BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Robert Durant Tucker New York, NY, Respondent.	DECISION Complaint No. 2009016764901 Dated: December 31, 2013

A hearing panel barred the respondent for improperly approving a transfer of customer funds, converting the funds, and improperly commingling the funds. Held, findings affirmed in part, and bar imposed by the hearing panel affirmed.

Appearances

For the Complainant: Leo Orenstein, Esq., Jennifer Schulp, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Pursuant to FINRA Rule 9311, Robert Durant Tucker ("Tucker") appeals a January 11, 2013 decision. In that decision, the Hearing Panel found that Tucker violated: (1) FINRA Rule 2010 by improperly approving a transfer of customer funds; (2) NASD Rule 2330 and FINRA Rule 2010 by converting customer funds to himself; and (3) FINRA Rule 2010 by improperly commingling customer funds.[1] For these violations, the Hearing Panel barred Tucker from associating in any capacity with any FINRA member. After an independent review of the record, we affirm the Hearing Panel's findings in part and sustain the sanction it imposed.

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1 The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Background

Tucker entered the securities industry in 1989. From June 2008 to January 2009, Tucker was registered with Bishop Rosen & Company, Inc. ("BR Company" or the "Firm"), as a corporate securities representative. Tucker is not currently associated with another FINRA member firm.

II. Procedural History

On September 9, 2011, FINRA's Department of Enforcement ("Enforcement") filed a three-cause complaint alleging that Tucker: (1) improperly approved a wire transfer of customer funds to himself in violation of FINRA Rule 2010; (2) converted customer funds, in violation of NASD Rule 2330 and FINRA Rule 2010; and (3) commingled funds, in violation of FINRA Rule 2010. Tucker denied the alleged violations.

A disciplinary hearing was held on July 17 and 18, 2012.[2] In a decision issued on January 11, 2013, the Hearing Panel found Tucker liable for all three causes of action alleged in the complaint. The Hearing Panel barred Tucker in all capacities for these violations.

On January 29, 2013, Tucker appealed the Hearing Panel's decision. Oral argument before the National Adjudicatory Council ("NAC") subcommittee empanelled to consider Tucker's appeal (the "Subcommittee") was scheduled for May 3, 2013. On May 2, 2013, however, Tucker informed FINRA's Office of General Counsel ("OGC") via email that he would not attend the May 3, 2013 oral argument because he was ill and en route to the hospital. On May 3, 2013, the Subcommittee proceeded with the scheduled oral argument despite Tucker's failure to attend. The Subcommittee heard 15 minutes of oral argument from Enforcement, who reserved its remaining 15 minutes for rebuttal. The Subcommittee also left the record open to allow Tucker to participate in the oral argument via telephone at a later date.

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[2] The disciplinary hearing was originally scheduled for May 2, 2012, but the Hearing Officer rescheduled the hearing for July 17, 2012. This is because on May 2, 2012, Tucker appeared at FINRA's security desk and claimed that he had become ill. Tucker then called an ambulance and went to the hospital.

At this time, Enforcement informed the Hearing Officer that on the eve of a *separate* disciplinary hearing in November 2009, Tucker checked himself into a hospital, causing the hearing to be postponed for two months. The Hearing Officer adjourned the May 2, 2012 hearing and issued a May 7, 2012 order asking Tucker to show cause as to why he should not be held in default. Nevertheless, in a June 7, 2012 order, the Hearing Officer did not hold Tucker in default, and rescheduled the hearing for July 17, 2012. Tucker attended the July 17, 2012 hearing.

The Subcommittee agreed, however, that Tucker would only be able to participate if he provided an explanation as to why he failed to communicate with OGC prior to May 2, 2013, and also provided substantiating evidence of the medical condition that caused him to miss the May 3, 2013 oral argument. In a letter dated May 15, 2013, the Subcommittee informed Tucker that, if he failed to provide such evidence, it would deem his request for oral argument abandoned under FINRA Rule 9342.[3]

On May 29, 2013, the respondent provided a response via email that that did not include the report requested in the May 15, 2013 letter, but stated that he was not abandoning his request for oral argument. Tucker's May 29, 2013 response indicated that he was incapacitated because of an ailment related to his blood pressure—and that he intended to provide OGC with the report once he felt better. Tucker never provided the requested report. Accordingly, the Subcommittee found Tucker's request for oral argument abandoned and considered this matter solely on the basis of the written record—including the appellate briefs submitted by both Tucker and Enforcement prior to Tucker's professed illness.

III. Facts

A. Improper Approval of Funds Transfer

The facts of this case are largely undisputed. Tucker admits that on December 19, 2008, he prepared a wire request form instructing BR Company's clearing firm to wire $4,500 from the account of an 85-year-old customer, PN, to Tucker's personal checking account at Signature Bank. Under BR Company's procedures, such a request required *written* approval from a manager. Tucker, however, did not obtain written approval from any BR Company manager.

Tucker claims that he discussed a potential investment opportunity involving day trading with PN and that the investment would require PN to transfer some of PN's funds to a limited liability company called Dimension Securities.[4] Tucker further claims that PN authorized him to transfer the funds because PN had agreed to invest the $4,500 in Dimension Securities. Tucker never transferred PN's funds to Dimension Securities or engaged in any day trading with

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[3] OGC requested that Tucker provide a report from his physician detailing Tucker's condition and treatment—as well as the reason why Tucker was unable to attend the May 3, 2013 oral argument. OGC also asked that this report identify a date when Tucker would be able to participate in oral argument. OGC informed Tucker that he must provide this information by May 29, 2013, or the Subcommittee would conclude that the respondent had abandoned his request for oral argument.

[4] Tucker described Dimension Securities as "a trading firm that allows one to trade securities as well as allows one to leverage money at a higher rate than a broker dealer." He also referenced a holding company called "Star Alliance," which he described as the "same company" as Dimension Securities. The investment in Dimension Securities apparently involved day trading and what the Hearing Panel described as an "alternative trading platform."

Dimension Securities. Moreover, PN testified that he did not recall having any conversation with Tucker about Dimension Securities or day trading.[5]

Tucker also claims that BR Company's compliance director, Mitch Halpern ("Halpern"), knew about and gave Tucker permission orally to transfer PN's funds to Tucker's checking account. At the hearing, Tucker testified that he notified Halpern of the transfer during a conversation in which Halpern gave Tucker his "blessing" to make the transfer and also gave Tucker permission to sign Tucker's name (in place of Halpern's name) on the manager approval line of the wire transfer form.[6] Halpern testified that he did not give Tucker permission to sign the wire transfer form—orally or otherwise.

There is additional evidence in the record that Tucker's transfer of PN's funds to Tucker's checking account was unauthorized. As a safeguard against unauthorized transfers of customer funds, BR Company's sole fax machine automatically sent copies of all outgoing faxes to an email box that the Firm's compliance department reviewed. Tucker circumvented this safeguard, however, by using a fax machine from a "candy and cigar" store a few blocks from the firm to fax the wire request transfer to BR Company's clearing firm. BR Company's compliance department was therefore unaware of the transfer until PN made a verbal complaint on January 22, 2009—approximately one month after the transfer.

B. Conversion and Commingling of Customer Funds[7]

As instructed, on December 22, 2008, BR Company's clearing firm wired $4,500 from PN's account to Tucker's checking account. Prior to the deposit of PN's funds, Tucker's account had a negative balance of $65.10. Over several days in late December 2008, Tucker withdrew $3,900 in cash and used the debit feature of the checking account to pay for several personal expenditures, including a purchase at Tucker's gym, an automated payment to Tucker's cell phone carrier, and a purchase of a transportation fare card. During this time, the deposit of

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5 PN testified by telephone. On cross examination, Tucker asked PN if he could have possibly received literature from Dimension Securities or Star Alliance. PN stated that "I guess anything can happen," but said he did not recall receiving any literature and there was no evidence in the record of PN receiving such literature. The Hearing Panel found that PN "credibly testified that he could not recall any discussions about the use of an alternative trading platform." PN also testified that he did not give Tucker the authority to withdraw the funds.

6 It is undisputed that Tucker signed the wire transfer form as a BR company manager, even though he is not, and has never been, a manager. During FINRA's investigation, Tucker first claimed that no one at the Firm was involved in the transfer, but that he left a voicemail about the transfer with Halpern. Tucker then claimed that he spoke with Halpern, but could not recall any of the details of the conversation.

7 The facts associated with Tucker's conversion of PN's funds and Tucker's commingling of PN's funds with Tucker's checking account are essentially the same.

PN's funds was the only deposit made in Tucker's checking account. By December 31, 2008, Tucker's checking account had a negative balance of $103.33.

After PN's verbal complaint to BR Company regarding the unauthorized transfer, the Firm confronted Tucker. Tucker told the Firm that he would "fix it," and he arranged for a close personal friend, DA, to repay PN.

IV. Discussion

A. Improperly Approving a Wire Transfer of Customer Funds

FINRA Rule 2010 requires a registered person to observe high standards of commercial honor and just and equitable principles of trade in the conduct of that person's business.[8] Tucker improperly approved a wire transfer of PN's funds to Tucker's checking account by falsifying the wire transfer form to give the appearance that Tucker was a manager at BR Company. Using a false document to improperly approve a wire transfer is unethical and is a violation of FINRA Rule 2010.[9] It is undisputed that Tucker was not a manager at BR Company. It is also undisputed that BR Company required a wire request form for the transfer of customer funds to a third party. Under the Firm's procedures, this wire request form had to be signed by both the registered representative making the request and a BR Company manager.

Here, Tucker admits that he signed the wire transfer form as a manager—creating a document that was false on its face. This false document also facilitated the transfer of $4,500 from PN's account to Tucker's personal checking account. Tucker, however, testified that Halpern was aware of the $4,500 transfer and that Halpern gave Tucker permission for the transfer. The Hearing Panel did not find this testimony credible and we see no basis for rejecting this determination.[10] In fact, there is no support in the record for Tucker's claim that Halpern

[8] *Dante J. DiFrancecso*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *2 n.2 (Jan. 6, 2012).

[9] *Cf. Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22-23 (Aug. 22, 2008) (finding that applicant's submission of false information to his member firm violated NASD Rule 2110, the predecessor to FINRA Rule 2010). FINRA Rule 0140(a) makes FINRA Rule 2010 applicable with equal force to members and their associated persons. On December 15, 2008, NASD Rule 2110 was adopted as FINRA Rule 2010, and NASD Rule 0115(a) was adopted (with minor, non-substantive changes) as FINRA Rule 0140(a). *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *2 (Apr. 18, 2013) (citing *FINRA Notice to Members 08-57*, 2008 FINRA LEXIS 50, at *30-32 (Oct. 2008)).

[10] *See Midas Sec. LLC*, Exchange Act Release No. 66200, 2012 SEC LEXIS 199, at *53 n.72 (Jan. 20, 2012) (stating that "[i]t is well settled that credibility determinations of an initial fact finder are entitled to considerable weight" and concluding that a Hearing Panel's credibility determinations "can be overcome only where the record contains 'substantial evidence' for doing so") (citations omitted).

authorized the transfer of PN's funds to Tucker's account—other than Tucker's own testimony which the Hearing Panel rejected in favor of Halpern's credible testimony.[11]

Under these facts, we affirm the Hearing Panel's determination that the Firm did not authorize Tucker to transfer PN's funds to his own account.[12] Accordingly, we find that Tucker's improper approval of a funds transfer violated FINRA Rule 2010.

B. Conversion of PN's Funds

NASD 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." "[I]mproper use rises to the level of conversion 'when the associated person intends permanently to deprive the customer of the use' of his funds or securities."[13] Here, Tucker intended to permanently deprive PN of $4,500.[14]

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11 For example, there is no documentary evidence that supports Tucker's claim that Halpern authorized the transfer. In addition, the Hearing Panel found that Halpern credibly testified that Tucker never asked him to approve the transfer. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1161-62 (2002) (deferring to FINRA's credibility findings where FINRA concluded below that witness was more believable than the applicant, the record supported the witness' version of events, and the record also contained "no substantial contrary evidence"). Finally, Tucker's testimony at the hearing on the issue of how Halpern authorized the transfer does not align with his testimony on this issue that he gave during FINRA's investigation. *See Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *24-25 (Apr. 26, 2006), *aff'd*, 235 Fed. App'x 475 (9th Cir. 2007) (finding that FINRA's determination that the applicant lacked credibility was supported by record evidence that his testimony in the early stages of FINRA's investigation differed from his testimony at the hearing).

12 Tucker argues that Halpern must have approved of the transfer because it is unlikely that an experienced manager like Halpern could have allowed Tucker's conduct to go undetected. This argument is nonsensical and we reject it. This argument is particularly spurious in light of the fact that Tucker made significant efforts to prevent Halpern and BR Company from detecting Tucker's actions—including Tucker's use of a fax from a nearby retail store to execute the wire transfer instead of the Firm's fax machine.

13 *Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *21 (FINRA NAC Feb. 24, 2011), *aff'd*, 2012 SEC LEXIS 464 (Feb. 10, 2012); *see also Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *20-21 (Dec. 7, 2010) (finding applicants converted customer property where applicants "not only intended to permanently deprive their customers of their property, but did, in fact, deprive their customers of their property. . . .").

14 Tucker deprived PN of the $4,500 by spending PN's money on Tucker's personal expenses almost immediately. Tucker did not repay PN until PN complained to BR Company—approximately one month later. Moreover, Tucker did not repay PN with Tucker's own funds.

[Footnote continued on next page]

Tucker accomplished this by using a false document to cause BR Company to transfer money from PN's account at the Firm to Tucker's checking account. Thereafter, Tucker spent the money on personal expenses. Tucker had no authority to make this transfer.[15] In fact, there is no evidence in the record that Tucker ever told PN about the transfer of the funds.[16]

Tucker's taking of PN's money was intentional as evidenced by the fact that he took several steps, including using an outside fax machine that could not be monitored by the Firm, to accomplish the unauthorized transfer of PN's money to Tucker's personal checking account. There is also no evidence in the record showing that Tucker had any ownership rights in or was entitled to PN's cash. Consequently, we find that Tucker violated NASD Rule 2330(a) and FINRA Rule 2010 by converting PN's cash for Tucker's own benefit.[17]

C. Comingling of PN's Funds

A broker's commingling of customer funds with his own personal funds is conduct inconsistent with FINRA's high standards of commercial honor and just and equitable principles of trade. *See Henry E. Vail*, 52 S.E.C. 339, 342 (1995), *aff'd*, 101 F.3d 37 (5th Cir. 1996) (sustaining FINRA's finding that the applicant violated FINRA's high standards of commercial honor and just and equitable principles of trade where the applicant, who was a treasurer for a political club, commingled his and the club's funds for the sake of his own personal convenience); *cf. Peter Paul Glagola*, 47 S.E.C. 290 (1980) (finding that applicant "engaged in

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[cont'd]

Instead, he persuaded a friend to repay PN. Under these facts, we find that Tucker intended to permanently deprive PN of the transferred funds.

15 The record does not support Tucker's claim that PN authorized him to invest the $4,500 in an "alternative trading platform" relating to Dimension Securities or Star Alliance. PN testified that he did not recall discussing any alternate trading platform with Tucker. In addition, PN complained to the Firm about the transfer of funds promptly after discovering the unauthorized withdrawal from his account. Moreover, Tucker never moved the funds into another investment related to Dimension Securities or Star Alliance. Instead, Tucker used PN's funds to pay for personal expenses almost immediately after the transfer.

16 Tucker testified that he did "not recall" telling PN about the transfer of PN's funds to Tucker's checking account. Moreover, PN testified that he would never grant Tucker authority to withdraw funds from his account for Tucker's personal benefit.

17 The fact that Tucker arranged for a friend to reimburse PN *after* the Firm discovered Tucker's misconduct does not alter this conclusion. *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1225-26 (1994) (finding that representative converted customer funds even though representative repaid those funds after his firm discovered the misconduct).

conduct inconsistent with just and equitable principles of trade by . . . commingling [a] customer's funds with those of his wife, and converting the customer's funds to his own use").

Here, it is undisputed that Tucker transferred PN's funds into his personal checking account and used the funds to pay for his personal expenses. As noted above, we do not find that Tucker had authorization from PN to use these funds and that he converted these funds. The evidence to support that Tucker commingled a customer's funds is exactly the same evidence that proves that he converted a customer's funds. Given our finding of conversion, however, we find it unnecessary to consider whether Tucker also commingled PN's customer's funds with his own funds.

Accordingly, we dismiss the allegation that Tucker commingled PN's funds with his own funds in violation FINRA Rule 2010.

D. Tucker's Procedural Arguments Have No Merit

On appeal, Tucker makes several procedural arguments that imply he was prejudiced during the proceedings. We find none of these arguments persuasive and discuss the rationale for our conclusions below.

First, Tucker argues that because PN testified by telephone, Tucker did not have "a true and meaningful cross examination." The record shows otherwise. There are roughly twenty-two pages of testimony from PN—about ten of those pages reflect Tucker's cross examination of PN. Moreover, telephone testimony is not uncommon in FINRA proceedings, and the Commission has repeatedly upheld FINRA's reliance on telephone testimony in reaching its decisions. *See, e.g., Daniel Joseph Alderman*, 52 S.E.C. 366, 368 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997) (table format). Finally, Tucker has not made it clear what specific prejudice he may have experienced due to PN's telephone testimony. Thus, we do not find his argument that he was prejudiced by this testimony to be persuasive.[18]

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[18] Tucker also asserts that he was damaged because of purportedly false testimony by a FINRA examiner named Christopher Sealey ("Sealey"). Tucker claims that Sealey lied under oath regarding the details of a visit Sealy made to Star Alliance. There is, however, no evidence in the record that supports this claim.

Tucker further claims he was damaged when the Hearing Panel would not allow Tucker to recall Sealey to the stand. There is no evidence in the record that this occurred. The record does show, however, that Tucker wanted to ask "one other question" to a BR Company compliance officer named Thomas Murphy ("Murphy") after Murphy had been excused. The Hearing Officer did not allow Tucker to recall Murphy as a witness because Murphy had already left the hearing. Prior to this, Tucker had a full opportunity to cross-examine Murphy. Tucker has offered no explanation as to how his inability to recall Murphy prejudiced Tucker in any way. Consequently, we reject Tucker's argument that he was damaged by being denied the opportunity to recall Sealy (or Murphy) to testify.

Next, Tucker asserts that his physical condition on the day of the hearing prevented him from effectively representing himself. The evidence in the record does not support this assertion. First, Tucker did not provide any evidence substantiating his claims of health problems so severe that he could not participate effectively in the hearing.[19] To the contrary, the record shows that over the course of the two-day hearing, Tucker competently engaged in cross-examination, provided testimony, and made legal arguments. Moreover, at the end of the first day of the proceeding, the Hearing Officer specifically remarked that Tucker had been "fully engaged and able to participate in the hearing and ha[d] asked good questions." The Hearing Officer further noted that the Hearing Panel agreed with this assessment of Tucker's level of engagement. Under these facts, we do not find that Tucker's physical condition on the day of the hearing precluded him from effectively representing himself.

Finally, Tucker implies that he was at a disadvantage because no one called a witness from his bank, Signature Bank. Tucker, however, has not specified what evidence he was seeking from such a witness, other than to state that the witness could have provided additional evidence that "maybe there was some truth to [Tucker's] claim of the trading program, etc." Tucker has not shown that he was prejudiced in any way and also had the opportunity to call witnesses from his bank, but failed to do so. We find no disadvantage or prejudice to Tucker from his own inaction in this regard. *See Thomas E. Warren III*, 51 S.E.C. 1015, 1020 (1994), *aff'd*, 69 F.3d 549 (10th Cir. 1995) (table format) (discussing how the applicant cannot complain that his hearing was unfair because he did not call certain witnesses at the hearing).

V. Sanctions

The Hearing Panel barred Tucker, imposing a unitary sanction for his misconduct.[20] We find that Tucker's conduct was egregious and that a bar is an appropriate sanction to protect the investing public and deter others from engaging in such misconduct.

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[19] On the day of the hearing below, Tucker submitted a doctor's note. The note stated that Tucker was under his doctor's care for hypertension and dizziness caused by stress and that Tucker should avoid "extra stress." The note did not state that Tucker was medically precluded from participating in the hearing and did not identify an alternative date as to when Tucker would be able to participate in the hearing. Tucker also claims that he had surgery the day after the hearing, but provided nothing to substantiate this claim.

[20] *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 24, 2005) (stating that "[w]here multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve [FINRA's] remedial goals") (citation omitted), *aff'd*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005). We also find that a unitary sanction is appropriate here because Tucker's violations all relate to his conversion of funds from PN's account.

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanction for Tucker's violations.[21] The Guidelines governing sanctions for conversion recommend a bar regardless of the amount converted.[22] There is no sanction guideline for the improper approval of a funds transfer. In this case, however, Tucker used a false document to initiate the improper approval and we consider the Guideline for the falsification of records to be analogous. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *42 (June 14, 2013) (noting that "[t]he Guidelines state that, where there is no specific guideline for a violation, it is appropriate to consider those [guidelines] for analogous misconduct . . . .") (citation omitted). For falsification of records, the Guidelines recommend a suspension in any and all capacities for up to two years in cases where mitigating factors exist. The Guidelines also recommend that adjudicators consider: (1) the nature of the documents forged or falsified; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[23] For falsification of records, the Guidelines further recommend a fine of $5,000 to $100,000 and also state that a bar should be considered in egregious cases.[24]

We also have considered the Principal Considerations in Determining Sanctions.[25] Upon consideration, we find that there are several aggravating factors and no mitigating factors associated with Tucker's misconduct.

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[21] *FINRA Sanction Guidelines* (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].

[22] *Id.* at 36.

[23] *Guidelines*, at 36. We find that there are no mitigating factors in the record that are associated with Tucker's misconduct. With regard to his improper approval of a transfer of funds, we find that the wire transfer forms were extremely important in that the misuse of these forms could lead to the conversion of customer funds. Indeed, BR Company had procedures in place—which Tucker circumvented—to prevent the misuse of this very significant form. Tucker claims that he had authority to sign the form as a manager and that Halpern gave him authority to sign the form. Tucker, however, produced no corroboration of a grant of such authority from Halpern. Moreover, Tucker offered conflicting and non-credible versions of how Halpern granted this purported authority. In contrast, the Hearing Panel found that Halpern testified credibly that he did not grant Tucker such authority.

[24] *Id*. at 37.

[25] *Id*. at 6-7.

First, we find it aggravating that Tucker's misconduct harmed the customer by depriving the customer of $4,500.[26] We also find it aggravating that Tucker's misconduct was intentional in that he deliberately completed a false document stating that he was a manager—allowing him to improperly transfer funds from PN's account without authorization.[27] Tucker also tried to conceal his actions from BR Company by faxing the false document from a candy and cigar store rather than the Firm's offices.[28] Tucker's misconduct also provided him with monetary gain in the form of the $4,500 that he transferred from PN's account and spent on personal expenses.[29] Tucker has not accepted responsibility for his misconduct; instead, he blames others at BR Company and questions the effectiveness of the Firm's procedures.[30] Finally, we find it aggravating that Tucker has a prior disciplinary history.[31]

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26 *Id*. at 6 (Principal Considerations in Determining Sanctions, No. 11) (adjudicators should consider whether the respondent's misconduct resulted in injury to the investor).

27 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 13) (adjudicators should consider whether the respondent's misconduct was intentional).

28 *Id*. at 6 (Principal Considerations in Determining Sanctions, No. 10) (adjudicators should consider whether an individual attempted to conceal his or her misconduct from their firm).

29 *Id*. at 7 (Principal Considerations in Determining Sanctions, No. 17) (adjudicators should consider whether the respondent's misconduct resulted in the potential for monetary or other gain).

30 *Id*. at 6 (Principal Considerations in Determining Sanctions, No. 2) (adjudicators should consider whether an individual accepts responsibility for and acknowledged the misconduct).

31 *Id*. (Principal Considerations in Determining Sanctions, No. 1) (adjudicators should consider the respondent's relevant disciplinary history). In November 2012, the Commission affirmed FINRA findings that, during the course of seven years, Tucker failed to disclose on the Forms U4 he completed for 11 employers three judgments, two bankruptcies, a federal tax lien, and a state tax lien. *See Robert D. Tucker,* Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *1 (Nov. 9, 2012). For this misconduct, FINRA suspended Tucker from associating with any FINRA member in any capacity for two years and required that, at the conclusion of his suspension, he re-qualify as a corporate securities limited representative, and the Commission affirmed these sanctions. *Id*. at *2. Because Tucker's misconduct involved a willful failure to disclose material information, Tucker became statutorily disqualified from future association with FINRA member firms. *Id*. The Commission affirmed the sanctions that FINRA imposed. *Id*. at *69.

Taking all these factors into account, we find that Tucker's misconduct was egregious and that a bar is an appropriate sanction for his violations.[32] Moreover, the bar serves to deter others from engaging in such egregious misconduct. *Cf. Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *85-86 (Dec. 10, 2009) (upholding bar imposed against the applicant and stating that the bar would "[deter] others from engaging in the same serious misconduct").

In determining sanctions, we have also considered the potentially mitigating factors in the record.[33] Tucker does not make any arguments for mitigation on appeal, and we find that there are no mitigating factors supported by the record that militate against imposing a bar for Tucker's violations.[34] Moreover, a bar will serve to protect investors and prevent the recurrence of Tucker's egregious misconduct by denying him access to customer funds. After reviewing the record, we find that there are significant aggravating factors and a lack of mitigating factors that justify a bar for Tucker's violations.[35]

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[32] Although we impose a unitary sanction of a bar for Tucker's individual violations involving his improper transfer of customer funds and conversion of customer funds, we find that under the Guidelines each individual violation is egregious and would justify a separate bar if evaluated independently.

[33] We do not consider Tucker's claimed illness to be mitigating. There is nothing in the record that Tucker's medical condition influenced him in any way during the specific period of his misconduct or during the hearing below.

[34] On appeal, Tucker merely states that he "takes exception to [the] FINRA ruling of a [b]ar and any aggressive [s]anctions from this [h]earing."

[35] We note that the Hearing Panel decision made reference to the fact that PN was "a retired World War II veteran in his eighties," but in determining sanctions did not make any specific findings regarding PN's level of sophistication. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 2) (adjudicators should consider the level of sophistication of the injured or affected customer). Tucker claims that the Hearing Panel decision gives the impression that PN was not astute or was taken advantage of by Tucker because of PN's advanced age. We find nothing in the record to support this claim. Moreover, it is irrelevant; we do not consider the mere fact that PN was over 80 years old at the time of the misconduct—standing alone—to be an aggravating factor in our sanctions determinations.

VI. Conclusion

We find that Tucker: (1) improperly approved a transfer of customer funds to his personal checking account, in violation of FINRA Rule 2010; and (2) converted those funds, in violation of NASD Rule 2330 and FINRA Rule 2010. For these violations, we bar Tucker in all capacities. Finally, we affirm the Hearing Panel's order that Tucker pay hearing costs of $3,087.15, and we impose appeal costs of $1,070.04 (consisting of a $750 administrative fee and $320.04 in transcript costs).[36] The bar is effective upon service of this decision.

Comment [DG2]: Please add boilerplate to FN from p. 13 of Style Guidelines re: Rule 8320.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith, Senior Vice President and Corporate Secretary

[36] We have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, any member that fails to pay any 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.