

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

Department of Enforcement,

Complainant,

v.

Shailesh B. Patel  
Huntington Beach, CA,

Respondent.

DECISION

Complaint No. C02990052

Dated: May 23, 2001

**In the decision issued below, the Hearing Panel found that the respondent had misused customer funds and it barred him from associating with any member firm in any capacity. Held, findings and sanctions affirmed on appeal.**

Shailesh B. Patel ("Patel") appealed a June 27, 2000 decision of a Hearing Panel of the Office of Hearing Officers ("Hearing Panel") of NASD Regulation, Inc. ("NASD Regulation"). After reviewing the entire record in this matter, we hold that Patel misused customer funds in the amount of \$40,000 in violation of NASD Conduct Rules 2110 and 2230(a). We impose on Patel a bar from associating with any NASD member firm in any capacity.

Background

Patel first became registered with an NASD member firm as a general securities representative in or about June 1995. During the period in question, he was registered with Corporate Securities Group, Inc. ("CSG") as a general securities representative and as a general securities principal.

### Factual and Procedural History

The Department of Enforcement ("Enforcement") of NASD Regulation filed a one-cause complaint against Patel on September 10, 1999.<sup>1</sup> The complaint alleged that Patel, while associated with CSG, had violated NASD Conduct Rules 2110<sup>2</sup> and 2330(a)<sup>3</sup> by misusing \$40,000 that he received from customers DB and JJB (husband and wife). Patel filed an answer to the complaint denying the substantive allegations.

The hearing in this matter lasted two days. Enforcement presented evidence that, on March 18, 1997, customers DB and JJB wire transferred \$40,000 to Patel in order to purchase certain bonds, but Patel failed to purchase the bonds or make any other investment on their behalf. In addition to documentary evidence, Enforcement introduced the testimony of customers DB and JJB and a former CSG compliance officer.

Customer DB testified that she had a high school education and that, at the time in question, she worked at EDT Shark, a software company. She stated that she previously had invested only in securities through her employer's 401(k) retirement savings plan. She wanted to invest money in the securities market, however, and in early 1997, at her coworker's recommendation, she contacted Patel to receive investment advice.

Customer JJB testified that he was a United States postal worker during the relevant period. He also stated that he had no experience investing in securities and had never dealt with a broker prior to his dealings with Patel. Customers DB and JJB both testified that they did not have a social

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<sup>1</sup> NASD Regulation began investigating Patel after CSG submitted a Uniform Termination Notice for Securities Industry Registration ("Form U-5"), discussed *infra*. NASD Regulation's investigation culminated in the filing of the complaint for this matter.

<sup>2</sup> NASD Conduct Rule 2110 states that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." We note that the NASD's rules apply to associated persons to the same extent as they do to member firms through application of NASD Rule 115, which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under these Rules."

<sup>3</sup> NASD Conduct Rule 2330(a) provides that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." The complaint referred to Conduct Rule 2330(e) (prohibiting certain guarantees), in an apparent typographical error. At the commencement of the hearing below, Enforcement requested that the complaint be deemed amended to refer to Rule 2330(a) in place of Rule 2330(e). Because there was no objection to Enforcement's request and no confusion as to the nature and substance of the violations charged, the Hearing Panel granted Enforcement's request and deemed the complaint amended nunc pro tunc.

relationship with Patel and had never had any personal business dealings with Patel prior to their decision to invest through CSG.

According to customers DB and JJB, they told Patel that they were going to take out a \$40,000 home equity loan and use the money to invest in securities. They also told him that they wanted to supplement their income in order to pay off a car loan and to allow customer DB to stay at home and take care of their young daughter. According to customers DB and JJB, Patel estimated that they would need approximately \$1,600 per month in supplemental income to accomplish their goals.

Customers DB and JJB testified that Patel initially recommended that they invest in stocks and discussed general investment strategies with them. They told Patel that they were only willing to take minimal risks, and Patel eventually suggested that they invest in "California bonds" because the stock market was volatile at the time and bonds would be a safer investment. Customers DB and JJB stated that Patel had indicated that the California bonds would yield monthly interest payments of approximately \$2,200 to \$2,300 and that the original funds invested would be returned in full after three months. Based on Patel's recommendation, customers DB and JJB decided to invest the full amount of funds from the home equity loan in California bonds.

Sometime between March 13 and 19, 1997, customers DB and JJB received a CSG new account form and a CSG options information form and agreement. The new account form indicated that customers DB and JJB previously had held a securities account with Fidelity and that they had an estimated net worth, excluding residence, of \$300,000. The options form stated that they had a net worth of approximately \$300,000 and that they had three years of experience investing in securities and one year of experience investing in options. Customers DB and JJB testified that the investment-experience and net-worth information on those forms was incorrect, and that they had never held an account with Fidelity. Indeed, they stated that the forms, which had been partially completed before they received them, had numerous inaccuracies. Customer JJB testified that he had questioned Patel about the discrepancies in the forms and Patel had indicated that they were standard forms and that the mistakes were "no big deal."<sup>4</sup> Customer DB testified that she also had asked her coworker who had recommended Patel and who had opened a securities account with CSG whether his new account form contained inaccurate information. According to customer DB, her coworker replied that the form he had received contained inaccurate information but that he believed it was not a problem. Customers DB and JJB signed the forms and returned them to Patel.

On March 18, 1997, customers DB and JJB wired \$40,000 to what they believed was a CSG corporate account. On or about May 9, 1997, they received a check from Patel for \$2,500, dated

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<sup>4</sup> In response to a question regarding why he did not become suspicious after receiving opening account and option account forms with inaccurate information, customer JJB stated: "I guess because we had never done anything like this before, we were just very naive, and so we relied on Mr. Patel obviously to tell us the truth; so when I questioned him about that, he just told us it's not a big deal. It's standard forms. Don't worry about it."

May 12, 1997. The lower left-hand corner of the check contained the following information: "INT. DIV. April 1997." Customers DB and JJB testified that they believed the check represented an interest or dividend payment from the bonds.

Nonetheless, when customers DB and JJB did not receive any confirmation notice regarding their investment in California bonds, they asked Patel to send them written verification of the transaction. Shortly after Patel sent customers DB and JJB the May 12 check for \$2,500, he sent them a "confirmation statement" on "SP Capital and Asset Management" letterhead. The "confirmation statement" purported to show that customers DB and JJB held an investment with a current market value of \$39,800 in a product identified as "Income & Bond." Customers DB and JJB stated that they believed that the information in the confirmation statement referred to their investment in California bonds.

On or about May 16, 1997, the bank returned the May 12 check for \$2,500 because of insufficient funds. Customer JJB testified that he immediately contacted Patel, who claimed that the bank had made a mistake and that there were sufficient funds in the account but that they may not have cleared by the time the check was deposited. Patel agreed to wire transfer replacement funds to customers DB and JJB no later than May 23, 1997. When Patel failed to provide the funds by that date, customer JJB verbally complained to CSG.

John Busacca ("Busacca"), a former CSG compliance officer who handled customers DB and JJB's complaint, testified that customer JJB had contacted CSG to inquire about his investment in California bonds.<sup>5</sup> Busacca, however, quickly discovered that the firm had no record of any activity in customers DB and JJB's account and no record of having received any funds from them. Busacca stated that he immediately began an investigation after speaking with customer JJB. Busacca spoke with Patel and requested a written response to the customers' complaint. On May 27, 1997, Patel provided the written response. In part, Patel's written response stated that customers DB and JJB had "invested" \$40,000 for three months in a project he was working on (and that, in return, they would receive \$2,250 per month in interest). Patel also stated that the complaint was based on a simple misunderstanding and that he would soon resolve the matter with customer JJB. Busacca testified that Patel never mentioned that the customers had lent him the money, and Patel's written statement did not indicate that the transaction was a loan.

On or about May 28, 1997, Patel and customers DB and JJB entered into an agreement whereby Patel would return the "initial capital" of \$40,000 and a total of \$5,625 in interest earned (in periodic payments) by June 10, 1997. In late May 1997, Patel sent customers DB and JJB \$2,250 to cover the May 12 check and, on or about June 4, 1997, he wired them an additional \$2,250. After

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<sup>5</sup> Busacca took contemporaneous notes of his conversation with customer JJB. The notes memorialize the fact that customer JJB told Busacca that "we [customers DB and JJB] gave him [Patel] \$40,000 for California Bonds [sic]."

receiving these funds, and at the insistence of Patel, customer JJB prepared and signed a handwritten note addressed to CSG retracting his complaint against Patel.<sup>6</sup>

On or about September 10, 1997, after Patel failed to make the other required payments, customers DB and JJB hired an attorney and filed an arbitration claim against Patel and CSG. In March 1998, Patel paid \$5,000 to customers DB and JJB. In May 1998, he paid them \$4,500. On or about September 14, 1998, customers DB and JJB, Patel, and CSG entered into an agreement to settle the arbitration proceeding, pursuant to which Patel was required to pay customers DB and JJB \$42,500 (in addition to the previous payments he had made). Ultimately, customers DB and JJB received \$43,500 and their attorney received \$13,000.<sup>7</sup>

During the disciplinary proceedings below (and on appeal), Patel did not dispute that customers DB and JJB had contacted him to invest in securities, that he had opened an account for them at CSG, and that they had wired him \$40,000. He also did not dispute the allegation that he used the funds for his own benefit, *i.e.*, to pay overdue rent on his office space and overdue phone bills, to purchase computer equipment and office furniture, and to entertain brokers whom he was attempting to recruit in connection with establishing his own financial services business. Patel argued, however, that customers DB and JJB had agreed to lend him the \$40,000 in question to purchase office equipment and that they had not provided the funds for the purchase of bonds.

On June 27, 2000, the Hearing Panel issued its decision, finding that Patel had violated Conduct Rules 2110 and 2330(a) by misusing customer funds in the amount of \$40,000. The Hearing Panel barred Patel from associating with any NASD member firm in all capacities. The Hearing Panel also directed that Patel pay \$3,733 in hearing costs. This appeal followed.

### Discussion

In the decision rendered below, the Hearing Panel focused on whether the \$40,000 was supposed to be used to purchase bonds for customers DB and JJB, as alleged by Enforcement and the customers, or as a loan, as claimed by Patel. The Hearing Panel concluded that there was "substantial evidence supporting the [customers'] contention that they gave Patel \$40,000 with the intention and expectation he would use their funds to purchase California bonds." In reaching this finding, the Hearing Panel credited the testimony of customers DB and JJB and former CSG compliance officer Busacca over that of Patel.

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<sup>6</sup> Customers DB and JJB testified that Patel had explained that he would be fined thousands of dollars and would have difficulty paying back the \$40,000 if the complaint was not withdrawn.

<sup>7</sup> The record indicates that CSG paid \$18,000 of the settlement with customers DB and JJB. Patel, however, executed a promissory note to CSG for \$18,000, pursuant to a separate agreement, in relation to the settlement with the customers.

On appeal, Patel argues that the Hearing Panel's finding of violation should be reversed. The thrust of his argument is that the Hearing Panel's credibility determinations were erroneous. He also claims, however, that the Hearing Panel's decision to allow the customers to testify telephonically was unfair. In addition, he asserts that the Hearing Panel improperly based its decision, in part, on a finding not alleged in the complaint: namely, that Patel sold securities away from his firm. Finally, he argues that the sanctions imposed are unwarranted. We will discuss each contention in turn.

Credibility Determinations. The Hearing Panel based its findings in large measure on its credibility determinations of several key witnesses. As an initial matter, we note that the SEC has repeatedly emphasized that "the credibility determinations of an initial fact-finder are entitled to considerable weight and deference unless the record contains substantial evidence to the contrary." In re Rafael Pinchas, Exchange Act Rel. No. 41816, at 13 (Sept. 1, 1999). See also Alderman v. SEC, 104 F.3d 285, 288 n.4 (9th Cir. 1997) ("An initial factfinder's assessments of credibility deserve 'special weight.'). With this principle in mind, we turn to Patel's specific claims of error.

First, Patel claims that the Hearing Panel's determination to credit customers DB and JJB's testimony regarding their belief that the interest checks from Patel were actually interest or dividend payments on a bond is not supported by the record. Patel asserts that the fact that the checks were drawn on his personal account supports his claim that the transaction was a loan.<sup>8</sup> Second, Patel argues that the Hearing Panel erroneously credited customers DB and JJB's testimony that the "confirmation statement" referred to their purchase of California bonds. Patel claims that the "confirmation statement" was nothing more than a sample confirmation of the loan. He further argues that his position is bolstered by the fact that the "confirmation statement" was printed on the letterhead of 'S.P. Capital and Asset Management." Third, Patel states that the Hearing Panel ignored biases exhibited by customers DB and JJB. Fourth, Patel asserts that the Hearing Panel erred in crediting Busacca's testimony that Patel had not mentioned that the transaction was a loan. Patel argues that Busacca's testimony is unreliable because it is contradicted by CSG's Form U-5 statement indicating that the reason for Patel's termination was that he had borrowed money in violation of an internal firm policy.

Patel's arguments are unpersuasive, and he has not met the heavy burden that must be overcome in order to successfully challenge the credibility determinations of the initial trier of fact. Customers DB and JJB consistently stated that they intended to invest in bonds and did not agree to lend Patel \$40,000. The consistency of their statements is evidenced by the May 1997 conversation between customer JJB and Busacca (Busacca testified that, during that conversation, customer JJB stated that he and his wife had invested \$40,000 in California bonds through CSG), the arbitration claim that the customers filed against Patel in September 1997 (claiming that they intended to invest in California bonds and did not loan any money to Patel), the declarations they made under penalty of

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<sup>8</sup> Patel further argues that customer DB had to have known, because of her previous experience as a bank teller, that investors receive interest and dividend payments from the issuer and not from an individual's personal checking account. See infra note 13 and the discussion therein.

perjury in January 1998 (same), and the sworn testimony they gave at the hearing in March 2000 (same).<sup>9</sup>

Furthermore, many of the very documents that Patel cites as support for his current position actually bolster the testimony and statements given by customers DB and JJB. The "interest" checks, the "confirmation statement," the written statement he provided to CSG about the events in question, and various other documents prepared by or on behalf of Patel do not mention a loan or state that he had borrowed the funds from customers DB and JJB. On appeal, Patel counters that "he is a man of foreign heritage with problems distinguishing the interpretation of legalistic phrases and words." In light of Patel's experience with financial matters, including his registration as a general securities representative and a general securities principal, we cannot say that the Hearing Panel erred in disregarding his testimony in this respect. We note as well that, during the hearing below, Patel admitted that he knew the meaning and import of the term "loan" at the time when he prepared the written statement for CSG and when he executed the various settlements because he had recently applied for a loan from Oceanside Mortgage.<sup>10</sup>

A number of the documents, moreover, not only failed to mention a loan, but they actually used language indicating that customers DB and JJB had invested in bonds.<sup>11</sup> The check for \$2,500, dated May 12, 1997, that Patel sent to customers DB and JJB had the following notation in the lower left-hand corner: "INT. DIV. April 1997." Under the heading "Account," the "confirmation statement" that Patel prepared and sent to customers DB and JJB stated, "Income and bond, total shares 1,000; current share price \$39.80; current market value \$39,800."<sup>12</sup> Patel claimed that the "confirmation

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<sup>9</sup> We also concur with the Hearing Panel's determination that the customers' testimony was not inconsistent simply because they testified at the hearing about matters that were not included in prior declarations. Customer JJB's inability to recall at the hearing certain facts that were included in his declaration also does not prove that his testimony and declaration were inconsistent.

<sup>10</sup> Patel also failed to list the purported loan from customers DB and JJB as a liability on the loan application that he had completed for Oceanside Mortgage. As the Hearing Panel noted, Patel gave inconsistent reasons for this omission.

<sup>11</sup> A number of documents also support customers DB and JJB's belief that they were customers of CSG. The cover letter accompanying the new account form was printed on CSG letterhead and stated, "Dear Valued Client: I would like to take this opportunity to thank you for opening your account with us and to welcome you as a new client of [CSG]. . . . Thank you again for entrusting us to take care of your investment needs." Similarly, the cover letter accompanying the options questionnaire and account form provided, "Dear Customer: As one of our valued clients, we wish to take this opportunity to thank you for your business and your confidence in [CSG]."

<sup>12</sup> In addition to the language used in the May 12 check and the "confirmation statement," a number of other documents prepared by Patel used terms that would be more closely associated with a securities transaction than a loan. For instance, both Patel's May 27, 1997 written statement to CSG

statement" was simply a sample confirmation. The document itself, however, did not in any way indicate that it was a sample or that it represented only a hypothetical transaction.

Although these two documents did not indicate that they were from CSG, customer JJB explained why he was not immediately concerned by that irregularity. With regard to the May 12 check for \$2,500 drawn on Patel's personal account, customer JJB explained in a sworn declaration that Patel had stated that the check was drawn on a corporate account with CSG in his (Patel's) name.<sup>13</sup> As to the "confirmation statement," customer JJB testified at the hearing that Patel had explained that he worked for CSG out of his home and that he did not have any CSG letterhead available to him at that time so he sent the confirmation on "S.P. Capital and Asset Management" letterhead.<sup>14</sup> In light of customer DB and JJB's lack of sophistication and inexperience with the securities industry, we find that the Hearing Panel did not err in crediting these explanations.<sup>15</sup>

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and the May 28, 1997 agreement into which he entered with customers DB and JJB used the term "investment" and did not mention a loan.

<sup>13</sup> Customer JJB was never asked at the hearing about the specifics of his conversation with Patel regarding why the check did not indicate that it was from CSG or the issuer. Customer JJB did verify at the hearing, however, that he had questioned Patel about that issue and that the information in the declaration was true to the best of his knowledge. Customer DB testified that her husband received and deposited the check and that she did not actually review it until it was returned for insufficient funds. Customer DB also testified that it was her husband who had conversations with Patel about the check and the "confirmation statement."

Patel claims that the fact that customer DB had worked at a bank somehow proves that she and her husband knew that the check was not an interest or dividend payment on a bond. We disagree. That customer DB had worked at a bank for six years in no way imputes knowledge to her and her husband that an interest or dividend payment on a bond would be sent by the issuer. (Indeed, not all interest or dividend payments would be sent directly from an issuer to an investor.) Customer DB testified that she was a teller and then an assistant supervisor in the tellers' unit of a savings and loan. The extent of her experience with checks was to verify that a customer's endorsement matched the customer's signature when a check was deposited. She stated that the savings and loan at which she worked did not have large corporate or commercial bank accounts. Moreover, as noted above, she did not initially review the May 12 check or have direct conversations with Patel about it.

<sup>14</sup> At another point, customer JJB explained that he and his wife "had never done anything like this [i.e., invest through a broker] before and we didn't know what we were supposed to be getting. . . ."

<sup>15</sup> Customers DB and JJB also explained that they believed that they had wired the \$40,000 to a CSG corporate account. We do not find that the Hearing Panel erred in crediting the customers' testimony in this respect.

Patel also argues that the Hearing Panel's credibility determinations regarding customers DB's and JJB's testimony is flawed because the Hearing Panel ignored certain biases that they exhibited during the hearing. Customer JJB, for instance, testified that his wife "hate[d] Mr. Patel with a passion." Regarding his own state of mind, customer JJB stated, "I was in my own personal living hell for that year and a half because I had just questioned myself about being so stupid and naïve [sic] and, you know, not looking into things further than what I had [sic] and just trusting this guy to do the right thing." The fact that these customers may have had negative feelings about Patel does not automatically undermine the reliability of their testimony. Although the decision below did not specifically discuss the bias alleged by Patel, the Hearing Panel was aware of the statements and clearly considered the consistency of the customers' testimony, corroborative evidence, and the inconsistency of Patel's version of the events in weighing the credibility of the various witnesses. The Hearing Panel also noted that customers DB and JJB did not stand to gain any financial benefit from testifying during the disciplinary proceedings because they had settled their claims against Patel and CSG. Under these circumstances, we cannot say that the Hearing Panel erred in determining that the customers' testimony was reliable notwithstanding that they may have exhibited some animosity toward Patel.

Finally, Patel asserts that the Hearing Panel erred in crediting Busacca's testimony that Patel had never mentioned that the money from the customers was a loan. According to Patel, the Hearing Panel should not have relied on Busacca's statement because it was contradicted by CSG's Form U-5. The Disclosure Reporting Page of the Form U-5 stated that Patel had been discharged for "borrowing from the customer and paying the customer back \$2,250.00 each month as interest with the principal due in July 1997." We do not agree with Patel's position. Busacca stated that he did not prepare the final language used in the Form U-5 and did not agree with the description therein of the events in question. The Hearing Panel was not required to substitute CSG's Form U-5 disclosure for its own independent findings. It was well within the Hearing Panel's discretion, and we find no error in its determination, to give minimal or no weight to CSG's Form U-5 disclosure and to credit the testimony of a non-interested, former CSG compliance officer over Patel's testimony regarding whether Patel had mentioned a loan. Cf. In re Eliezer Gurfel, Exchange Act Rel. No. 41229, at 7 n.11 (Mar. 30, 1999) (rejecting contention that supervisor's testimony about broker's forgery was not credible because the firm's Form U-5 did not mention forgery), aff'd sub nom., Gurfel v. SEC, No. 99-1199 (D.C. Cir. Mar. 7, 2000).

Telephonic Testimony. Patel argues that the Hearing Panel erred in allowing customers DB and JJB to testify by telephone. We note at the outset that the courts and the SEC have held that the NASD may admit telephonic testimony in disciplinary proceedings. See, e.g., Alderman v. SEC, 104 F.3d 285, 288 (9th Cir. 1997) (rejecting argument that credibility determinations made during NASD proceedings were undermined because the testimony was provided over the telephone); In re Howard Alweil, 51 S.E.C. 14, 17 (1992) (upholding the use of telephonic testimony in NASD proceeding). Patel claims, however, that doing so in a case in which witness credibility determinations were so crucial to the outcome was patently unfair. We disagree.

Customers DB and JJB indicated that they could not make the trip from their residence in New York to the location of the hearing in Los Angeles, California due to financial, professional, and personal

reasons. They did agree to testify by telephone, and they signed declarations swearing under penalty of perjury that the testimony they would give at the hearing would be the truth.

In the best of all worlds, it may be preferable to have witnesses appear in person so that the trier of fact can observe the witnesses' demeanor. The NASD, however, does not have subpoena power, and it cannot require non-members to appear and provide testimony at disciplinary hearings. Respondents, moreover, do not have a right to a face-to-face confrontation of witnesses in NASD proceedings, and we find that allowing customers DB and JJB to testify telephonically in this case was fair. Patel's counsel cross-examined both customers at length. In addition, the Hearing Panel had the opportunity to assess credibility by listening to the witnesses' voices, examining the consistency of their answers, evaluating how directly or indirectly they responded to cross-examination, and comparing their testimony with other evidence introduced during the proceeding. We therefore reject Patel's argument that the proceedings were fundamentally unfair as a result of the telephonic testimony.<sup>16</sup>

Hearing Panel's Alleged Reliance on "Selling Away" Charges. Patel argues that the Hearing Panel somehow committed reversible error by discussing "selling away" practices when no such cause of action was alleged in the complaint. Our review of the record, however, indicates that the Hearing Panel only referenced "selling away" in relation to a brief statement by Busacca that he believed Patel may have been "selling away" or "investing away" from CSG. The Hearing Panel did not make any findings that Patel violated NASD Conduct Rule 3040, which prohibits a registered representative from selling securities away from the brokerage firm at which he or she is employed without prior written notification to and approval by the firm. The Hearing Panel also did not rely on such charges in imposing sanctions. Accordingly, we reject Patel's argument.

Misuse of Customer Funds. Having rejected Patel's claims regarding the Hearing Panel's credibility determinations and alleged procedural irregularities, we turn now to the finding of violation. Conduct Rule 2330(a) prohibits an associated person from misusing a customer's funds. An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer. See, e.g., Aldeman, 104 F.3d at 289 (upholding finding of violation based on a misuse of customer funds where respondent mistakenly transferred the funds to the firm's account but then deliberately withheld repayment to the customer for two months); In re Lawrence R. Klein, 52 S.E.C. 535, 536-37 (1995) (upholding violation for misuse of customer funds based on finding that respondent caused \$17,000 to be wired from one customer account to another customer); In re Bernard D. Gorniak, 52 S.E.C. 371, 372-73 (1995) (affirming

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<sup>16</sup> We note that there is some indication in the record that Patel was willing to hold the hearing in New York, where the customers resided. Patel alleges that Enforcement orchestrated an elaborate plan to keep the customers from providing testimony in person. We find no evidence indicating that Enforcement intentionally sought to preclude the customers from giving testimony in person, however. Although it might have been preferable for the Hearing Panel to have changed venue under these circumstances, we find that allowing the customers to testify by telephone and refusing to change venue at Patel's request was not reversible error.

violation based on the misuse of customer funds where respondent retained customer funds for an indeterminate period after failing to effect purchase of securities). The misuse of customer funds also violates Conduct Rule 2110 because such conduct is "patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that the NASD seeks to promote." In re Joel Eugene Shaw, 51 S.E.C. 1224, 1226-27 (1994).

We find that a preponderance of the evidence supports the Hearing Panel's determinations that (1) customers DB and JJB intended to invest in certain bonds and not to loan Patel \$40,000, (2) Patel failed to use the funds as directed by customers DB and JJB, and (3) Patel used the customers' funds for his own benefit. As such, we conclude that Patel misused customer funds in violation of Conduct Rules 2110 and 2330(a).

### Sanctions

The Hearing Panel reviewed the NASD Sanction Guideline relevant to an action based on misuse of customer funds, which provides that adjudicators should consider a bar unless there was a misunderstanding regarding the customer's intended use of the funds or other mitigation exists. See NASD Sanction Guidelines (1998 ed.) at 34. The Hearing Panel barred Patel in all capacities and ordered him to pay \$3,733 in costs, consisting of a \$750 administrative fee and a \$2,983 transcript fee. The Hearing Panel found that there were no mitigating factors present to justify the imposition of any sanction less severe than a bar. The Hearing Panel, for instance, specifically found that Patel's eventual repayment of the misused funds (plus an additional sum) to customers DB and JJB was not a mitigating factor. Although the Hearing Panel acknowledged that Patel had no pertinent disciplinary history, the Hearing Panel determined that a bar was necessary because Patel had intentionally misused customer funds.

We concur with the Hearing Panel's reasoning and uphold the sanctions imposed in this case, which are consistent with the relevant Sanction Guideline. Patel engaged in serious misconduct. He took advantage of novice investors by using \$40,000 that they thought was being invested in bonds for his own purposes. The fact that he eventually returned the funds is not mitigating under the facts of this case. His capitulation after the customers complained to his firm, hired an attorney, and filed an arbitration case against him hardly evidences his desire to rectify his original misconduct.

In light of our duty to protect the investing public and to ensure the integrity of the market, we would be remiss in not acting decisively in cases, like the present matter, where the evidence calls into question the honesty and the veracity of a person associated with a member firm. As the SEC has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." Gorniak, 52 S.E.C. at 373. Because we find that Patel's continued participation in the securities industry presents a risk to the public, we hold that his exclusion from association with any member firm is necessary.<sup>17</sup>

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<sup>17</sup> Patel argues on appeal that a bar is unfair and unreasonable because sanctions imposed in past, similar cases were more lenient. We reject his argument. It is axiomatic that "appropriate sanctions

Conclusion

Based on the foregoing discussion, we find that Patel misused customer funds. Accordingly, Patel is barred from associating with any member firm in any and all capacities. The bar is effective upon service of this decision. We also uphold the Hearing Panel's imposition of \$3,733 in costs.<sup>18</sup> In addition, we impose \$1,000 in costs related to this appeal.

On Behalf of the National Adjudicatory Council

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Barbara Z. Sweeney  
Senior Vice President and Corporate Secretary

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depend on the facts and circumstances of each particular case, and cannot precisely be determined by comparison with action taken in other proceedings." In re Larry Ira Klein, 52 S.E.C. 1030, 1040 n.41 (1996) (citing Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973); Hiller v. SEC, 429 F.2d 856, 858-59 (2d Cir. 1970)).

<sup>18</sup> We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein. Pursuant to NASD Procedural Rule 8320, any member who fails to pay a fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.