FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN EDWARD MULLINS (CRD No. 1007176), and KATHLEEN MARIA MULLINS (CRD No. 2790621), Respondents.	Disciplinary Proceeding Nos. 20070094345 20070111775 Hearing Officer — MC **HEARING PANEL DECISION** **August 25, 2009**

Respondent John Edward Mullins ("J. Mullins") is barred from associating with any FINRA member firm in any capacity for misusing customer funds, in violation of Conduct Rules 2110 and 2330(a), converting customer property, and violating his fiduciary obligations, in violation of Conduct Rule 2110. J. Mullins is not liable for attempting to convert funds from his FINRA member firm employer, in violation of Conduct Rule 2110. In light of the bar, no additional sanctions are imposed for material misstatements made by J. Mullins to his FINRA member firm employer on annual compliance questionnaires, in violation of Conduct Rules 2110 and 3110, or for borrowing funds from a customer without the approval of his employer firm, in violation of Conduct Rules 2110 and 2370.

Respondent Kathleen Maria Mullins ("K. Mullins") is suspended in all capacities from associating with any FINRA member firm for six months and fined $15,000 for making material misstatements to her FINRA member firm employer on annual compliance questionnaires, in violation of Conduct Rules 2110 and 3110. Furthermore, K. Mullins is suspended in all capacities from associating with any FINRA member firm for an additional three months, and fined an additional $5,000, for borrowing funds from a customer without the approval of her employer firm, in violation of Conduct Rules 2110 and 2370. Finally, K. Mullins is ordered to requalify by examination before again becoming registered in any capacity in the securities industry.

The Respondents are assessed hearing costs.

Appearances

Richard R. Best, Director, and Scott M. Andersen, Director, New York, NY, for the Department of Enforcement.

Norman B. Arnoff, Esquire, Garden City, NY, for Respondent John Edward Mullins.

Frank P. Arleo, Esquire, West Orange, NJ, for Respondent Kathleen Maria Mullins.

DECISION

I. Introduction and Procedural History[1]

From June 28, 2002, until August 16, 2006, J. Mullins and his wife, K. Mullins (the "Respondents") were registered as General Securities Representatives with FINRA member firm Morgan Stanley DW Inc. ("Morgan Stanley" or the "Firm").[2] The Respondents were employed at the Firm's Northfield, NJ, branch office, where they operated the Mullins Group, which included another registered representative and two support persons.[3]

In late July 2006, J. Mullins met Salvatore Monastero ("S. Monastero"), the Firm's Philadelphia District Director, for lunch. The record does not disclose the topics discussed by J. Mullins and S. Monastero at their July 2006 lunch meeting. Immediately afterwards, however, S. Monastero called John D'Alessandro, the Northfield branch office manager, and asked D'Alessandro to review activity in the accounts of EW, an

[1] References to the testimony at the hearing are designated as "Tr. __." References to Enforcement's Exhibits are designated as "C-___." References to Respondent Kathleen Mullins' Exhibits are designated as "KM-_." No exhibits were received from Respondent John Mullins.

[2] C-139, ¶¶ 1-2.

[3] Tr. 1918.

elderly widow[4] who was a customer of the Respondents.[5] S. Monastero asked D'Alessandro to look for activity that would be "odd for a woman north of 90 years old."[6]

EW had 14 retail investment accounts in her name and one account for a charitable foundation ("Foundation account") in the name of EW and her deceased husband, PW.[7] D'Alessandro reviewed EW's account activity for the months of April, May and June 2006.[8] D'Alessandro discovered what he termed a "fair amount" of activity that struck him as odd for the elderly customer, including debit card and other expenditures at a Four Seasons Hotel and purchases totaling approximately $5,000 at an upscale clothier called Boyds Philadelphia ("Boyds").[9] D'Alessandro reported his findings to S. Monastero.[10] After further investigation by the Firm, the Respondents were placed on administrative leave. On August 16, 2006, the Firm terminated their employment.[11]

On February 14, 2008, FINRA's Department of Enforcement ("Enforcement") filed the initial Complaint against the Respondents in this disciplinary proceeding. Subsequently, on December 8, 2008, Enforcement filed an Amended Complaint with six

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[4] Born May 25, 1910, EW was then 96 years old. She died on February 2, 2008. C-40(b).

[5] Tr. 1925. All members of the Mullins Group serviced the accounts, regardless of who was designated as financial advisor on a particular account. Tr. 1928.

[6] Tr. 1929.

[7] C-129; Tr. 1933.

[8] Tr. 1933.

[9] Tr. 1935.

[10] Tr. 1936.

[11] Tr. 1963-1964.

Causes of Action, four alleging misconduct by J. Mullins and two alleging misconduct by both Respondents.

The first four Causes of Action of the Amended Complaint charge that J. Mullins: (i) made improper use of customer funds, in violation of Conduct Rules 2110 and 2330(a); (ii) in the alternative, converted customer funds, in violation of Conduct Rule 2110; (iii) attempted to convert funds from his FINRA member firm employer, in violation of Conduct Rule 2110; and (iv) breached fiduciary responsibilities he owed to a customer, in violation of Conduct Rule 2110. The Fifth Cause of Action of the Amended Complaint alleges that both Respondents failed to disclose, and misstated, material information on annual compliance questionnaires Morgan Stanley required them to complete, thereby causing the Firm to maintain inaccurate books and records, in violation of Conduct Rules 2110 and 3110. Finally, the Sixth Cause of Action of the Amended Complaint alleges that both Respondents borrowed funds from customer EW without approval from the Firm, in violation of Conduct Rules 2110 and 2370.[12]

In the Answer he filed to the Amended Complaint, J. Mullins denied the misconduct alleged solely against him as well as the violations alleged jointly against him and K. Mullins. In her Answer to the Amended Complaint, K. Mullins denied committing the violations alleged against her in the Fifth and Sixth Causes of Action.

Shortly before the hearing, each Respondent filed an "Evidentiary Stipulation," attesting to the authenticity and admissibility of Enforcement's proposed exhibits, and

[12] As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. The applicable rules are available at www.finra.org/rules.

"Factual Stipulations," consisting of numerous facts to which the parties agreed.[13] On April 30, 2009, J. Mullins filed a pleading captioned "Notice of Motion"[14] requesting that the hearing of this matter provide him with "a full and fair opportunity to present all evidence to fully explain the circumstances relating to the violations charged and his acceptance of liability in respect to the administrative charges made in this proceeding; to consider all evidence and argument in mitigation as well as all evidence and argument as to the appropriateness of the sanctions to be imposed." In an affidavit attached to the Notice of Motion, J. Mullins claimed that he accepted liability for all of the charges alleged in the Amended Complaint.

These filings were the subject of discussion at a Pre-Hearing Conference held on May 1, 2009, during the course of which counsel for J. Mullins stated, repeatedly, "We are not contesting liability"[15] and "We do accept liability."[16] Nonetheless, the parties concurred that their divergent inferences from the facts and evidence to which they stipulated would require testimony at the hearing from a number of witnesses.

An Extended Hearing Panel, composed of a former member of FINRA's District 8 Committee, a former member of FINRA's District 10 Committee, and the Hearing Officer, convened for seven days in Philadelphia, PA, commencing on May 4, 2009, to hear this matter. The Extended Hearing Panel bases the following findings of fact and

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[13] At the hearing, the Evidentiary Stipulation filed by J. Mullins was offered and received as C-137; an identical Evidentiary Stipulation, filed by K. Mullins, was offered and received as C-138. The document containing the factual stipulations filed by J. Mullins was offered and received as C-139, and an identical document filed by K. Mullins, was offered and received as C-140.

[14] The Notice of Motion had attached to it a copy of the Factual Stipulations and documents pertaining to a New Jersey Superior Court criminal proceeding against J. Mullins based upon his misuse of Foundation account funds.

[15] Pre-Hearing Conference Tr. 10.

[16] *Id.* at 14.

conclusions of law on its evaluation of the substance and credibility of the testimony of the witnesses called by the parties, including the Respondents, the extensive factual and evidentiary stipulations agreed upon by the parties, and the exhibits received into evidence in the course of the hearing.

II. Findings of Fact and Conclusions of Law

A. Respondents

J. Mullins first became employed in the securities industry on May 26, 1981. K. Mullins was first employed in the securities industry on February 1, 1993. Both Respondents registered as General Securities Representatives with Morgan Stanley on June 28, 2002, and worked at Morgan Stanley's Northfield, NJ, branch office until August 16, 2006.[17] On February 19, 2008, their registrations with FINRA were terminated.[18] The Respondents are not currently associated with any FINRA member firm. Because the Complaint was initially filed in this disciplinary proceeding while the Respondents were still registered, and because the misconduct alleged in the Complaint occurred while the Respondents were registered through a FINRA member firm, FINRA retains jurisdiction over them pursuant to Article V, Section 4 of FINRA's By-Laws.

B. Customer EW and the Foundation

J. Mullins testified that his relationship with EW commenced in 1981 when, as an employee of another FINRA member firm, he was handed a stack of old account cards and called PW, EW's husband.[19] J. Mullins and PW discovered they shared an interest in

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[17] C-139, ¶¶ 1, 2.

[18] *Id.*, ¶ 5.

[19] Tr. 1344.

music.[20] J. Mullins described the relationship with EW and PW as one that evolved quickly into a social relationship in which they saw each other at least weekly and spent a great deal of time dining out and attending concerts.[21] K. Mullins, too, described the relationship as one that began as a business relationship and developed into a personal relationship in which PW and EW sought the advice of the Respondents not just on business matters but on a wide variety of personal matters, such as the medications they were being prescribed.[22] The Respondents also serviced investment accounts held by EW and PW.[23]

Beginning in 1992, J. Mullins began suggesting that EW and PW consider forming a charitable foundation to promote the appreciation of music.[24] J. Mullins discussed creating the foundation with PW and EW over a period of years.[25] On December 16, 1999, shortly after PW's death, EW established the EW and PW Foundation, Inc. as a non-profit corporation under Section 501(c)(3) of the Internal Revenue Code to receive and administer funds for the benefit of charities devoted to the promotion of the musical arts.[26] The Respondents, along with EW, were named Trustees of the Foundation.[27] Upon EW's death, J. Mullins was to become president of the

[20] Tr. 1345.

[21] Tr. 1345-1346.

[22] Tr. 650-651.

[23] Tr. 1347.

[24] Tr. 1349-1351.

[25] Tr. 1349.

[26] C-139, ¶ 6.

[27] *Id.*, ¶ 7.

Foundation, and K. Mullins the secretary.[28] J. Mullins testified that the purpose of the Foundation account was to be the conduit for EW's charitable gifts.[29]

EW wrote all the checks on the Foundation account,[30] although she often gave J. Mullins signed checks and subsequently instructed him to fill in the amounts before sending them to various recipients.[31] The Respondents saw to it that the account always contained sufficient funds to cover EW's checks by moving funds from EW's other accounts as needed.[32] According to J. Mullins, the Respondents were not paid for the work they did for the Foundation over the years.[33]

After PW died, the Respondents and EW became even closer, to the point that one or both of the Respondents saw EW virtually every day of the week, to run errands, entertain, attend events and dine together.[34] J. Mullins testified that the Respondents "were like her two children, her grandchildren. I mean, she came to us for absolutely everything."[35]

In her Last Will and Testament ("Will"), executed on August 29, 2000, EW bequeathed a condominium in Philadelphia and $25,000 in cash to the Respondents.[36] In

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[28] Tr. 1355-1356.

[29] Tr. 1355.

[30] *Id.*

[31] Tr. 1358.

[32] Tr. 1355.

[33] Tr. 1361.

[34] Tr. 1365-1367.

[35] Tr. 1365.

[36] C-139, ¶ 10.

the Will, EW appointed K. Mullins as co-executor and co-trustee, and named J. Mullins as successor co-executor and successor co-trustee.[37]

In 2006, EW resided in an apartment at an assisted living facility and nursing home.[38] On April 3, 2006, EW fell ill and was hospitalized until April 11, 2006,[39] when she was transferred to the third-floor medical unit of the nursing home, where she received 24-hour nursing care[40] for approximately a month.[41] K. Mullins testified at the hearing that in April and May 2006, EW was "sick," her blood pressure was out of control, she was experiencing severe nose bleeds, and her blood oxygen level was at a dangerous level.[42]

It was during this period that J. Mullins embarked on his misuse and conversion of Foundation funds.

C. Violations

1. J. Mullins Misused Foundation Funds: First, Second and Fourth Causes of Action of the Amended Complaint

The first four Causes of Action of the Amended Complaint are directed against J. Mullins alone. The First, Second, and Fourth Causes of Action are closely related.

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[37] *Id.,* ¶ 11; CX-35. EW appointed attorney Raymond Beebe and K. Mullins as co-executors and co-trustees. J. Mullins was to succeed either Beebe or K. Mullins in the event of either's resignation, death or incapacitation.

[38] Tr. 326-327, 330.

[39] Tr. 333-334.

[40] C-139, ¶¶ 34-35. In an on-the-record interview on April 3, 2007, J. Mullins described the third floor as the location at which a resident of the nursing home would be placed when "you are on your way out the door to a pine box." C-124, pp.186-187. K. Mullins characterized the medical floor as the nursing home's equivalent of a "rehab center" and testified that when EW was placed there on her release from the hospital, she was in a "weakened condition" and received therapy but was alert, talkative and "her old self, personality-wise." Tr. 642-643.

[41] Tr. 343-344.

[42] Tr. 331-338. EW remained on the third floor for approximately a month before her condition improved Tr. 343-344.

These three Causes of Action concern the same conduct, consisting of J. Mullins' alleged misappropriation of Foundation funds, by using Four Seasons Hotel and Boyds gift certificates purchased with Foundation money for his own use and benefit, and by using Foundation funds to purchase wine for himself. The Third Cause of Action alleges that J. Mullins, in unrelated conduct, attempted to convert Firm funds.

The First Cause of Action alleges that J. Mullins knowingly, intentionally and without authorization misused Foundation funds by diverting the funds to his own purposes in violation of Conduct Rules 2110 and 2330(a). The Second Cause of Action alleges, in the alternative, that J. Mullins' misuse of the same Foundation funds violated Conduct Rule 2110 because it was inconsistent with the Rule's requirement that associated persons observe "high standards of commercial honor and just and equitable principles of trade." The Fourth Cause of Action alleges that J. Mullins' misuse of the same Foundation funds breached his fiduciary duties to the Foundation, also in violation of Conduct Rule 2110. Because the three Causes of Action are so interrelated, the Hearing Panel considered them together.

The evidence shows, and J. Mullins concedes, that his misuse of Foundation funds began after he purchased a number of gift certificates redeemable at Boyds and at Four Seasons Hotels. He claimed in testimony that all of the gift certificates were purchased on behalf of the Foundation, with EW's approval, and with the intent to sell the gift certificates in "silent auctions" for the Foundation to fund "multiple charities and foundations, scholarships."[43] J. Mullins explained that he selected the Four Seasons Hotel gift certificates "in part, because that's one of [EW's] favorite places."[44] He did

[43] Tr. 1372-1373.

[44] Tr. 1374.

not explain why he selected Boyds for additional gift certificates to sell at the silent auctions.

a. The Four Seasons Hotel Gift Certificates

On April 14, 2006, J. Mullins used a check drawn on the Foundation account at Morgan Stanley to purchase Four Seasons Hotel gift certificates totaling $11,000.[45] The check, dated April 12, 2006,[46] was made out by him to "Four Seasons," and signed by EW.[47]

J. Mullins testified that, in May 2006, the day before the Respondents left for a London vacation where they were to stay at a Four Seasons Hotel, he learned from a person at a lunch that he attended with EW and others that it would be less expensive for him to use hotel gift certificates than to use his credit card for the stay.[48] J. Mullins testified that he informed EW he would use some of the Foundation's Four Seasons Hotel gift certificates for the vacation, and that she approved.[49] He then took some of the gift certificates to London, "fully intending" to pay for them on his return.[50] He spent $4,000 worth of the gift certificates for the Respondents' stay at the Four Seasons Hotel in London from May 24-28, 2006.[51] The trip was entirely unrelated to Foundation business.[52]

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[45] C-139, ¶ 36.

[46] EW was hospitalized until April 11, 2006, when she was moved to the medical floor of her nursing home. C-139, ¶ 35.

[47] C-97, p. 4; C-64.

[48] Tr. 1374-1375, 1505-1506.

[49] Tr. 1375.

[50] *Id.*

[51] C-139, ¶ 37; C-67 (Four Seasons Hotel London bill).

[52] *Id.*, ¶ 38.

Although he testified that he intended to pay for replacement hotel gift certificates on his return, J. Mullins did not, claiming that he "got stupid and sloppy" and simply neglected to do so.[53]

In fact, J. Mullins failed to replace the Four Seasons Hotel gift certificates for over a year. He testified that in July 2007, in preparation for returning some other property belonging to EW, he found the remaining $7,000 in Four Seasons Hotel gift certificates and "realized" he had not paid for those he had used in London.[54] He testified that he drove to Philadelphia on the July 4 weekend, "the worst drive that you can have," bought $4,000 in Four Seasons Hotel gift certificates, and gave them, together with the $7,000 worth of remaining original certificates, to EW's attorney.[55] This was approximately ten months after he had been dismissed by Morgan Stanley, and after he became aware that FINRA had commenced its investigation into his misuse of Foundation funds.[56]

b. The Boyds Gift Certificates

On April 15, 2006, while EW remained under 24-hour medical care, J. Mullins used the Foundation account debit card to purchase eight gift certificates, for a total of $3,000, from Boyds, where he had a personal account.[57] He used the Foundation debit card once more on June 25, 2006, to purchase an additional $2,500 Boyds gift

[53] Tr. 1375.

[54] Tr. 1376-1379. J. Mullins testified this occurred when he was preparing to return a piano belonging to EW and went through the piano's bench seat where he found the unredeemed gift certificates. A receipt, however, prepared by EW's lawyer, Raymond Beebe, documenting the return of the gift certificates, is dated June 26, 2007. C-65, p. 14.

[55] Tr. 1378.

[56] Tr. 1376-1377.

[57] C-139, ¶ 45.

certificate.[58] J. Mullins testified that he bought the Boyds gift certificates at the instruction of EW.[59] They were intended to be sold, like the Four Seasons Hotel gift certificates, at silent auctions to raise money for charities.[60] Instead, on April 19, April 25, and July 12, 2006, J. Mullins redeemed the entire $5,500 worth of gift certificates for his personal clothing purchases at Boyds.[61]

J. Mullins replaced the Boyds gift certificates when he purchased the replacement Four Seasons Hotel gift certificates, in June 2007, and submitted them to EW's attorney.[62]

c. The Wine at Morton's Restaurant

In addition to purchasing the gift certificates, J. Mullins used the Foundation account debit card on May 8, 2006, to purchase 23 bottles of wine at Morton's Restaurant in Atlantic City, NJ, for a total cost of $1,656.47.[63] He had the bottles stored in his personal wine locker at the restaurant, to which only he had access.[64] J. Mullins implied in his testimony that he bought the wine, with EW's consent, because she and her husband "loved wine," and it was to be used for dinners at Morton's, which was EW's "favorite restaurant," where he and EW dined often on Foundation business.[65] The

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[58] *Id*, ¶ 48.

[59] Tr. 1374.

[60] *Id*.

[61] C-139, ¶¶ 46, 47, 49. As one of the Hearing Panelists noted at the hearing, even though Boyds sells women's clothing as well as men's, none of the clothes purchased at Boyds with the Foundation's gift certificates were for K. Mullins. Tr. 1668; C-102.

[62] Tr. 1379.

[63] C-139, ¶ 39.

[64] *Id.*, ¶ 41. J. Mullins did not obtain a locker in the name of the Foundation to store the wine. Tr. 1380.

[65] Tr. 1379-1380.

purchase was prompted, he testified, by the fact that Morton's had a "special offer of a very good wine" at a discount, and EW agreed they should take advantage of it.[66] He claimed he stored the wine in his personal wine locker so that it would be there when EW "was no longer going to be in the picture," and he would use Morton's for Foundation dinner meetings.[67]

None of the wine was consumed at Foundation functions, however.[68] After purchasing the wine, he consumed several bottles, the first on August 15, 2006, the day before he was terminated by Morgan Stanley,[69] and the last on May 3, 2007, long after his relationship with the Foundation had ended.[70]

J. Mullins claimed that the wine he had purchased and stored at Morton's "absolutely had gone out of my mind" until he was questioned by New Jersey securities authorities on September 19, 2007.[71] As he described it, the New Jersey authorities "painted me into a corner" with questions about the wine.[72] It was then, like "a thunderbolt," that he realized he had done something wrong by paying for the wine with

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[66] Tr. 1380.

[67] Tr. 1380-1381.

[68] Tr. 1381.

[69] C-139, ¶ 1.

[70] *Id.*, ¶¶ 40-43.

[71] Tr. 1382. J. Mullins was deposed by investigators with the Bureau of Securities, New Jersey Department of Law & Public Safety, on September 19, 2007. C-127. In the deposition, J. Mullins claimed that the wine was purchased for the Foundation's use. *Id.*, p. 239. When initially asked if purchasing wine for his own purpose with Foundation money would be wrong, J. Mullins answered "Yes;" when asked if he would do such a thing, he said "No." *Id.*, p. 90.

[72] *Id.*

Foundation money and consuming some of it himself.[73] Shortly thereafter, he wrote a check to repay the Foundation for the wine.[74]

d. J. Mullins' Admissions

i. Hearing Testimony

There is no question that J. Mullins misused the funds of the Foundation. He stipulates to doing so.[75] Furthermore, at the hearing, he expressly admitted that he was liable for misusing Foundation funds by appropriating to his personal use gift certificates and the wine purchased with Foundation funds, as alleged in the First Cause of Action of the Amended Complaint.[76] Similarly, he testified that this misconduct also rendered him liable for the charge of conversion of customer property, as alleged in the Second Cause of Action of the Amended Complaint,[77] and for the charge that he breached his fiduciary duty to the Foundation, as alleged in the Fourth Cause of Action of the Amended Complaint.[78]

J. Mullins qualified his admissions, however. In his hearing testimony, he minimized his culpability by claiming that he had received EW's permission to make personal use of the Four Seasons Hotel and Boyds gift certificates, and the wine he purchased with Foundation money. He characterized his misconduct as a technical

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[73] *Id.*

[74] Tr. 1383. In his testimony before the New Jersey Bureau of Securities, J. Mullins said that returning the wine to the Foundation after his relationship with the Foundation ended was "one of the details I forgot." C-127, p. 243.

[75] C-139, ¶¶ 36-43, 45-49.

[76] Tr. 1369-1372.

[77] Tr. 1387-1388.

[78] Tr. 1391-1392.

oversight in that he failed to obtain, in advance, a resolution from the board of the Foundation authorizing him to spend the Foundation's money for his own purposes:

> 18 On the gift certificates, I -- and the wine, I had
> 19 used some of those for personal use and failed to
> 20 have a corporate resolution in place for the
> 21 foundation giving me permission to do so, even though
> 22 I had Esther's permission.
> 23 Q You said you had Esther's permission?
> 24 A Yes, sir.
> 25 Q But you didn't have the position --
> 1
> 2 the -- the permission that you were required to have
> 3 in order to use it; true and correct?
> 4 A True and correct.[79]

J. Mullins also testified that his offenses resulted from getting "sloppy" and failing to maintain a distinction between EW "the client" and EW "the family member."[80] He also blamed Raymond Beebe, the Foundation's attorney, for failing "to tell us what we should and shouldn't do … and then we wouldn't have been in this situation."[81]

ii. The Guilty Plea

Before the Superior Court of New Jersey, however, on December 23, 2008, when he entered a plea of guilty to misapplication of entrusted funds in the third degree, J. Mullins admitted unambiguously that he knowingly used $7,134 of Foundation monies for personal purposes that were unauthorized.[82] He specifically admitted that: (i) he was an officer of the Foundation and had a fiduciary relationship with it; (ii) he used

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[79] Tr. 1371-1372.

[80] Tr. 1388.

[81] Tr. 1561.

[82] C-133, pp. 6-8. The New Jersey criminal charges addressed only the misuse of EW and Foundation monies at Boyds and at Morton's Steak House, not the conversion of the Four Seasons Hotel gift certificates.

Foundation monies for unauthorized purposes; (iii) he was not authorized to use the Foundation debit card for personal use; and (iv) his use of the Foundation debit card and monies was not authorized by the Foundation. In his colloquy with the Court, J. Mullins acknowledged without qualification that his expenditure of Foundation monies for personal use was unauthorized and violated the criminal code of New Jersey. That conduct also violated applicable FINRA Rules of Conduct governing his relationship to the Foundation.

e. J. Mullins is Liable for Misusing Foundation Funds: First, Second, and Fourth Causes of Action of the Amended Complaint

Conduct Rule 2330(a) prohibits registered representatives from making improper use of customer funds. A violation of Rule 2330(a) also constitutes a violation of the fundamental obligation of registered representatives to respect high standards of commercial honor and just and equitable principles of trade imposed by Conduct Rule 2110.[83] Using customer funds improperly is a violation of the fundamental relationship between a registered representative and the customer, and "undermines the integrity of the securities industry."[84] Even when conversion of customer funds is not committed in connection with a securities transaction, it constitutes "unethical business-related conduct and calls into question [the respondent's] ability to fulfill his fiduciary duties in handling other people's money."[85]

[83] *Dist. Bus. Conduct Comm. v. Bernadette Jones,* No. C02970023, 1998 NASD Discip. LEXIS 60, at *8 (NAC Aug. 7, 1998).

[84] *Dist. Bus. Conduct Comm. v. Julie S. Westberry,* No. C07940021, 1995 NASD Discip. LEXIS 225 (NBCC Aug. 11, 1995).

[85] *Daniel D. Manoff,* Exch. Act. Rel. No. 46,708, 2002 SEC LEXIS 2684 (Oct. 23, 2002).

The Hearing Panel finds that the testimony and evidence presented at the hearing of this matter, including the various admissions of J. Mullins, clearly establish that J. Mullins: (i) improperly used Boyds gift certificates in the amount of $5,500 that he purchased with a Foundation debit card to pay for clothing for himself on April 19, April 25, and July 12, 2006, a period spanning three months; (ii) improperly used $4,000 worth of Four Seasons Hotel gift certificates, purchased with Foundation funds, to pay costs associated with the vacation he and K. Mullins took to London, England, in May 2006; and (iii) improperly used a Foundation debit card to purchase wine on May 8, 2006, for $1,656.47 for his personal use. These actions constitute improper use of customer funds, as alleged in the First Cause of Action of the Amended Complaint, in violation of Conduct Rules 2110 and 2330(a); conversion of customer property, as alleged in the Second Cause of Action of the Amended Complaint, in violation of Conduct Rule 2110; and a breach of his fiduciary duty to the Foundation, as alleged in the Fourth Cause of Action of the Amended Complaint, in violation of Conduct Rule 2110.

f. J. Mullins is Not Liable for Attempting to Convert Funds from His Member Firm Employer: Third Cause of Action of the Amended Complaint

i. The Seminar in Washington, D.C.

The Third Cause of Action of the Amended Complaint alleges that J. Mullins violated Conduct Rule 2110 by attempting to convert funds from Morgan Stanley by seeking reimbursement for hotel and other expenses related to a seminar that he and K. Mullins attended on behalf of the Foundation, for which he had been fully reimbursed by the Foundation.

From June 13, 2006, through June 17, 2006, the Respondents attended a seminar in Washington, D.C., sponsored by the American Institute of Certified Public

Accountants.[86] The seminar was designed for "Nonprofit Financial Executives and Practitioners that serve the nonprofit industry."[87] J. Mullins testified that EW was enthusiastic about his attending the seminar and decided in advance that the Foundation should pay the expenses.[88] His primary motivation for attending the seminar was his work for the Foundation, but J. Mullins testified that he had long been interested and involved in work for nonprofit organizations.[89] When asked if the training offered at the seminar related to Morgan Stanley, he replied "Not as a company, but as our industry, yes."[90]

ii. The Foundation Reimbursement

To obtain reimbursement for seminar expenses from the Foundation, J. Mullins made out a check[91] payable to himself, for $6,247, drawn on the Foundation account at Morgan Stanley, with the notation "Washington DC Seminar," that was subsequently signed by EW.[92] The check was reimbursement for the Respondents' round-trip, first-class airfare from Philadelphia, PA to Washington, D.C.,[93] for their lodging and meals at the Four Seasons Hotel in Washington, D.C., and for taxi fares, parking, registration, and

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[86] C-139, ¶ 51.

[87] C-107, p. 61.

[88] Tr. 1567-1568.

[89] Tr. 1566.

[90] Tr. 1568-1569.

[91] C-110.

[92] C-139, ¶ 53.

[93] C-107, pp. 3-8.

course fees.[94] The check was deposited into the Respondents' joint checking account on July 31, 2006.[95]

iii. The Morgan Stanley Reimbursement Process

Paragraph 60 of the Amended Complaint alleges that J. Mullins "completed, or caused to be completed, a Firm travel and expense ("T&E") form and caused the T&E form to be submitted to the Firm to cover $4,793.53 of J. Mullins's and K. Mullins's hotel and seminar expenses incurred in Washington DC." Although Morgan Stanley never reimbursed the Respondents for the expenses contained in the T&E form, the Third Cause of Action of the Amended Complaint alleges that this conduct constituted an attempted conversion of Morgan Stanley funds, in violation of Conduct Rule 2110.

Denise Sarkis-Irish, a full-time member of the Mullins Group support staff at Morgan Stanley, was responsible for preparing and submitting requests for reimbursement for business expenses incurred by J. Mullins.[96] Sarkis-Irish identified receipts provided to her by J. Mullins for expenses incurred at the Four Seasons Hotel and for the seminar. She testified that he directed her to submit a standard T&E claim for reimbursement for the expenses.[97] She recalled that J. Mullins expressly informed her, before departing for the seminar, that his wife would be his guest and that the reimbursements he sought would be only for the hotel and seminar registration, not for airfare or other expenses.[98] Sarkis-Irish testified that J. Mullins explained to her that he

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[94] C-139, ¶ 53; C-111, p. 1.

[95] C-139, ¶ 54.

[96] Tr. 1814-1815.

[97] Tr. 1826, 1841.

[98] Tr. 1816-1819.

sought only partial reimbursement for the costs of the trip because he thought he had previously accumulated expenses on Morgan Stanley business approaching the limit of what the Firm would reimburse him for.[99] She remembered, because it was unusual and inconsistent with the routine procedure for such matters, that when she asked J. Mullins to sign the reimbursement claim form, he declined, and instead directed her to take the unsigned form to the branch manager, D'Alessandro, to see if he would approve the request.[100] According to Sarkis-Irish, D'Alessandro told her he would not approve it, or even review it, without J. Mullins' signature.[101]

D'Alessandro's recollection of his review of the reimbursement form differed from that of Sarkis-Irish. He testified that Sarkis-Irish brought the T&E form to him after the Respondents were terminated by the Firm, informed him that this was something that was in her "pending file" that J. Mullins had wanted D'Alessandro to approve, but that he told her J. Mullins needed to sign it.[102]

After initially asserting that he accepted liability for all of the allegations made against him in the Amended Complaint, J. Mullins changed his position as to Cause Three of the Amended Complaint and denied attempting to convert Morgan Stanley funds.[103] He claimed that the T&E form, which was dated after he was terminated by Morgan Stanley, was not signed by him, and because it lacked the signatures of both the branch and regional managers, could not have been, and was not, submitted by him.[104]

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[99] Tr. 1820.

[100] Tr. 1842.

[101] Tr. 1844.

[102] Tr. 1986-1987.

[103] Tr. 1389.

[104] Tr. 1389-1390.

iv. J. Mullins Did Not Complete a Claim for Reimbursement for the Washington Seminar, Cause it to be Completed, or Cause it to be Submitted to Morgan Stanley

The Hearing Panel finds that J. Mullins, as Sarkis-Irish testified, instructed her to file for reimbursement for seminar expenses for which he had already been paid by the Foundation. Sarkis-Irish's testimony was corroborated by her notation on the employee expense reimbursement paperwork, "per JEM hotel & course only,"[105] that J. Mullins instructed her not to apply for reimbursement for the airfare. The Hearing Panel finds that Sarkis-Irish's account was also partly corroborated by D'Alessandro's testimony that Sarkis-Irish told him, albeit after the Respondents' employment with Morgan Stanley ended, that J. Mullins wanted the reimbursement to be approved and processed.

This is of little importance, however, because the evidence does not sustain Enforcement's allegation that J. Mullins "completed, or caused to be completed" the Morgan Stanley T&E form and "caused the T&E form to be submitted to the Firm." The evidence, therefore, does not prove essential elements of the allegation in the Third Cause of Action of the Amended Complaint. The testimony of J. Mullins, Sarkis-Irish, and D'Alessandro concur on the single most salient fact: without being signed, the expense form was not complete, could not be submitted to Morgan Stanley, could not be approved and would not be paid. J. Mullins did not sign it. For these reasons, the Hearing Panel finds that J. Mullins is not liable for attempting to convert funds of Morgan Stanley by completing, or causing to be completed, the T&E form, as alleged in the Third Cause of Action of the Amended Complaint. In the judgment of the Hearing Panel, J. Mullins may

[105] C-111, p. 3.

have intended to cause the T&E form to be completed and submitted, but his actions did not go "beyond mere preparation."[106]

2. The Respondents Failed to Disclose Material Information on Annual Compliance Forms: Fifth Cause of Action of the Amended Complaint

The Fifth Cause of Action of the Amended Complaint alleges that the Respondents failed to disclose, and misstated, material information on annual compliance questionnaires they submitted to Morgan Stanley, causing the Firm to maintain inaccurate books and records, in violation of Conduct Rules 2110 and 3110.

Failure by a registered representative to disclose material information in responding to a compliance questionnaire issued by his or her firm is a violation of Conduct Rule 2110, in part because it relates to an associated person's willingness and "ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public."[107] Rule 2110 allows FINRA to regulate members' ethical conduct, and applies to all business-related misconduct, regardless of whether the conduct involves securities, under the Rule's general command that members "shall observe high standards of commercial honor and just and equitable principles of trade."[108]

The Respondents stipulate to the following facts relevant to the Fifth Cause of Action of the Amended Complaint:

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[106] Attempt "may be described as an endeavor to do an act, carried beyond mere preparation, but short of execution." *Black's Law Dictionary,* Sixth Ed. (1990).

[107] *James A. Goetz,* Exch. Act Rel. No. 39,796, 1998 SEC LEXIS 499 at *11 (Mar. 25, 1998) (a registered representative's false representation that he would not personally benefit from his firm's matching gifts program reflected on his ability to comply with fundamental regulatory requirements).

[108] *Dep't of Enforcement v. Davenport,* C05010017, 2003 NASD Discip. LEXIS 4 at *8-*9, (NAC May 7, 2003).

- From the inception of the Foundation in 1999, through the period the Respondents were employed with Morgan Stanley, the Foundation's certificate of incorporation named the Respondents as Trustees.[109] At the Firm, J. Mullins was the designated financial advisor on EW's retail investment accounts and K. Mullins, starting in July 2003,[110] was the designated financial advisor on the Foundation account, and both Respondents serviced the accounts.
- EW's Will, from 2000 through the period the Respondents were employed with Morgan Stanley, appointed K. Mullins as Co-Executor with attorney Raymond Beebe, and J. Mullins as Successor Co-Executor; K Mullins as Co-Trustee, and J. Mullins as Successor Co-Executor.[111]
- Morgan Stanley's supervisory policies and procedures in effect while the Respondents were employees forbade a financial advisor from servicing an account in which he or she was acting in a fiduciary capacity, without obtaining prior approval from the Firm's regional sales manager and compliance department.[112] Nonetheless, J. Mullins was the designated financial advisor for EW's investment accounts, K. Mullins was the designated financial advisor on the Foundation accounts, and both Respondents serviced all of the accounts.

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[109] C-139, ¶¶ 6-8.

[110] On July 1, 2003, the Firm granted J. Mullins permission to serve as vice president of the Foundation and prohibited him from serving as the financial advisor of record on any Foundation account. C-11.

[111] C-139, ¶¶ 10-11.

[112] *Id.,* ¶ 12.

- In June 2003, March 2004, March 2005, and January 2006, the Respondents filled out compliance questionnaires for Morgan Stanley which asked them to identify "account numbers and positions for any accounts in which you are named as a trustee, successor trustee, guardian, executor, and/or beneficiary." The Respondents failed to list the Foundation account and did not identify their roles in the Foundation. In answer to questions that asked them to identify all non-profit organizations in which they served as "director, officer, employee or representative," and to identify the specific position held, the Respondents answered "none."[113]

The Respondents were clearly aware of their positions as fiduciaries for the Foundation. K. Mullins fully understood the meaning of the term "fiduciary,"[114] and J. Mullins fully appreciated his fiduciary role in the Foundation.[115] Furthermore, attorney Raymond Beebe, who performed legal work for EW and the Foundation,[116] wrote the Respondents in April 2000 to remind them that they were "serving as officers of the foundation in a fiduciary capacity for the foundation."[117]

The Respondents understood their responsibility to inform Morgan Stanley and to obtain approval for accepting fiduciary appointments. Indeed, J. Mullins had followed the procedure by applying for approval to accept appointment to the position of vice

[113] *Id.*, ¶¶ 13-25.

[114] Tr. 405-406.

[115] Tr. 1428-1429.

[116] Tr. 1131-1132.

[117] Tr. 405-407; C-33.

president of the Foundation; the request was approved by Morgan Stanley, but the Firm removed him from his role as financial advisor to the Foundation, allowing K. Mullins to be the financial advisor instead.[118] K. Mullins understood that Morgan Stanley forbade her husband from serving as the financial advisor of record to the Foundation precisely because of his fiduciary role as vice president.[119]

Further, in June 2003, just before she became the designated financial advisor to the Foundation, and during the period in which she failed to identify the positions she held as an officer of the Foundation, K. Mullins requested the Firm's approval to be appointed co-executor of an estate for a recently deceased person, GS, who had been a long-time customer of her husband.[120] On March 18, 2004, the Firm denied her request.[121] In subsequent annual compliance questionnaires, K. Mullins identified the trust accounts for GS's estate as ones in which she was named as trustee, but made no mention of the Foundation.[122] When asked why she followed the procedure to request approval regarding the GS estate but did not ask for approval to serve as an officer of the Foundation, K. Mullins sought to distinguish the two accounts. She testified that the trusts related to the GS estate were ones in which she played "an active role" with "responsibilities" and "duties," whereas the Foundation was "informal" and "loosely structured,"[123] and she considered positions in the Foundation to be largely

[118] Tr. 431.

[119] Tr. 432.

[120] C-14; Tr. 419-420.

[121] C-15.

[122] Tr. 435-438.

[123] Tr. 425-427.

"ceremonial."[124] Thus she did not think she needed to ask for permission or to identify the offices she held in the Foundation in the compliance questionnaires.

Yet K. Mullins' Foundation-related activity was, by her own description, extensive. K. Mullins testified that Foundation activity accelerated in 2005 and 2006.[125] She testified that EW called her whenever she wanted money moved into the Foundation account.[126] In 2006, K. Mullins interacted with EW daily[127] and was in frequent contact with the representatives of the numerous charities to which EW donated money through the Foundation.[128] Thus, by her own account, the Hearing Panel finds the role of K. Mullins in the charitable work of the Foundation was more than merely ceremonial.

K. Mullins also testified that formal disclosure of her positions in the Foundation on the compliance questionnaires was unnecessary because Morgan Stanley already knew she was an officer of the Foundation. She testified that Todd Monastero ("T. Monastero"), the Morgan Stanley branch office manager at the time the Respondents joined the Firm, was "a billion percent aware" that she was an officer of the Foundation,[129] and that Linda Cohen, the Firm's branch operations manager, also knew that K. Mullins was an officer of the Foundation.[130] K. Mullins testified that she specifically discussed her receipt of power of attorney for the Foundation with Cohen.[131]

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[124] Tr. 432.

[125] Tr. 638-639; 676-677.

[126] Tr. 323.

[127] Tr. 326.

[128] Tr. 326-330.

[129] Tr. 446.

[130] Tr. 445-447.

[131] Tr. 371-375.

Further, K. Mullins argued that Cohen, because she was responsible for reviewing and approving all incoming and outgoing correspondence, had to have seen numerous documents and correspondence that identified K. Mullins' roles in the Foundation.[132] Finally, K. Mullins contends that she had the approval of both T. Monastero and Cohen to serve as a fiduciary to the Foundation "from day one."[133]

Cohen, however, testified that she did not recall any discussions with K. Mullins about her role in the Foundation and was unaware that K. Mullins held positions in the Foundation.[134] She acknowledged that she reviewed and approved incoming correspondence, but she did so with an eye to screening the correspondence to identify possible complaints or customer orders and, once she determined that a piece of correspondence was not (i) a complaint, (ii) an order, or (iii) an instruction the Firm would have to act upon, she did not review it further.[135]

T. Monastero did not testify at the hearing, but in sworn testimony at which both Respondents' counsel cross-examined him, he testified that he was unaware that K. Mullins had any role in the Foundation.[136] He testified that although he was aware of J. Mullins' role as vice president, and that his role was to serve in a public relations

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[132] Tr. 2463-2464.

[133] Tr. 441. K. Mullins later testified, however, that she did not view Cohen as a person in a position to approve her role with the Foundation. That responsibility, K. Mullins testified, was T. Monastero's. Tr. 711-712.

[134] Tr. 781-783.

[135] Tr. 764-765, 917-919.

[136] C-131, pp. 61-62, 83, 85.

capacity if the president, EW, became ill,[137] T. Monastero did not know that J. Mullins was also a trustee.[138]

J. Mullins, too, denies misstating, and failing to disclose, his fiduciary roles with the Foundation, asserting that he was the "most open-door policy broker at Morgan Stanley," and that he "never hid anything."[139] J. Mullins denied filling out compliance forms incorrectly, stating that generally he delegated the task of filling out compliance forms to his staff. He implied that any errors were therefore made by staffers, not by him.[140] Because he had applied for approval to serve as vice president of the Foundation, and because Morgan Stanley managers attended Foundation events, J. Mullins claims, as does K. Mullins, that Morgan Stanley knew of his involvement with the Foundation.[141] Nonetheless, J. Mullins acknowledged that "the buck stops with me," and that he was ultimately responsible for the accuracy of the information contained in the responses to the compliance questions.[142]

The Hearing Panel, based on its evaluation of the content of their testimony, as well as Cohen's demeanor, finds the testimony of T. Monastero and Cohen credible. The Hearing Panel concludes that until August 2006, Morgan Stanley was not aware of the Respondents' fiduciary roles in the Foundation, aside from J. Mullins' approved role as vice president. Whether or not Morgan Stanley knew or could have known of the fiduciary capacities in which the Respondents served the Foundation, the Firm was not

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[137] *Id.*, 56-58.

[138] *Id.*, 85.

[139] Tr. 1392-1393.

[140] *Id.,*1394.

[141] Tr. 1394-1398.

[142] *Id*.

informed by the Respondents of their fiduciary roles. The Firm depended on its associated persons to inform it of such matters. That the Firm could have discovered the information is not a defense to, nor does it mitigate, the Respondents' failure to make truthful disclosures on the Firm's questionnaires.[143]

The compliance questionnaires were instruments whose purpose was to ensure that branches of Morgan Stanley adhered to the policies and procedures of the Firm.[144] According to Tracy McGuinness, who at the time was a Morgan Stanley branch examiner,[145] the answers to the questions that the Respondents answered incorrectly, or failed to answer, were important to Morgan Stanley's determination of whether the positions held by the Respondents in the Foundation, even if they were "ceremonial," had been properly approved by the Firm, and whether they presented potential conflicts of interest.[146] Adam Freedman, currently a manager of a Morgan Stanley policies and procedures group,[147] testified that Morgan Stanley employees are required to disclose every position they hold in a charitable organization, and that disclosing an approved role as a vice president does not relieve an employee from the responsibility to disclose his or her other roles, such as a trustee.[148]

For these reasons, the Hearing Panel finds that the Respondents violated Conduct Rules 2110 and 3110 by failing to disclose to Morgan Stanley their roles as officers and trustees of the Foundation, and by misstating their roles, in annual compliance

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[143] *Dep't of Enforcement v. James S. Davenport*, *supra* at *12.

[144] Tr. 84.

[145] Tr. 81.

[146] Tr. 104-106.

[147] Tr. 209.

[148] Tr. 223-224.

questionnaires they were required by Morgan Stanley to complete. This caused the Firm to maintain inaccurate books and records, as alleged in the Fifth Cause of Action of the Amended Complaint.

3. The Respondents Borrowed Funds from a Customer Without Prior Approval of Their Member Firm Employer: Sixth Cause of Action of the Amended Complaint

The Sixth Cause of Action of the Amended Complaint alleges that the Respondents borrowed funds from customer EW without approval from Morgan Stanley, in violation of Conduct Rules 2110 and 2370.

Conduct Rule 2370 prohibits associated persons registered in any capacity from borrowing from or lending money to any of their customers unless a firm has written procedures allowing it and the lending or borrowing agreement meets certain conditions.

Morgan Stanley's policy on employees borrowing from customers in effect during the relevant period was straightforward: employees were "prohibited from lending to or borrowing from clients."[149] If, despite the clarity of the stated policy, Morgan Stanley employees wished to borrow from a customer, they were required to seek approval for an exception to be made to the policy.[150]

The Respondents borrowed $100,000 from EW on March 1, 2005.[151] The loan was made in the form of a cashier's check made payable to K. Mullins.[152] The money was deposited into the Respondents' joint bank account.[153] The Respondents needed the

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[149] C-139, ¶ 28.

[150] Tr. 213-214.

[151] C-139, ¶ 26.

[152] C-58, p. 3.

[153] C-139, ¶ 29.

money as a bridge loan because of a delay in receipt of financing for a new home they were building.[154] Almost immediately thereafter, the Respondents' mortgage loan was approved, and the Respondents no longer needed the money, at which point they returned it to EW three days later.[155]

The Respondents did not request or obtain Morgan Stanley's approval to borrow the money from EW. The Hearing Panel finds, therefore, that by borrowing $100,000 from EW, the Respondents committed a clear violation of Morgan Stanley's policy and of Conduct Rules 2110 and 2370.

In their testimony about the loan, the Respondents stressed that it was just a "bridge loan" and was quickly repaid. The unchallenged testimony of Morgan Stanley witnesses McGuinness and Freedman, however, established that these features of the loan do not excuse the Respondents from the obligations imposed by the policy.[156]

On compliance questionnaires they signed on March 8, 2005, within four days of repaying the loan to EW, the Respondents replied "No" to the question: "Have you within the past 12 months made loans to, or received loans from any of your clients or family members while they maintained accounts at Morgan Stanley?"[157] Ten months later, in the next annual compliance questionnaire they were required to complete, the Respondents again answered "No" to the same question.[158]

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[154] Tr. 509-510; 1401-1402

[155] Tr. 1403-1404.

[156] Tr. 117, 214.

[157] C-139, ¶¶ 30-31; Tr. 1404.

[158] *Id.*, ¶¶ 32-33.

In her defense, K. Mullins testified that she filled out the March 8, 2005, questionnaire approximately three weeks to a month before she signed it, and before the Respondents asked for the loan.[159] When she signed the questionnaire on March 8, 2005, K. Mullins testified, she "mistakenly" did not consider the receipt of EW's $100,000 "a loan," and she was not thinking "about that particular question" when she signed the questionnaire.[160] When she signed it, K. Mullins did not review the questionnaire for accuracy.[161]

In his defense, J. Mullins claimed that he failed to report the loan in the March 2005 compliance questionnaire because "you did get your compliance questionnaire months ahead of time. That's why most people ignore them… you throw it in a pile."[162] J. Mullins testified further that he did not consider the transaction to be a "loan," but an "aborted loan," and offered further that this was an extremely tumultuous period in the Respondents' lives.[163] Nonetheless, J. Mullins admitted it was a mistake, and he was wrong not to have disclosed the loan in the compliance questionnaires.[164]

The Hearing Panel finds that the Respondents willfully failed to acknowledge the loan on the March 8, 2005, compliance questionnaires they signed. Even if they had filled out the questionnaires weeks earlier, as they testified, they signed them within four days of an event – an emergency loan of $100,000 – that reasonably would have been important to them, and fresh in their minds. The Hearing Panel does not find credible the

[159] Tr. 511-512.

[160] Tr. 511.

[161] Tr. 512.

[162] Tr. 1404.

[163] Tr. 1405.

[164] Tr. 1406.

explanations the Respondents offered when testifying in their defense that because they were extremely busy during that period, and under stress, they forgot about the loan, or, alternatively, they considered it an "aborted" loan, as opposed to an actual loan, because it was repaid so quickly.

Furthermore, the Hearing Panel finds that the Respondents knew or were reckless in not knowing that they violated a clear Morgan Stanley policy by borrowing $100,000, however briefly, from their elderly customer, EW, without first having sought and obtained approval from Morgan Stanley. The fact that they failed to request permission from Morgan Stanley before borrowing the money, together with the other circumstances noted above, suggest that their failures to disclose the loan on the compliance questionnaires were intentional and designed to conceal the loan from Morgan Stanley.

By borrowing $100,000 from EW without Morgan Stanley's approval, and failing to disclose it on the Firm's compliance questionnaires, the Respondents violated Conduct Rules 2110 and 2370, as alleged in the Sixth Cause of Action of the Amended Complaint.

III. Sanctions

A. The First, Second and Fourth Causes of Action of the Amended Complaint: Violations of J. Mullins

Enforcement recommends imposition of a bar from associating in any capacity with any FINRA member firm for all of J. Mullins' "egregious misconduct related to the Foundation and the Firm."[165] Enforcement's recommendation focuses specifically on J. Mullins' improper use of Foundation funds and conversion of Foundation property, as alleged in the First, Second, and Fourth Causes of Action of the Amended Complaint. Enforcement did not make specific recommendations for sanctions for J. Mullins'

[165] Department of Enforcement's March 30, 2009, Pre-Hearing Memorandum, p. 24.

violations of Conduct Rules 2110, 3110, and 2370, as alleged in the Fifth and Sixth Causes of Action of the Amended Complaint.

Because the First, Second, and Fourth Causes of Action of the Amended Complaint are directed to the same course of conduct, the Hearing Panel considered these violations together for the purposes of determining the sanctions to be imposed.

The FINRA Sanction Guidelines recommend adjudicators consider a fine of $2,500 to $50,000, and a bar, for improper use of customer funds. If the improper use results from a misunderstanding by a respondent of the customer's intended use of the funds, or if other mitigation exists, adjudicators are directed to consider suspension in any or all capacities for a period of six months to two years.[166]

It is well-established that misuse of customer funds is a serious matter that goes to the heart of the relationship between a broker and a customer "and undermines the integrity of the securities industry."[167] Such conduct is antithetical to the high standards of commercial honor and just and equitable principles of trade mandated by Conduct Rule 2110.[168]

The Sanction Guidelines state that the standard sanction for conversion, defined as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it," is a bar.[169]

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[166] *FINRA Sanction Guidelines*, p. 38 (2007).

[167] *Dist. Bus. Conduct Comm. v. Julie S. Westberry,* No. C07940021, 1995 NASD Discip. LEXIS 225 at *24 (NBCC Aug. 11, 1995).

[168] *Dep't of Enforcement v. Shailesh B. Patel, supra* at *25, *quoting from Joel Eugene Shaw,* 51 S.E.C. 1224, 1226-27 (1994).

[169] *Sanction Guidelines, supra* at 38, note 2.

J. Mullins did not own the Four Seasons and Boyds gift certificates. He was entitled to possess them, but only in his fiduciary capacity as vice president and trustee of the Foundation, for the use and benefit of the Foundation. The personal use to which he put thousands of dollars worth of the certificates, as he acknowledged in his testimony and to which he stipulated, constituted conversion.

1. Failure to Accept Responsibility

Principal Consideration No. 2 of the Sanction Guidelines requires adjudicators to give credit to a respondent for accepting responsibility and acknowledging misconduct to his or her employer prior to detection and intervention by a firm or regulator.[170] As noted above, in this case J. Mullins did not bring his misconduct to Morgan Stanley's attention and accept responsibility. It was the Firm's investigation that led, ultimately, to the discovery of the misuse of Foundation funds by J. Mullins.

J. Mullins nonetheless contends that he has taken responsibility for his misuse of Foundation monies. To buttress this contention, in his hearing testimony he pointed out that he hired a "forensic accountant" to investigate what he had done with Foundation funds,[171] to "see if there was any fraud or discrepancies or embezzlements," "not so much to help me but to catch me," and to account for "as many of the dollars as we could."[172]

The accounting, however, failed to "catch" the blatant misuse of Foundation funds by J. Mullins. The accounting mischaracterized the purchases of the Boyds gift

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[170] *Id.* at 6.

[171] Tr. 1384-1386, 1586.

[172] Tr. 1589.

certificates as being for EW's "medical and personal supplies,"[173] and did not capture J. Mullins' personal use of either the Four Seasons Hotel or the Boyds gift certificates, or his purchase and consumption of the wine.[174] Furthermore, the Hearing Panel observes that for J. Mullins to instruct the forensic accountant to take responsibility to investigate and "catch" his embezzlements suggests that it was up to the accountant, not his own responsibility, to bring such misconduct to light.

2. Concealment of Wrongdoing

Even more significant to the Hearing Panel is the evidence that reflects that J. Mullins sought to conceal his misconduct. In his May 1, 2007, on-the-record interview, when J. Mullins was asked about the use of $11,000 of Foundation money to purchase Four Seasons gift certificates, he made no mention of his use of $4,000 worth of the gift certificates in London.[175] Enforcement, in a letter dated May 14, 2007, specifically asked J. Mullins if he had used any of the gift certificates for personal purposes.[176] After J. Mullins sent two responses in June 2007, Enforcement again, on June 29, 2007, advised him that he had still not provided a clear answer to the question.[177] In a written response to Enforcement dated July 12, 2007, J. Mullins provided some detailed information about the gift certificates, but again made no mention of using them for personal purposes, claiming that he could not "fully account for all of the gift certificates."[178]

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[173] Tr. 1459-1461; C-95, p. 20.

[174] Tr. 1694-1695, 1706-1707.

[175] C-126, p. 208.

[176] C-96, p. 1.

[177] C-97, p. 1.

[178] C-97, p. 4.

It was not until an August 28, 2007, letter that J. Mullins finally admitted using the Four Seasons gift certificates for the Respondents' London vacation. His explanation, however, was inconsistent with his testimony at the hearing. In the August 28 letter, he claimed that before leaving for London:

> "I called the Four Seasons Hotel in London to ask about exchange rates and fees on currency conversions. I asked if there was a way to minimize them. The hotel suggested I purchase Four Seasons gift certificates in the USA and use them in London to avoid the usual three percent (3%) or more fee the credit card company would charge."[179]

In this letter, J. Mullins made no mention of the May 2006 lunch he described in detail at the hearing, at which someone supposedly suggested he use gift certificates to avoid fees that would be charged to his credit card. He also made no mention of obtaining EW's permission to use Foundation gift certificates for the vacation. When cross-examined about the differences between the August 28 letter and his hearing testimony, J. Mullins claimed that he called the London Four Seasons Hotel to "make sure what I had been told at lunch was in fact true."[180]

The Hearing Panel finds J. Mullins' different descriptions of how he came to decide to use the Foundation's Four Seasons Hotel gift certificates for his vacation to be inconsistent and not credible. The Hearing Panel finds that, instead of forthrightly admitting his misuse of Foundation monies, J. Mullins persisted, long after spending the gift certificates, in concealing and minimizing his misconduct.

3. Claims of Mitigation

In this case, J. Mullins argues in mitigation that EW approved his use of the Four Seasons Hotel gift certificates for the Respondents' London vacation, rendering his

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[179] C-99, p. 3.

[180] Tr. 1510.

conduct violative of FINRA rules merely because there was no formal corporate resolution by which the Foundation gave formal authorization. As noted above, he testified that, at a lunch meeting the day before his London vacation began, "I am going to use some of these [Foundation gift certificates] and she [EW] said okay."[181] The Hearing Panel finds that, even if EW indicated her approval at lunch as J. Mullins described, such a casual and ambiguous oral exchange would not authorize or excuse his personal appropriation of the use of Foundation gift certificates purchased to raise funds for charity. Similarly, the Hearing Panel does not credit J. Mullins' claim that EW gave him permission to use Foundation funds to buy wine for his own consumption at Morton's. The Hearing Panel finds that J. Mullins' misconduct was not an oversight, or the result of the absence of a formal corporate resolution; it was a fundamental violation of his fiduciary obligations to the Foundation.

J. Mullins suggests that he intended to repay the Foundation and that this mitigates his misconduct. The Hearing Panel finds, however, that J. Mullins' claim that he intended to replace the certificates when he returned from the vacation does not mitigate the egregiousness of his misconduct.[182] The Hearing Panel rejects J. Mullins' claim that he would have purchased Four Seasons Hotel gift certificates himself, but simply did not have time to do so prior to his departure for London. The Hearing Panel also does not find credible J. Mullins' assertion that the reason he did not replace the certificates immediately was that he was fired before he was able to do so, and that

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[181] Tr. 1375.

[182] *Dep't of Enforcement v. Shailesh B. Patel, supra at* *26 (respondent's eventual repayment of misused funds plus additional money was not mitigating).

subsequently the matter "slipped" his mind.[183] The Respondents' London vacation ended on May 28, 2006.[184] They were not discharged from Morgan Stanley until August 16, 2006, approximately two and a half months after their return from London.

In those two and a half months, J. Mullins continued to work with EW and the Foundation, yet did not replace the gift certificates. The fact that he did not do so until a year had passed, and the FINRA investigation into his conduct had begun, suggests strongly that J. Mullins would not have replaced the gift certificates he used in London without the regulatory pressure of the FINRA investigation, and that it was his intention to appropriate Foundation property, in the form of Four Seasons Hotel gift certificates valued at $4,000, for his personal use and benefit.

Such egregious misconduct "calls into question the honesty and veracity of a person associated with a member firm" and suggests that J. Mullins presents a risk to the investing public, requiring imposition of a bar "to protect the investing public and ensure the integrity of the market."[185]

B. The Fifth and Sixth Causes of Action of the Amended Complaint: Violations of Both Respondents

Enforcement recommends imposition of a nine-month suspension in all capacities and a $15,000 fine upon K. Mullins for the material misstatements she made on four compliance questionnaires, in violation of Conduct Rules 2110 and 3110, as alleged in the Fifth Cause of Action of the Amended Complaint, and a three-month suspension and $5,000 fine for borrowing money from EW without the approval of the Firm, in violation

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[183] C-99, p. 3.

[184] C-67.

[185] *Dep't of Enforcement v. Shailesh B. Patel, supra* at *27-*28.

of Conduct Rules 2110 and 2370, as alleged in the Sixth Cause of Action of the Amended Complaint.[186] Enforcement requests that the periods of suspension be imposed consecutively, resulting in a total 12-month suspension in all capacities. Enforcement makes no recommendations of sanctions for these violations by J. Mullins.

1. Material Misstatements to the Firm and Causing the Firm's Books and Records to be Inaccurate

a. K. Mullins

For violations of Conduct Rules 2110 and 3110, the Sanction Guidelines recommend a fine of $1,000 to $10,000, suspension in any or all capacities for up to 30 business days, and, in egregious cases, fines of $10,000 to $100,000, and suspension for up to two years, or a bar.[187]

Enforcement cites a number of aggravating factors to justify its recommendations: (i) K. Mullins' provision of false information to the Firm contributed to J. Mullins' ability to misuse Foundation funds; (ii) K. Mullins' failure to disclose her positions of responsibility in the Foundation concealed potential conflicts of interest from the Firm; and (iii) K. Mullins knew the Foundation had been transferred to her as its financial advisor because J. Mullins was appointed the Foundation's vice president. Thus she knew her involvement with the Foundation should disqualify her from serving as the Foundation's financial advisor.

[186] Tr. 2457.

[187] *Sanction Guidelines, supra* at 30.

K. Mullins argues that she committed no violations of Conduct Rules 2110 and 3110, because Morgan Stanley knew and approved of her roles in the Foundation, and, alternatively, if she committed any infractions, they were "innocuous."[188]

The Hearing Panel finds that K. Mullins' failure to provide accurate information about her positions with the Foundation contributed to the Firm's inability to monitor the Respondents' relationships with EW and the Foundation to guard against possible conflicts of interest. The Hearing Panel accepts K. Mullins' statement that, in the context of the relationship that had developed between EW and the Respondents, she viewed her roles as secretary, treasurer, and trustee of the Foundation as "relaxed and informal," as contrasted with her perception of "formal" service on a board of trustees and "signing legal documents, taking notes and putting together records that would be used in an official capacity."[189] K. Mullins may, as she testified, have felt it was unnecessary to list her positions with the Foundation on the compliance questionnaires because she believed the Firm was aware of the fact that she was actively engaged with the Foundation and that she was a member of the "Foundation team."[190]

Nonetheless, as K. Mullins acknowledged in her hearing testimony, the range of her activities with EW on behalf of the Foundation, although not as great as that of J. Mullins,[191] was significant, especially as Foundation activity increased in 2005 and 2006.[192] K. Mullins assisted in planning numerous concerts, took EW to various

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[188] Tr. 2470-2471.

[189] Tr. 717.

[190] Tr. 695-696, 717.

[191] Tr. 708.

[192] Tr. 676-677.

receptions, assisted EW in negotiating terms of the donation of a music room to a college, advised EW on donations to be made by the Foundation, represented the Foundation at board meetings of various other organizations, and ensured that the Foundation account always maintained sufficient funds to cover Foundation grants and gifts.[193] Hers was not merely a ceremonial role. K. Mullins acknowledged that her activities, like those of J. Mullins, were those of a fiduciary for the Foundation.[194] K. Mullins also acknowledged that even though this was her first experience serving as an officer of a foundation, she made a mistake by taking her roles in the Foundation too lightly.[195]

Although K. Mullins contested her liability for violating Conduct Rules 2110 and 3110, she testified that, in retrospect, when the Firm prohibited J. Mullins from serving as financial advisor to the Foundation because of his appointment as vice president, she should have realized her Foundation positions made it equally inappropriate for her to serve in the capacity of the Foundation's financial advisor.[196] The Hearing Panel finds that K. Mullins appeared sincerely remorseful for these violations.

The Hearing Panel concludes that the violations of Conduct Rules 2110 and 3110 by K. Mullins, as alleged in the Fifth Cause of Action of the Amended Complaint, are serious, but not as egregious as Enforcement argues. In light of the length of time of the misconduct, extending from 2003 through 2006, involving numerous material misstatements, taken together with the above considerations, the Hearing Panel concludes that a suspension from associating with any FINRA member firm in all capacities for six

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[193] Tr. 676-699.

[194] Tr. 708.

[195] Tr. 644-645.

[196] Tr. 664-665.

months, and a fine of $15,000, with the requirement that she requalify by examination before serving again in any registered capacity in the securities industry, are sanctions sufficient to deter K. Mullins from repeating her mistakes and to deter others from engaging in similar misconduct.

b. J. Mullins

In light of the bar imposed upon J. Mullins for the violations described by the First, Second, and Fourth Causes of Action of the Amended Complaint, the Hearing Panel finds it unnecessary to impose additional sanctions upon him for his misstatements to the Firm and causing the Firm's books and records to be inaccurate, in violation of Conduct Rules 2110 and 3110. Were the Hearing Panel to impose sanctions for these violations, however, it would impose upon J. Mullins a one-year suspension from associating with any FINRA member firm in all capacities, a fine of $25,000, and a requirement that he requalify by examination before serving in any registered capacity in the securities industry. The Hearing Panel finds that J. Mullins' violations were more egregious than those of K. Mullins. By his testimony, corroborated by the testimony of other witnesses from the Firm, J. Mullins was the primary figure in the Mullins Group and in the establishment of the Foundation. He played the major part in advising EW and implementing her decisions for disbursement of Foundation funds. His responsibilities exceeded those of K. Mullins; hence, his concealment from the Firm of the extent of his involvement with the Foundation renders him more culpable than K. Mullins.

2. Borrowing Funds from a Customer Without Firm Approval, in Violation of Conduct Rules 2110 and 2370

a. K. Mullins

The Sanction Guidelines do not specifically address borrowing from a customer without firm approval, in violation of Conduct Rules 2110 and 2370. For K. Mullins, Enforcement recommends imposition of a three-month suspension in all capacities and a fine of $5,000. Enforcement makes no recommendations for sanctions to be imposed upon J. Mullins for these violations.

K. Mullins testified that she should have, but did not, review the March 8, 2006, compliance questionnaire before she signed it, was not thinking of the loan when she signed the questionnaire, and therefore incorrectly failed to inform the Firm that she had, with her husband, borrowed $100,000 from EW.[197] No promissory note documented the loan.[198] As noted by Enforcement, had anything happened to EW, then 95 years old, the only document evidencing the loan was the cashier's check made out to K. Mullins. Borrowing the money, even for the short period here, violated the Firm's clearly stated policy. K. Mullins' denials that she had borrowed any funds from customers, in the compliance questionnaire of March 8, 2006, and the subsequent questionnaire ten months later, are aggravating circumstances, as those answers concealed the violation of the Firm's policy and of Conduct Rules 2110 and 2370. Such a failure has been deemed to reflect upon an associated person's ability to comply with the regulatory requirements fundamental to the proper functioning of the securities industry and to fulfill his or her fiduciary responsibilities in handling customers' money.[199] This misconduct is regrettably consistent with the Respondents' admitted failure to be mindful of their professional and fiduciary obligations to EW and the Foundation, and their apparent

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[197] Tr. 712-714.

[198] Tr. 662-663.

[199] *Dep't of Enforcement v. James S. Davenport, supra* at *9 (May 7, 2003), *citing James A. Goetz, supra.*

attitude of entitlement to EW's largesse. In light of K. Mullins' assertion that she did not consider the borrowed money to constitute a loan, because it was repaid within days, the Hearing Panel concludes that a suspension from associating with any FINRA member firm in all capacities for three months, a fine of $5,000, and a requirement that she requalify by examination before serving again in any registered capacity in the securities industry, will suffice to deter K. Mullins from violating FINRA rules, and the policies of her employer firm, in the future, and to deter others from similar misconduct.

b. J. Mullins

The Hearing Panel finds, again, that in light of the bar imposed upon J. Mullins for his misuse of funds and conversion of property, it is unnecessary to impose additional sanctions for the violations he committed concerning the unapproved loan. Were it necessary to impose additional sanctions, however, the Hearing Panel finds that, with regard to the unapproved loan, J. Mullins stands *in pari delicto* with K. Mullins, and would apply the same facts and rationale discussed above to J. Mullins, and impose the same sanctions upon him as it has upon K. Mullins for violating Conduct Rules 2110 and 2370.

IV. Conclusion

A. J. Mullins

Respondent John Edward Mullins is barred from associating with any FINRA member firm in all capacities for misusing customer funds, in violation of Conduct Rules 2110 and 2330(a), converting customer property to his own use, and violating his fiduciary responsibilities to a customer, in violation of Conduct Rule 2110. J. Mullins is not liable for attempting to convert funds from his FINRA member firm employer, in violation of Conduct Rule 2110. In light of the bar, no additional sanctions are imposed

for material misstatements made by J. Mullins to his FINRA member firm employer on annual compliance questionnaires, in violation of Conduct Rules 2110 and 3110, and for borrowing funds from a customer without the approval of his Firm, in violation of Conduct Rules 2110 and 2370.

B. K. Mullins

Respondent Kathleen Maria Mullins is suspended in all capacities from associating with any FINRA member firm for six months and fined $15,000, for making material misstatements to her FINRA member firm employer on annual compliance questionnaires, in violation of Conduct Rules 2110 and 3110. K. Mullins is further suspended in all capacities from associating with any FINRA member firm for an additional three months, and fined an additional $5,000, for borrowing funds from a customer without the approval of her FINRA member employer firm, in violation of Conduct Rules 2110 and 2370. Finally, K. Mullins is ordered to requalify by examination before serving again in any registered capacity in the securities industry.

If this decision becomes FINRA's final disciplinary action, the bar imposed upon J. Mullins shall be effective immediately. The nine-month suspension imposed upon K. Mullins shall become effective upon the opening of business on October 19, 2009, and end on July 18, 2010. The fines shall be due and payable upon K. Mullins' return to the securities industry.

In addition, the Respondents are ordered jointly and severally to pay the costs of the hearing, in the amount of $16,003, which includes an administrative fee of $750 and the cost of the hearing transcripts.[200]

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

Copies to:

John Edward Mullins (FedEx and first-class mail)
Kathleen Marie Mullins (FedEx and first-class mail)
Norman B. Arnoff, Esq. (electronic and first-class mail)
Frank P. Arleo, Esq. (electronic and first-class mail)
Richard R. Best, Esq. (electronic and first-class mail)
Scott M. Andersen, Esq. (electronic and first-class mail)
David R. Sonnenberg, Esq. (electronic mail)

[200] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.