FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN JOSEPH PLUNKETT (CRD No. 2321368), Respondent.	Disciplinary Proceeding No. 20060052598-01 Hearing Officer – LBB **AMENDED HEARING PANEL DECISION**[1] January 4, 2011

Respondent John Joseph Plunkett is suspended for two years and fined $20,000 for taking his firm's books and records at the time of his resignation from the firm, in violation of NASD Conduct Rule 2110. Respondent is suspended for an additional six months and fined an additional $5,000 for failing to respond to a request for information, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010. The suspensions shall be served consecutively. Respondent is also ordered to pay costs.

Appearances

For the Department of Enforcement: Elissa Meth Kestin, Senior Regional Counsel, and Julie K. Glynn, Senior Regional Counsel, New York, New York.

John Joseph Plunkett, *pro se*.

DECISION

The Department of Enforcement filed the Complaint in this disciplinary proceeding on December 1, 2009, asserting two causes of action against Respondent John Joseph Plunkett

[1] This decision is amended to correct the dates of Respondent's suspension.

Respondent").[2] The First Cause of Action charges Respondent with engaging in conduct inconsistent with just and equitable principles of trade, in violation of NASD Conduct Rule 2110, by taking almost all of the books and records from his firm when he, and most of the firm's registered representatives, resigned from the firm. The Second Cause of Action charges Respondent with failing to respond to a FINRA request for information, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010.

A hearing was held in New York City on September 27 and 28, 2010, before a Hearing Panel composed of one current and one former member of the District 10 Committee, and a Hearing Officer.

I. Summary

A. First Cause of Action: Removal of Books and Records

Beginning in 2003, Respondent was the president and chief compliance officer of Lempert Brothers International USA, Inc. ("Lempert USA"),[3] a FINRA member firm that he helped establish. Lempert USA was owned indirectly by Roman and Edouard Orlov, Ukrainian brothers who also owned brokerage firms in Europe. Lempert USA was unprofitable, and stopped paying Respondent and other representatives in March 2005. In the summer of 2005, Respondent and two other Lempert USA principals, Mitch Borcherding ("Borcherding") and Brian Coventry ("Coventry"), secretly began to form a new brokerage firm, Emerald

[2] 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). For the First Cause of Action, this decision relies on NASD Conduct Rule 2110, which was the applicable rule at the time of Respondent's alleged misconduct. For the Second Cause of Action, this decision relies on FINRA Rules 8210 and 2010, which had been implemented prior to the alleged violation.

[3] Lempert Brothers International USA, Inc. was related to other firms that included the name "Lempert." Lempert USA was owned by Lempert Holdings Establishment, a European holding company. CX-2; CX-5, at 5; CX-66, at 35. In this decision, "Lempert USA" refers solely to the American firm that was a FINRA member.

Investments, Inc. ("Emerald"), with plans to take Lempert USA's business and brokers to their new firm.

In early 2006, Respondent, Borcherding, and Coventry began to receive reports that the Orlovs were engaged in fraud in their European operations. In March 2006, Respondent learned that the Orlovs were about to fire him. In late March and early April 2006, Lempert USA was the subject of an on-site SEC examination. Respondent did not inform the SEC examiner of the fraud allegations concerning the Orlovs.

On the night of April 3, 2006, Respondent, Coventry, and several other Lempert USA registered representatives resigned from the firm. They left the office and, when those who were not included in their plans had left for the day, they went back and took almost all of the firm's original books and records, copied the firm's computer files, and erased the files on the firm's computers. Respondent and the others soon established an office for Success Trade Securities, Inc. ("Success Trade"), and moved to Emerald when its FINRA membership application was approved. Respondent did not return the books and records for several months.

Respondent seeks to justify his actions by asserting that he acted to protect the firm's clients, European investors, the registered representatives who left the firm and the Securities Investor Protection Corporation ("SIPC") from frauds that the Orlovs would have committed. The Hearing Panel finds that the true motivation was economic self-interest and not the protection of others. Regardless of the true motivation, however, the Hearing Panel finds that Respondent's actions were inconsistent with the high standards of commercial honor required of registered representatives, and violated NASD Conduct Rule 2110.

B. Second Cause of Action: Failure to Respond to a Request for Documents and Information Pursuant to Rule 8210

Enforcement sent Respondent a Wells notice on May 8, 2009, notifying him that a preliminary determination had been made to file a disciplinary action charging him with a violation of NASD Rules for removing Lempert USA's books and records. Respondent responded to the Wells notice on June 29, 2009. On July 15, 2009, a FINRA examiner served Respondent with a Rule 8210 request seeking documents and information relating to Respondent's response to the Wells notice. Respondent failed to submit a substantive response until several months after the Complaint was filed. By failing to provide documents and information in response to the July 2009 request until after the Complaint was filed, Respondent violated FINRA Procedural Rule 8210 and Conduct Rule 2010.

II. Respondent

Respondent first registered with a FINRA member firm in 1993. He was registered with Lempert USA from August 13, 2003, through April 3, 2006. Respondent was co-president and chief compliance officer during his first year at Lempert USA, then became the sole president and chief compliance officer. CX-1; CX-2; CX-5, at 14; Tr. 44-45.

Although he was still employed by Lempert USA Respondent began his employment with Emerald in October 2005. He remained employed in this capacity by Emerald until January 2010. CX-1; CX-3. When Respondent left Lempert USA, he registered with Success Trade, where he was employed from April 17, 2006, until July 11, 2006. When Respondent left Success Trade, he registered with Emerald, where he was registered until January 4, 2010. He has not been registered with a member firm since January 2010. CX-1.

III. Respondent Violated NASD Rule 2110 by Taking His Firm's Books and Records When He Left Lempert USA

A. Facts

1. Events Leading Up to Respondent's Departure from Lempert USA

a) Lempert USA's Struggles

Respondent was hired in August 2003 to help set up Lempert USA. Tr. 41-42. Lempert USA was owned indirectly by the Orlovs, whose main office was in Vienna, Austria. CX-66, at 35; Tr. 94. George Milter ("Milter"), the Orlovs' nephew, was their representative in the United States. Milter was never registered with FINRA, but had an informal role with Lempert USA. CX-66, at 35; Tr. 87, 204, 261, 318, 332. Borcherding helped to set up Lempert USA in late 2002. He was initially the firm's executive vice-president, then its co-president with Respondent when the firm first began operations, until Respondent became the sole president. Borcherding became a trader for the firm, primarily trading the owners' capital. Tr. 316; CX-5, at 14. Coventry was hired to handle investment banking. Tr. 48; CX-5, at 14.

Lempert USA was never profitable. By March 2005, the firm was having financial difficulties, and could not pay its employees, including Respondent.[4] Lempert USA stopped paying Respondent in March 2005. CX-33, at 5; CX-42; CX-44, at 3; CX-46, at 2; CX-57, at 22-23; Tr. 47-48, 120-121, 317. As a result of the financial situation, Respondent and other Lempert USA principals told the owners that they would have to look for another firm with which to associate, and they began to look for other employment. Tr. 318, 361-362.

[4] Respondent testified that the Orlovs had stopped putting money into the firm by March 2005. Tr. 47-48. In fact, the Orlovs contributed $150,000 to the firm in March and $100,000 after March. CX-5 at 18.

b) Respondent and Other Lempert Principals Take Steps to Start a New Broker-Dealer While Employed at Lempert USA

In the summer of 2005, Lempert USA's lawyer introduced Respondent, Borcherding, and Coventry to two investors, J.I. and R.R. (the "Emerald Investors"). The group developed a plan to start a new broker-dealer, which became known as Emerald. Tr. 51, 71, 319; CX-29, at 5; CX-51; CX-52; CX-53; CX-81. Respondent did not disclose Emerald to the Orlovs while he was at Lempert USA. Tr. 95, 167.

A shareholder agreement was drafted in about August 2005. Tr. 51; CX-66, at 41. Respondent, Borcherding, Coventry, and the Emerald Investors signed the agreement in September 2005. CX-51. The Emerald Investors agreed to contribute $250,000. Respondent, Borcherding, Coventry agreed to establish the new broker-dealer as quickly as possible, to work for it once established, and to continue to build the business at Lempert USA with the goal of bringing Lempert USA's business to the new broker-dealer. However, Lempert USA had no business until Ray Thomas ("Thomas") joined the firm later in 2005, as a Series 24 sales supervisor, and brought retail brokers to the firm. Tr. 47, 55-57, 130; CX-5, at 14; CX-51, at 5-6.

Although he was still president and chief compliance officer at Lempert USA, Respondent was Emerald's president and chief compliance officer from the time it was formed in October 2005. CX-3; Tr. 59-60. In late 2005 through early 2006, Respondent, Borcherding, and Coventry continued to prepare for the move to their new broker-dealer. They hired a consultant and an attorney to do the paperwork for the new firm. Tr. 59. In October 2005, Respondent told the Emerald Investors he would stay at Lempert USA "in order to grow, maintain and bring a functioning broker-dealer online from day one after approval," and that he was taking action to "continue to build the business, maintain it, and be able to move it with us." Respondent hoped

to obtain FINRA's approval for Emerald by the beginning of 2006, and projected that he and the others would bring enough business to Emerald to at least break even without additional cash infusions. CX-81; Tr. 66, 73.

Respondent, Borcherding, and Coventry each received a total of between $25,000 and $40,000 from the Emerald Investors in late 2005. Tr. 77-78, 366-367; CX-84.[5] Respondent told the Emerald Investors, and testified at the hearing, that they did not keep the money they received from the Emerald Investors, but used it to pay Lempert USA's bills so they could build the business and move it to Emerald. CX-81; Tr. 400-401.[6]

Respondent signed a Uniform Application for Broker-Dealer Registration (Form BD) for Emerald as the new firm's president on December 22, 2005. The Form BD was submitted to FINRA on January 19, 2006. CX-54; CX-55; Tr. 84. In January 2006, Respondent reported to the Emerald Investors that there had been good progress in securing a lease for Emerald's offices and in building the Lempert USA business, and that he would soon execute an agreement with a clearing firm. Respondent expressed optimism about the plans and projections for Emerald. CX-84. Coventry signed a lease for office space for Emerald on March 22, 2006. CX-44, at 6; Tr. 109. Emerald's office was on the same floor as Lempert USA. CX-56; Tr. 107.

On June 30, 2006, FINRA notified Respondent that Emerald's membership application had been approved. Tr. 60.

[5] Respondent acknowledged receipt of at least $25,000. Tr. 168-170; CX-84. Borcherding testified that he received $40,000. Tr. 366-367. Under the terms of the shareholder agreement, the three principals should have received the same amount.

[6] The Hearing Panel did not find this assertion credible. It is also inconsistent with the demand in arbitration by Respondent and Emerald against Borcherding, in which Respondent and Emerald sought to recover the $40,000 from Borcherding. CX-65.

c) Respondent Learns of Allegations Concerning the Orlovs' European Operations

In early 2006, Respondent spoke to a Latvian lawyer concerning allegations of fraud in the Orlovs' European operations. The lawyer also told Respondent that the Orlovs had represented that Lempert USA would participate in a merger, partnership, or other business relationship with Lempert entities in Europe. Respondent informed the lawyer that these representations concerning plans for a business relationship were false. On March 1, 2006, the lawyer's firm sent Respondent a letter following up on their conversations. The letter stated that they represented clients who had invested with Adolph & Komorsky International ("AKI"), an Austrian brokerage firm owned and operated by the Orlovs, and that the Orlovs were the subject of criminal fraud proceedings in Austria. The Latvian attorneys claimed that the head of a Lempert company in London ("Lempert London") had signed an agreement representing that Lempert USA would take over AKI's obligations to the European investors and provide services to AKI's European customers. CX-86, at 9-10, 12; Tr. 181-184.

On about March 22, 2006, FINRA received a letter from a Latvian investor, alleging that there was a connection among Lempert USA, AKI, and a failed American brokerage firm. The investor alleged that Lempert USA had been named as the manager of the customer's funds, and that someone from Lempert International had agreed that Lempert USA "takes all the obligations of the bankrupt" AKI. CX-90. FINRA forwarded the letter to Respondent on March 31, 2006. CX-90; Tr. 171-172. Respondent also received an undated letter from another Latvian investor alleging fraudulent activities by Lempert London, enclosing a cooperation agreement between Lempert London and Lempert USA that was signed by Milter. CX-4 at 29.

Respondent wrote to the Orlovs on March 23, 2006, concerning the allegations against them in Europe, and making allegations concerning improper acts by Milter. CX-18; CX-88;

Tr. 195-197. The Orlovs were allegedly on vacation and did not respond. Tr. 192-193; CX-18, at 5.[7]

d) Respondent Learns that the Orlovs Plan to Fire Him

On about March 16, 2006, a week before Respondent wrote to the Orlovs concerning the fraud allegations, an attorney representing Milter and the Orlovs sent a draft resolution of Lempert USA's board of directors to Milter at Lempert USA. The resolution stated that the board would immediately terminate Respondent's employment as president. CX-18 at 36; Tr. 117-118. As Lempert USA's chief compliance officer, Respondent reviewed all Lempert USA e-mails. Respondent saw the e-mail with the draft resolution before he left Lempert USA. He knew at least as early as March 23, 2006, that the owners intended to fire him as president. Tr. 80, 112-113, 117, 118, 120, 193.

On March 30, 2006, the attorney for the Orlovs and Milter sent them an e-mail saying that Respondent would soon be relieved of his position with Lempert USA. CX-89. Respondent saw this e-mail before he left Lempert USA. Tr. 113, 116.

2. Respondent Leaves Lempert USA and Takes the Firm's Books and Records

In late March or early April 2006, Respondent and Thomas, Lempert USA's sales supervisor, met out of the office with the firm's seven or eight registered representatives to explain their plans to leave Lempert USA. All agreed to join Respondent, Thomas, and Coventry in leaving the firm and associating with Emerald. Tr. 131-132, 414. On March 31, 2006, Respondent wrote 15 checks from Lempert USA's bank account, totaling about $33,000,

[7] The Hearing Panel makes no findings with respect to the accuracy of the allegations concerning the Orlovs or Milter. The allegations are hearsay of unproven reliability, and a finding would not be supported by the record. *See, e.g.*, *Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *32-33 (Jan. 6, 2006), *aff'd*, 209 Fed. Appx. 6 (2d Cir. 2006); *Dep't of Enforcement v. Cuozzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at *24 n.12 (N.A.C. Feb. 27, 2007); *Dep't of Enforcement v. Belden*, No. C05010012, 2002 NASD Discip. LEXIS 12, at *22 (N.A.C. Aug. 13, 2002)..

making payments to himself, other representatives who were leaving the firm, J.M. (the firm's sole clerical employee, who was leaving the firm with Respondent and the other representatives), and vendors. CX-12, at 19 et seq.; Tr. 123. The checks required signatures from Respondent and Borcherding, who co-signed the checks late in the afternoon of April 3. Tr. 126, 370. When he signed the checks, Borcherding did not know that Respondent and most of the firm's other representatives were leaving Lempert USA that night. Tr. 127.

At some time on April 3, 2006, Forms U5 were filed for Respondent and the other registered representatives who were leaving. Tr. 423-424. All Lempert USA employees left the office on April 3 and resigned from the firm that night, except Borcherding and registered representative Andy Shah, who were not aware of the others' plan. Respondent and the others waited for Borcherding to leave the office, then returned and took all of the firm's books and records except those that were in Borcherding's, Shah's, and Milter's offices. They took order tickets, accounting documents, customer files, employee files, the firm's checkbook and check register, bank statements, brokerage statements, FOCUS filings, compliance manuals, incorporation documents, documents relating to investment deals, and all computer records. In addition, they erased almost everything from Lempert USA's computers, and removed the backup computer tapes.[8] Tr. 132-137, 132, 320, 414, 331, 399; CX-5, at 1; CX-26, at 1, 2, 7, 9; CX-29, at 2-3; CX-42, at 2. They moved the documents to an office in the same building, where Coventry had arranged to have space available. Tr. 143-144, 419. The documents were subsequently moved to Emerald's office. Tr. 421.

Before leaving on April 3, Respondent faxed a letter of resignation to the Orlovs in Vienna. CX-85; Tr. 137. The other representatives who left submitted letters of resignation

[8] J.M.'s husband ran the computer firm that maintained Lempert's e-mails. He assisted in the removal of computer files and the erasure of Lempert USA's computers. The husband's firm subsequently received a contract to maintain Emerald's computers. Tr. 122.

addressed to Respondent as Lempert USA's president and chief compliance officer. CX-85; Tr. 129-130.

Borcherding arrived to a cleaned-out office on the morning of April 4, 2006. Tr. 319. It appeared to him that everything had been taken but the files from his office. He found that computer files had been deleted and the backup tapes had been taken. Tr. 319, 331. He called the police. He also called the bank and reported that the firm's checkbook had been stolen and stopped payment on all checks. Tr. 321.

Because Emerald's membership application had not yet been approved by FINRA, Respondent and the others who left Lempert USA joined Success Trade. Tr. 146-147. Within about 24 hours after leaving Lempert USA, the representatives had contacted all of their clients. The clients also received a letter from the brokers following up on the telephone calls. Virtually all of Lempert USA's clients transferred their accounts to Success Trade, and then to Emerald. Tr. 68-69, 145-147, 149-150; CX-5, at 13.

Lempert USA initially hired a consultant to help it attempt to reconstruct its records. Tr. 322-323. The consultant worked for about a week, until the firm hired a new principal to act as a compliance officer. Tr. 323. It took about a week to get account numbers so Borcherding could access records online at the clearing firm. After working with the clearing firm for about two weeks, Lempert USA was able to get trading records. Tr. 326-327. Borcherding eventually spoke to the firm's former clients, some of whom were confused about where their accounts were, and were unaware their accounts had been moved from Lempert USA. Tr. 325.

At the time of the departure, Lempert USA was the subject of an on-site SEC examination. Tr. 161-163. Respondent did not alert the SEC examiner to the fraud allegations concerning the Orlovs until after the Respondent left the firm on April 3. Tr. 164. On the

morning of April 4, Respondent spoke to the SEC examiner, and to FINRA, about departing from Lempert USA and removing the books and records. Tr. 161-162, 410. He and his attorney met with three FINRA examiners on April 11, 2006, and told them about the departure from Lempert USA, the removal of books and records, and the allegations concerning the Orlovs. Tr. 179, 249-250; CX-4.[9] Respondent did not offer to turn Lempert USA's documents over to the FINRA investigators because, he testified, he "didn't think of it." Tr. 415-416. Borcherding, on behalf of Lempert USA, also met with FINRA on April 11. The FINRA examiners told Borcherding that Lempert USA could do only liquidating transactions until FINRA was certain that the firm was capital compliant. Tr. 251-252, 324-326. Lempert USA did not resume full operations until August. Tr. 343.

3. Respondent's Alleged Reasons for Removing the Files

Respondent testified that he and his colleagues removed books and records and erased files "defensively," "to protect everyone" from the "criminals." Tr. 190. The principal "defensive" reason advanced by Respondent was that "they" were going to forge the names of the representatives who had left the firm on Lempert USA documents, harming the representatives and the firm's customers. Tr. 145-146, 401.[10]

Respondent testified that his group removed Lempert USA's files to prevent the firm from contacting clients, in order to protect the clients from being persuaded to make inappropriate investments. Tr. 150-151; CX-5. His basis for this concern was that on one occasion, when he was out of the office, Milter and one of the Orlovs allegedly tried

[9] FINRA's investigation began after Respondent met with FINRA examiners on April 11, 2006. Tr. 249, 254.

[10] It is unclear who "they" were, since only Borcherding, Shah, and Milter remained at Lempert USA. There had been no allegations concerning Borcherding and Shah, and Milter was not registered.

unsuccessfully to persuade the firm's representatives to participate in marketing a questionable investment in a penny stock with very high commission rates to the firm's clients. Tr. 154-155.

Respondent also asserted that "they" were going to engage in some sort of scheme to defraud the SIPC. Tr. 188. He testified that the fraudulent activity that would have taken place after his departure would have involved a massive transfer of accounts from Europe, perhaps in furtherance of the alleged plan to defraud the SIPC. Tr. 150.

The Hearing Panel did not find credible Respondent's claim that he and his group took the books and records to protect Lempert USA customers, the SIPC, and the departing representatives from fraud. Respondent and his group took the books and records in furtherance of their own economic interests. They had represented to the Emerald Investors that they were building Lempert USA to move it to Emerald, and taking the books and records was consistent with that plan. Furthermore, they offered to return the documents to Lempert USA only in return for money.

If the concerns were truly defensive, there were other obvious and far more sensible, ways to forestall any possible fraud. Respondent could have alerted the SEC examiner who was in Lempert USA's offices of the potential for fraud, or contacted FINRA. He also could have alerted the clearing firm to the alleged fraudulent intentions of the Orlovs and Milter. If Respondent's motivation was to ensure that the books and records could not have been altered without detection, he could have copied files and returned them to Lempert USA. He also could have immediately returned certain of the books and records that could not have been used for fraudulent purposes, such as the firm's corporate documents. Furthermore, if the goal was to have a copy of the records that could not be altered, then there was no need to erase Lempert USA's computer files and remove the backup tapes.

The Hearing Panel finds that Respondent took the books and records to further his own interests and interests of those whom he led in leaving Lempert USA in establishing their new business, and not for the purpose of protecting anyone from fraud.

4. The Eventual Return of Books and Records

On April 12, 2006, soon after Respondent departed from Lempert USA, the firm's attorney wrote to Respondent demanding the return of the books and records that he and his group had removed. CX-59. Respondent testified that he had been ready to return the books and records when Lempert USA stopped payment on the checks he had written on March 31. He testified that as of June 2006, he would have returned the documents if he had gotten the money represented by the checks. Tr. 214-215, 401.[11]

Through counsel, Respondent and at least some of the others who had left Lempert USA asked for back pay, plus the money represented by the checks Respondent had written on March 31, as a condition for the return of the documents. On June 19, 2006, Lempert USA's attorney wrote to Respondent's attorney, again demanding the return of the books and records, and noting that Respondent and others who had left the firm had demanded money for the return of the books and records. The attorney stated that "your clients have no right to hold [Lempert USA's] property, such as the Company's checkbook, hostage and blackmail the Company for their return." Tr. 215; CX-64; CX-79, at 9.

[11] Respondent has provided shifting explanations for precisely what happened and why. In his post-Complaint response to FINRA's Rule 8210 request of July 15, 2009, Respondent told FINRA that his group "temporarily remove[d] some records (to be returned in 24 hours) in order to make copies," that copies of some of the records were made on April 4, and that his group had been prepared to return all of the records until they learned that Lempert USA had stopped payment on the checks. CX-18 at 7. Respondent testified at the hearing that they did not make copies because they did not have enough money. Tr. 144. If there was not enough money to make copies, they could not have intended to make copies and return the documents in 24 hours.

On June 28, 2006, Emerald, Respondent, Coventry, and Jeff Heller,[12] filed an arbitration claim against Lempert USA, Milter, the Orlovs, and Borcherding, seeking approximately $300,000 in damages, primarily for back pay, and other relief.[13] No documents had been returned at that time. The first documents were returned on October 25, 2006, after Lempert USA had filed a motion to compel in the arbitration. CX-65; CX-69; CX-72; Tr. 220-224, 399-400. Additional documents were returned to Lempert USA in response to additional motions to compel and an order from the arbitrators. CX-73; CX-75. Respondent returned documents to Lempert USA only in response to discovery in the arbitration. Tr. 231-232. Some documents were never returned. CX-40; Tr. 338, 352-353.

B. Respondent Violated NASD Rule 2110 by Taking His Firm's Books and Records

NASD Conduct Rule 2110 requires a registered representative "in the conduct of his business," to "observe high standards of commercial honor and just and equitable principles of trade." Unethical conduct violates Rule 2110.[14] A violation of the Rule is based on the ethical implications of a representative's conduct, and does not depend on whether the representative has committed a legally cognizable wrong.[15] Rule 2110 applies broadly to apply to all business-related misconduct.[16] "NASD Rule 2110 reaches beyond legal requirements and, among other things, depends upon general rules of fair dealing, the reasonable expectations of the parties, and

[12] Heller had been Lempert USA's FINOP. Tr. 101. He moved to Emerald and became its FINOP. CX-3.

[13] Lempert USA and Borcherding filed counterclaims. CX-66; CX-67.

[14] *See Dep't of Enforcement v. Davenport*, No. CO5010017, 2003 NASD Discip. LEXIS 4, at *8 (N.A.C. May 7, 2003).

[15] *See, e.g., Dep't of Enforcement v. Foran*, No. C8A990017, 2000 NASD Discip. LEXIS 8, at *13-14 (N.A.C. Sept. 1, 2000); *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12 (N.A.C. June 2, 2000).

[16] *Dep't of Enforcement v. Davenport*, 2003 NASD Discip. LEXIS 4, at *8-9.

marketplace practices."[17] A registered representative owes a duty of loyalty to his firm, and a breach of the duty of loyalty violates Rule 2110.[18]

Respondent breached his ethical duties by removing his firm's books and records, taking property that was not his, and rendering the firm unable to operate. Such conduct violates the ethical standards required of registered representatives. It was a gross deviation from reasonable expectations and business practices, and violated Respondent's duty of loyalty to his firm.

Respondent seeks to justify his actions as defensive, taken to protect customers, the SIPC, and the brokers who left the firm, including himself, from fraud. Such motives, even if proven, would not excuse Respondent's actions. To prove a violation of Rule 2110, "'[b]ad faith' in the sense of malicious intent or deceitfulness need not be established."[19] "Rule 2110 and the overall regulatory scheme do not permit members and associated persons to engage in vigilante justice."[20] If Respondent believed that there was potential for wrongful conduct, he had "many lawful avenues to seek redress, including notifying [FINRA] or the SEC."[21] Although there was an SEC examiner in Lempert USA's office conducting an on-site examination, Respondent failed to notify the examiner of possible improprieties until after he left with the documents. He

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[17] *Dep't of Enforcement v. Conway*, No. E102003025201, 2010 FINRA Discip. LEXIS 27, at *29 (N.A.C. Oct. 26, 2010), *appeal filed* (S.E.C. Dec. 2, 2010) (citing *Dep't of Enforcement v. Shvarts*, 2000 NASD Discip. LEXIS 6, at *12).

[18] *See, e.g*., *David Arm*, Exchange Act Rel. No. 28418, 1990 SEC LEXIS 3115, at *23 (Sept. 7, 1990); *Jay Frederick Keeton*, Exchange Act Rel. No. 31082, 1992 SEC LEXIS 2002, at *22 (Aug. 24, 1992); *Louis Feldman*, Exchange Act Rel. No. 34933, 1994 SEC LEXIS 3428, at *8-9 (Nov. 3, 1994) ("In seeking to transfer the [customer] accounts to his future employer, [respondent] acted solely out of self-interest, in a manner both contrary to the interests of his employing broker-dealer, and indifferent to the interests of the mutual fund accountholders."), citing *Michael T. McAuliffe*, Exchange Act Rel. 21649, 1985 SEC LEXIS 2398, at *4, n. 3 (Jan. 14, 1985); *Dep't of Enforcement v. Foran*, 2000 NASD Discip. LEXIS 8, at *17-18.

[19] *Dep't of Enforcement v. Shvarts*, 2000 NASD Discip. LEXIS 6, at *16; *see also Heath v. SEC*, 586 F.3d 122, 131-139 (2d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 3029 (Apr. 5, 2010) (extensive discussion of analogous NYSE rule, finding that unethical conduct violates the rule even in the absence of a finding of bad faith).

[20] *Dep't of Market Reg. v. Respondent*, No. CMS030181, slip op. at 12 (N.A.C. June 9, 2005), available on FINRA's website at http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p014664.pdf.

[21] *Id.*

did not offer to turn the documents over to FINRA. He also could have notified the clearing firm to be alert to possible improprieties in the customers' accounts. He could have copied the documents and returned them before leaving,[22] and could have copied computer files without erasing the computers or taking the backup tapes. Instead, he chose a course of action that was certain to shut down Lempert USA, and to facilitate Respondent's move to his new firm.

The Hearing Panel finds that by removing the books and records from Lempert USA, Respondent violated NASD Conduct Rule 2110.

IV. Respondent Violated FINRA Rules 8210 and 2010 by Failing to Respond to FINRA's Request for Information and Documents

A. Respondent Did Not Respond to FINRA's Rule 8210 Request of July 15, 2009, Until After the Complaint Was Filed

On May 8, 2009, Enforcement sent a Wells notice to Respondent's counsel, informing him that a preliminary determination had been made to institute a disciplinary action against him for removing the books and records from Lempert USA.[23] CX-17. Respondent responded to the Wells notice on June 29, 2009, providing his version of the circumstances of his departure from Lempert USA and the removal of the firm's books and records. CX-18.

On July 15, 2009, pursuant to Rule 8210, a FINRA examiner sent a letter to Respondent, asking 20 questions concerning statements in Respondent's Wells submission, and requesting documents relating to those statements. The request directed Respondent to respond by July 27. CX-19. Respondent requested additional time to search for documents, and the examiner granted him an extension to August 10, 2009. CX-20; Tr. 238. On August 11, Respondent again requested additional time to respond, this time due to illness. CX-21. On August 20, the

[22] The Hearing Panel does not find that it would have been proper to take copies of documents, but it clearly would have been less harmful to Lempert USA to do so.

[23] *See* Reg. Notice 09-17, at 3 (Mar. 2009), for a description of the Wells process.

examiner sent a Second Request, enclosing the request of July 15, 2009, and requiring a response by September 3, 2009. CX-22; Tr. 240.

Respondent did not respond to the July 15 Rule 8210 request prior to the filing of the Complaint. He testified that he worked on the response, but so much was happening that he forgot to complete it and submit it to the examiner. He testified that the firm was being evicted, the files were in disarray, there was no way of getting to the files, and his secretary left the firm, all distracting him and making it difficult to respond. Tr. 385-386, 428.

Respondent submitted a narrative response to the Rule 8210 request on April 29, 2010. Citing the same difficulties to which he testified, he did not submit any documents. CX-23; Tr. 241, 384-386.

B. Respondent Violated FINRA Rules 8210 and 2010

FINRA Rule 8210 requires persons subject to FINRA's jurisdiction to provide information requested by FINRA in response to requests for information. Rule 8210 is FINRA's mechanism "to police the activities of its members and associated persons."[24] Rule 8210 "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations."[25] "The failure to respond to [FINRA] information requests frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."[26] The failure to respond to a Rule 8210 request until after the

[24] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) *quoting Richard J. Rouse*, Exchange Act Rel. No. 32658, 1993 SEC LEXIS 1831, at *7 (July 19, 1993).

[25] See *also, Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *15 (N.A.C. May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004); *Joseph G. Chiulli*, Exchange Act Rel. No. 42359, 2000 SEC LEXIS 112, at *18 (Jan. 28, 2000).

[26] *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *petition for review denied sub nom. Paz Sec. v. SEC*, 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

initiation of disciplinary action is considered a complete failure to respond, and a violation of Rule 8210.[27]

Respondent violated FINRA Rules 8210 and 2010 by failing to respond to the request for information served on July 15, 2009, until April 29, 2010, four months after the Complaint was filed.

V. Sanctions

A. Sanctions for Taking Books and Records

There is no Guideline that is specifically applicable to the taking of books and records in the FINRA Sanction Guidelines. ("Sanction Guidelines" or "Guidelines"). An adjudicator may look to analogous Guidelines in considering the sanction for violations that are not expressly covered by the Guidelines.[28] Enforcement cites the Guideline for recordkeeping violations as the most analogous,[29] arguing that Respondent's violation caused Lempert USA to violate FINRA and SEC recordkeeping requirements and is therefore an egregious recordkeeping violation.[30]

Characterizing the violation as recordkeeping misses the essence of the violation. Respondent did not merely fail to make and preserve books and records; he took almost all of them, virtually shutting down Lempert USA. Accordingly, the Hearing Panel has considered the

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[27] *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010), *appeal filed*, No. 10-4566 (2d Cir. Nov. 15, 2010) ("We have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210."). A violation of Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of Rule 2010. *Id.* at *13, n.12.

[28] "For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations." *Sanction Guidelines* at 1. *See, e.g.*, *Dep't of Enforcement v. McCrudden*, No. 2007008358101, 2010 FINRA Discip. 25, at *25 (N.A.C. Oct. 15, 2010).

[29] *See Sanction Guidelines* at 30.

[30] For egregious recordkeeping violations, the Guidelines recommend a fine of $10,000 to $100,000, and a suspension of more than 30 business days or a bar.

Principal Considerations in Determining Sanctions applicable to all violations, rather than relying on a single Guideline.[31]

Respondent's misconduct resulted in injury to his member firm. Principal Consideration No. 11. Lempert USA could not operate without books and records. It had no records of who its customers were, and had to reconstruct its customer records by working with its clearing firm. FINRA permitted the firm to conduct only liquidating transactions as a result of Respondent's actions. In addition, as Enforcement argues in support of its proposed sanctions, the removal of the firm's books and records caused the firm to be non-compliant with the recordkeeping obligations of SEC Rules 17a-3, 17a-4, and NASD Rule 3110.

Respondent's misconduct resulted in the potential for Respondent's monetary or other gain. Principal Consideration No. 17. By taking all the customer records, Respondent made certain that the brokers who moved with Respondent would have exclusive access to the Lempert USA customers until Lempert USA could reconstruct its customer records. The books and records were potentially helpful to the launch of Emerald by providing account histories for the clients, employment histories for the employees, and compliance manuals. Respondent had represented to the Emerald Investors that he would bring a functioning office to Emerald, and having a full set of books and records helped to fulfill that promise.

Respondent's misconduct was an intentional act. Principal Consideration No. 13. He fully understood that he was taking Lempert USA's records, and that he did not own them. Respondent has not accepted responsibility for his misconduct. Principal Consideration No. 2. Rather, he persists in his attempts to justify what he did with vague assertions that he was

[31] *Sanction Guidelines* at 6-7.

protecting customers, the SIPC, or himself, from "criminals." He fails to recognize that such "vigilante justice" is improper.

Respondent's concern about the honesty of the Orlovs is not a mitigating factor. While Respondent may have had genuine concerns, the Hearing Panel finds that Respondent's motivation was financial and not altruistic. The hodgepodge of fraudulent scenarios was a post-hoc justification for an economic decision.[32]

Enforcement seeks a one-year suspension and a $30,000 fine.[33] Given the seriousness of Respondent's conduct, a one-year suspension is not sufficiently remedial. Respondent orchestrated a scheme to take his firm's property, caused substantial injury to the firm and potential injury to the firm's customers, and violated his duty to the firm. The Hearing Panel finds that a two-year suspension is appropriate. The Hearing Panel finds that a fine of $20,000 is sufficiently remedial, and, with the substantial suspension, will provide a sufficient deterrent to future misconduct by Respondent.

B. Sanctions for Failure to Respond to Rule 8210 Request for Documents and Information

The Guidelines provide that for a failure to respond to Rule 8210 requests, a bar is the standard sanction for the responsible individual. Where mitigation exists, or the person did not respond in a timely manner, the Guidelines suggest consideration of a suspension in any or all capacities for up to two years. *Sanction Guidelines* at 35. Enforcement recommends a six-month suspension and a fine of $20,000.[34]

[32] Even if the Hearing Panel had found Respondent's altruistic explanation credible, it would not have found the explanation mitigating because there were other, far more reasonable, ways to protect the alleged intended victims.

[33] Tr. 444.

[34] Tr. 444.

In determining the appropriate sanctions, the Hearing Panel considered Respondent's compliance with several previous requests for information. Respondent responded to several requests for information from FINRA, although typically not promptly, in 2006. FINRA requested information from Respondent pursuant to Rule 8210 on March 31, May 23, July 20, August 18, and October 20, 2006. CX-4; CX-7; CX-11; CX-14; CX-90; Tr. 171-172, 265, 269, 271-272. Respondent submitted responses to all of these requests, answering all questions, except one about his financial situation. CX-5, at 27; CX-6; CX-8; CX-9; CX-10; CX-12; CX-13; CX-16; Tr. 270-271, 287, 306-307. He also provided information concerning Lempert USA's finances, his departure from Lempert USA, and the Orlovs, to FINRA in connection with Emerald's application for FINRA membership.

Given Respondent's history of responding to Rule 8210 requests, the Hearing Panel finds that a six-month suspension and a $5,000 fine is sufficiently remedial. The suspensions shall run consecutively.[35]

VI. Conclusion

Respondent John Joseph Plunkett is suspended for two years and fined $20,000 for taking almost all of the books and records from his firm at the time of his resignation from the firm, in violation of NASD Conduct Rule 2110. Respondent is suspended for an additional six months and fined an additional $5,000 for failing to respond to a request for information, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010. The suspensions shall run consecutively. In addition, Respondents shall pay costs in the amount of $4,004.85, which represents the cost of the hearing transcript together with a $750 administrative fee.

[35] *Michael Frederick Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *46 (Oct. 6, 2008) (consecutive suspensions appropriate because "violations are different in nature and raise separate public interest concerns"), *aff'd in part, rev'd in part on other grounds*, 592 F.3d 147, 157-158 (D.C. Cir. 2010).

If this decision becomes the final disciplinary action of FINRA, the suspensions shall become effective with the opening of business on March 7, 2011, and end with the close of business on September 6, 2013. The fine and costs shall become due and payable when Respondent returns to the industry.[36]

HEARING PANEL.

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