West*, the SEC explicitly rejected the argument that repayment of misused funds mitigates the seriousness of the misconduct. Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *44–45 (Jan. 9, 2015), *aff'd* 641 F. App'x. 27 (2d Cir. 2016).

[247] Respondent's Post-Hr'g Br., at 15.

[248] *Id*. at 16.

[249] Tr. 209; CX-70. In the email to Potter, with copies to RD and OPBO's attorney, BV wrote that he was sending the original bond power to Potter. BV wrote that he was attaching six of the DTC access codes for the Golden State bond, and that the remaining six would be held by Level Up to hold for release "at the appropriate time." CX-70, at 1–2. Of course, as described above, RD had already sent all twelve DTC access codes, but not the bond power, to Potter. JX-6.

not expect Potter to be compensated for serving as intermediary to oversee the exchange of the bond power, DTC access codes, and the deposit. His expenditures on March 12 and 13, 2013, constituted conversion, "the wrongful exercise of dominion over the personal property of another."[250]

Furthermore, the evidence shows that Potter had no intention of returning the funds he spent for his own purposes. His costant reassurances and vouching for RD and BV's credibility, and his silence as to when and where he directed the funds, helped to string along OPBO with false hopes of imminent success in saving the Chicago Parcel project.

After carefully considering the testimony, exhibits, arguments, and briefs filed by the parties, the Panel therefore concludes that Potter converted $25,177.47 of the $2 million OPBO entrusted to him and MFG, in violation of FINRA Rule 2010. His expenditures of OPBO funds on March 12 and 13, 2013, were not inadvertent or negligent equivalents of "overdrafts," as he posits. Although he claimed to have had other funds and assets available to him, there is no evidence to support this claim. The financial difficulties he and his companies experienced extending back to 2010 provide persuasive evidence of motive.

B. Potter Acted Unethically, Contrary to Just and Equitable Principles of Trade, Including Misuse of OPBO's Funds

1. The Allegations

The Complaint's second cause of action charges Potter with unethical business conduct in violation of Rule 2010 in several ways. First, it alleges that by acting as an intermediary to provide a "trust factor" for the transfer of funds between American Capital and OPBO, Potter had a duty to disclose to OPBO that RD owed a significant debt to him, and that RD told him he could keep $250,000 of the retainer.[251] Next, it charges that Potter misused all the funds, by spending without authorization, and transferring when he was supposed to hold, the entire deposit until at least April 1, 2013.[252] Third, it alleges that Potter never attempted to understand MFG's obligations under the Consulting Agreement, and as a result misused the funds in reckless disregard of those obligations.[253] Fourth, it alleges that Potter's failure to disclose to OPBO that he retained part of the deposit, and refusal to disclose where he wired $1.75 million, hindered OPBO's attempts at recovering its funds.[254]

In his Answer, Potter denies that his intermediary role in OPBO's transaction with American Capital required him to be "neutral" or that "he had any obligation to make any

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[250] *Paratore*, 2008 FINRA Discip. LEXIS 1, at *10.

[251] Compl. ¶ 55.

[252] Compl. ¶¶ 36, 56, 57.

[253] Compl. ¶ 57.

[254] Compl. ¶¶ 59–60.

disclosures to anyone."[255] He denies misusing the funds and denies that he was required to hold the funds until April 1, 2013.[256] He claims that he was not involved in negotiating or drafting the Consulting Agreement and denies he or his companies were financially troubled.[257] He denies that he delayed OPBO's efforts to recover funds and denies that OPBO was entitled to recover any funds from him or MFG.[258] Potter denies that he failed to understand the terms of the Consulting Agreement and insists he distributed the funds properly.[259]

2. Potter's Conduct

a. The April 1, 2013 Deadline

First, we find that although OPBO initially contemplated, and the Consulting Agreement provided, that American Capital had an April 1, 2013 deadline to conclude a settlement with CentrePoint or return the deposit, the Consulting Agreement did not require MFG to hold OPBO's money until then. True, the Consulting Agreement states that if settlement was not accomplished by April 1, MFG was to "facilitate" its return, or, in the alternative, provide DTC access codes enabling OPBO to acquire the Golden State bond.[260] As Enforcement has repeatedly argued,[261] and as the Consulting Agreement explicitly states, Potter was authorized to release the funds to American Capital when the bond power and DTC access codes were delivered to OPBO and delivery was confirmed.[262]

Furthermore, although PG testified that she believed Potter should have held the retainer in MFG's account for at least fourteen days,[263] she also testified that she had "lots of discussions" with American Capital about how BV would use the money.[264] BV told her he needed it to "obtain financing" for the development of the Chicago Parcel, including paying the expenses of cashing in the Golden State bond that would provide the funds to settle with CentrePoint.[265] For these reasons, then, we conclude that Potter was not required, as alleged, to

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[255] Ans. ¶ 2.

[256] Ans. ¶¶ 2, 32, 36, 38.

[257] Ans. ¶ 1.

[258] Ans. ¶¶ 32, 36, 38.

[259] Ans. ¶¶ 34, 57. Potter also argues that the Complaint should be dismissed because Enforcement unreasonably delayed initiating this proceeding and failed to file the Complaint in a timely fashion. Ans. at 8, ¶¶ 9, 10. Potter cites no authority to support these claims, and the Panel finds them without merit.

[260] JX-4, ¶ 7.

[261] Tr. 17–19, 1160–61; Enforcement's Post-Hr'g Br., at 7–8.

[262] JX-4, ¶ 2, and at 6.

[263] Tr. 766.

[264] Tr. 819–20.

[265] Tr. 766–67, 819–20.

hold the retainer until the settlement efforts had ended in either success or failure. This finding does not excuse Potter's conduct, however.

b. Deception Following Disbursement

The Panel concludes that for months after disbursing and using OPBO's retainer, Potter repeatedly vouched for the integrity of RD and BV, successfully assuaging PG's and KS's heightening concerns, giving unfounded reassurances that they simply needed to trust that BV would perform as promised. In so doing, Potter kept from OPBO the use he had made of the funds, concealed the disbursements to RD and BV, delaying OPBO from learning that American Capital was not honoring its agreement. Potter thereby rendered critical assistance to BV's effort to deceive OPBO as it sought to recover its funds from him, in violation of Rule 2010.[266]

PG testified unequivocally and persuasively that if she had known Potter took money out of the deposit on the day he received it, she would have known "conclusively right at the beginning that there was something really wrong."[267] The deposit was supposed to go to American Capital.[268]

c. The Consulting Agreement

The Complaint states that Potter made no effort to comprehend the Consulting Agreement and thus acted in reckless disregard of its terms. We disagree and find that he acted knowingly. As noted, Potter participated in crafting critical provisions of the Consulting Agreement and certainly understood the provisions governing the release of OPBO's funds. Potter's vague assertions implying that he did not are disingenuous and unconvincing. At the very least, when he received RD's email informing him that he should disburse $50,000 to RD and $1.7 million to Cristal Asset Management, Potter should not have done so without first consulting with OPBO. He understood he was an intermediary, entrusted to effect the transfers of funds and documents pursuant to the Consulting Agreement. Consequently, his disbursals of funds to RD and Cristal Asset Management, and the use he made of the remaining funds, constituted misuse of OPBO's funds, in violation of Rule 2010.

d. Failures to Disclose and Affirmative Misrepresentations

Potter kept PG, KS, and OPBO in the dark. PG believed Potter's representations that he was "trying to help, and he was very good friends with [RD]" in whom he had "all sorts of faith and confidence." She had no idea Potter was compensated.[269] She had no idea that Potter spent a

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[266] *Bayview Sec.*, at *12 (affirming violation of J&E Rule by associated person who knowingly assisted another in concealing assets from creditors).

[267] Tr. 716–17.

[268] Tr. 588.

[269] Tr. 699–700.

portion of the retainer before OPBO got the bond power and codes, or that RD owed money to Potter and MFG and authorized him to keep $250,000, and to wire $50,000 to RD.[270]

We agree with Enforcement that Potter should have disclosed his significant financial interest in serving as a facilitator of the Consulting Agreement. We also conclude that Potter affirmatively misled PG when, as she sought his assistance in communicating with BV, he told her that he did "not have an interest financially in the transaction."[271] Moreover, when KS asked him directly for information about where he had wired portions of the retainer, Potter's refusal to answer concealed from OPBO that he had not wired its funds to American Capital as he should have, but instead to RD and an entity unknown to OPBO, and that he kept $250,000 for himself. In failing to make these disclosures to OPBO, and affirmatively misleading PG and KS, we find that Potter violated Rule 2010.

VII. Sanctions

A. Arguments of the Parties

Enforcement argues that a bar is the "only appropriate sanction for Potter's misconduct." Enforcement notes that for conversion the Sanction Guidelines recommend imposition of a bar as the standard sanction for conversion without regard to the amount of money taken,[272] and the same for misuse, absent sufficient mitigation.[273] Enforcement identifies as aggravating factors the intentionality of Potter's actions, his failure to accept responsibility, the harm his actions caused, his failure to repay OPBO any of the funds he misused, and deceiving OPBO by failing to make appropriate disclosures and by making false statements.[274] Enforcement also asks the Panel to order Potter to pay $250,000 in restitution to KS, and to pay the costs of this proceeding.

Potter argues that no sanctions are appropriate, because, he insists, he did nothing wrong, but acted precisely as asked.[275] In his post-hearing brief, citing remarks by FINRA's executive vice president for Enforcement, he contends the Panel should dismiss this case because Potter's conduct caused no financial loss, impact on market integrity, or significant risk. He argues that by agreeing "to act as an intermediary, to assist the parties" he intended no harm and did not violate FINRA rules.[276]

Having found that Potter violated Rule 2010 by converting funds as charged in the first cause of action, and engaging in unethical conduct including misuse of funds as charged in the

[270] Tr. 717–20.

[271] Tr. 265–66; JX-46, at 3.

[272] Enforcement's Post-Hr'g Br., at 30.

[273] *Id.* at 33.

[274] *Id.* at 31–32.

[275] Tr. 1248.

[276] Respondent's Post-Hr'g Br., at 22–23.

second cause of action, we decline to dismiss the Complaint. We must therefore determine the appropriately remedial sanctions to impose in this case, consistent with the Sanction Guidelines and relevant precedents.

B. Discussion

As the SEC has clearly stated, by its nature, conversion is "antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money."[277] Conversion of another's property by "one who misapplies funds entrusted to him . . . demonstrates a lack of fitness to be in the securities industry."[278] This is why a bar is standard "regardless of [the] amount converted."[279]

Misuse, too, is such inherently serious misconduct that it calls for consideration of imposing a bar, unless it is mitigated by a respondent's misunderstanding of how the funds should be used, or if other mitigating factors were present.[280]

Guided by these precepts, the Panel must conclude that Potter's conversion and unethical conduct including the misuse of OPBO funds, are "extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade'" of Rule 2010.[281]

Furthermore, aggravating factors present here underscore the appropriateness of imposing a bar for each cause of action. As noted above, Potter acted intentionally,[282] converting thousands of dollars of OPBO's funds on the day they reached his account, and three days later transferring $50,000 to RD and $1.7 million to an affiliate of American Capital. Within a month of signing the Release Agreement, Potter had spent virtually all of the remaining funds.

Potter denies responsibility for his wrongdoing, and shows no remorse for the harm he caused.[283] To the contrary, he was fully aware that KS had loaned OPBO the $2 million and desperately needed repayment to avoid laying off employees. When confronted by his failure to offer to return any part of the funds he misused, Potter blithely shrugged off any concern or responsibility stating, "[t]hat was [RD's] problem or [BV's]."[284]

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[277] *Butler*, 2016 SEC LEXIS 1989, at *29 (internal quotations and citations omitted).

[278] *Wiley*, 2015 SEC LEXIS 4952, at *26.

[279] Guidelines at 36; *Wiley*, 2015 SEC LEXIS 4952, at *26.

[280] Guidelines at 36.

[281] *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *42 (Feb. 10, 2012).

[282] Guidelines at 8 (Principal Consideration No. 13).

[283] Guidelines at 7 (Principal Consideration No. 2).

[284] Tr. 286–87.

Potter's conversion and misuse of OPBO's money, and his failure to repay any of the $250,000 he used,[285] harmed KS directly,[286] and provided Potter and his broker-dealer with significant monetary gain.[287]

Following his receipt of the $2 million, despite many communications with PG and KS, Potter, posing as a selfless facilitator, unethically concealed important facts about the truth of what he had done with OPBO's funds, and affirmatively misled OPBO. Potter assuaged PG and KS's concerns, lulling them into waiting patiently, creating hope that: i) his representations about the integrity of RD were true, ii) American Capital was working for OPBO's goal; and, iii) the $2 million would soon be returned.[288] Potter's misuse of the funds continued for over a month, and his unethical misrepresentation and concealment of the facts continued for many more months.[289] Potter's wrongdoing involved numerous acts, constituting a pattern of misconduct.[290]

Taking into consideration all of these aggravating factors and finding no mitigating circumstances, we conclude that the only appropriate outcome to deter this type of behavior by Potter and others similarly entrusted with others' property is to impose a bar for each cause of action.

As we have noted, the Panel finds that Potter's actions provided him with ill-gotten gains, at KS's expense, totaling $250,000. Enforcement recommends that we order Potter to pay restitution in that amount to KS. We agree that doing so is consistent with our obligation to remedy the misconduct proven here, and to deter future misconduct.[291] We therefore order Potter to pay KS restitution of $250,000, plus prejudgment interest.[292]

VIII. Order

For conversion in violation of FINRA Rule 2010, as alleged in cause one of the Complaint, William James Potter is barred from associating with any FINRA member firm in any capacity. For unethical conduct including misuse of funds, as alleged in cause two of the Complaint, Potter is barred from associating with any FINRA member firm in any capacity. Potter is ordered to pay restitution to KS in the amount of $25,177.47 for the conversions charged in the first cause of action, and $224,822.53 for the misuse of funds charged in the second cause of action, for a total of $250,000 in restitution plus interest at the rate established

[285] Guidelines at 7 (Principal Consideration No. 4).

[286] Guidelines at 7 (Principal Consideration No. 11).

[287] Guidelines at 8 (Principal Consideration No. 16).

[288] Guidelines at 7 (Principal Consideration No. 10).

[289] Guidelines at 7 (Principal Consideration No. 9).

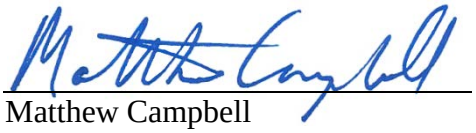
[290] Guidelines at 7 (Principal Consideration No. 8).

[291] Enforcement's Post-Hr'g Br., at 34; Guidelines at 10.

[292] See Addendum A for breakdown of the $250,000 restitution amount and the dates upon which interest will accrue.

for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). Potter is also ordered to pay $10,095.73 for the costs of this proceeding, which include an administrative fee of $750 and $9,345.73 for the hearing transcript.

The bars shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding. The restitution (including interest) and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action in this disciplinary proceeding.[293]



Matthew Campbell
Hearing Officer
For the Extended Hearing Panel

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[293] The Panel considered and rejected without discussion all other arguments by the parties.

ADDENDUM A

Restitution Ordered to Be Paid to KS

Effective Date for Interest Calculation	Restitution Ordered
March 12, 2013	$10,177.47
March 13, 2013	$15,000.00
April 1, 2013[294]	$224,822.53
TOTAL	**$250,000.00**

[294] The date that Potter spent the last of the $250,000 of the OPBO deposit that he kept for his own use.