FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. PAUL JAMES MARSHALL (CRD No. 1889692), Respondent.	Disciplinary Proceeding No. 2008014285801 Hearing Officer – MC **HEARING PANEL DECISION** January 25, 2012

For borrowing funds from a customer, in violation of NASD Conduct Rules 2110 and 2370, Respondent Paul James Marshall is suspended for 30 business days, fined $1,000, and ordered to pay restitution in the amount of $25,000 plus interest. For not responding timely to requests for documents, in violation of FINRA Conduct Rule 2010 and Procedural Rule 8210, he is fined $2,500. He is also ordered to pay costs of the hearing.

Respondent is not liable for misappropriating customer funds, in violation of NASD Conduct Rules 2110 and 2330(a). The allegation that he did so is dismissed.

Appearances

UnBo Chung, Senior Regional Counsel, and Marcletta Kerr, Senior Regional Counsel, Chicago, Illinois, for the Department of Enforcement.

Glenn A. Delk, Esq., Atlanta, Georgia, for Respondent.

I. Background

The backdrop to this case is the acrimonious termination of a business relationship between Respondent Paul James Marshall and JL, Marshall's former neighbor, friend, customer, and business partner. In June 2008, a year after their joint business venture failed with disastrous financial consequences to both men, JL contacted Marshall's firm to complain that two years earlier, in his role as JL's broker, Marshall had misused funds JL intended as an investment and

borrowed funds from JL that he did not repay. When the Department of Enforcement learned of JL's allegations, it investigated.

On December 23, 2010, Enforcement filed a three-cause Complaint alleging that Marshall: (i) misappropriated JL's funds; (ii) improperly borrowed money from JL; and (iii) failed to respond to requests for information issued by FINRA staff. The hearing took place in Atlanta, Georgia, on August 2, 2011. JL and Marshall were the principal witnesses. Enforcement also presented the testimony of a compliance officer from Marshall's employer firm and two FINRA staff members who participated in the investigation.

A. Jurisdiction

Marshall entered the securities industry in 1989. From 2004 until June 24, 2008, Marshall was registered with FINRA through member firm Oppenheimer & Co. ("Oppenheimer").[1] He is currently registered with another member firm,[2] and therefore is subject to FINRA's jurisdiction for the purposes of this disciplinary proceeding.

B. Complaint

The first cause of action relates to an option to purchase the stock of a company named Differential Solutions, Inc. ("DSI"). The Complaint alleges that in June 2006, Marshall, who held an option to purchase 100,000 shares of DSI at $3.82 per share, offered to sell JL the "*option* to purchase"[3] 10,000 shares of DSI at the same price. The Complaint further alleges that JL wired $38,200 to a bank account maintained by Marshall for the "purchase of *shares* of

[1] Hearing Transcript 238-239; Complainant's Exhibit 1; Complainant's Exhibit 15. References to the testimony at the hearing are to "Tr." with transcript page numbers. References to exhibits introduced by Enforcement are designated "CX-___." References to exhibits introduced by Marshall are designated "RX-___."

[2] CX-1.

[3] Complaint ¶¶ 4-5 (emphasis added).

DSI,"[4] and that Marshall "did not exercise the options to purchase DSI shares … did not forward the money to DSI and … did not return the money to JL." The first cause of action concludes that by keeping JL's funds, Marshall is liable for misappropriation,[5] in violation of NASD Conduct Rules 2110 and 2330(a).[6]

The second cause of action alleges that on February 28, 2007, Marshall borrowed $25,000 from JL, despite Oppenheimer's policy against borrowing from customers, and in violation of NASD Conduct Rules 2110 and 2370.[7]

Finally, the third cause of action alleges that on September 10, 2010, and November 17, 2010, pursuant to Rule 8210, FINRA staff issued requests to Marshall to provide records of the bank account into which JL wired the funds to purchase the DSI option, and that Marshall failed to do so, in violation of FINRA Conduct Rule 2010 and Procedural Rule 8210.[8]

In his Answer, Marshall denies misappropriating JL's funds, denies borrowing funds from JL, and contends he tried to produce the records Enforcement sought, offering circumstances in mitigation of his failure to do so in a timely fashion.

[4] Complaint ¶ 6 (emphasis added).

[5] Complaint, ¶¶ 5-8.

[6] Complaint, ¶ 9. 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). 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). The misconduct alleged in the first and second causes of action of the Complaint occurred from June 2006 through February 2007, prior to the effective date of the new consolidated rules. The misconduct alleged in the third cause of action of the Complaint occurred in September and November 2010, subsequent to the effective adoption of the new rules. Thus, this Decision refers to and relies on the NASD and FINRA Conduct Rules that were in effect at the time the alleged misconduct occurred. The applicable rules are available at www.finra.org/rules.

[7] Complaint ¶¶ 11, 16-17.

[8] Complaint ¶¶ 19, 21, 23.

II. Findings of Fact and Conclusions of Law

A. Summary

For the reasons set forth below, the Panel finds that Enforcement failed to establish by a preponderance of the evidence that a misappropriation occurred. As noted above, the Complaint's first cause of action alleges that Marshall offered JL an *option*, but that JL purchased *shares* of DSI. The Panel finds, contrary to this allegation, that Marshall offered JL a portion of his option to purchase DSI stock, which JL accepted. Thus, JL purchased an option, not DSI stock. The difference is significant. A stock option is the "right to buy a designated stock, if the holder … chooses, at any time within [a] specified period, at [a] determinable price."[9] However if, as happened here, "the right is not exercised after a specified period, the option expires and the option buyer forfeits the money."[10]

In this transaction, JL purchased the option in anticipation of an imminent merger that he and Marshall believed would increase the share price of DSI. However, the merger did not take place, and neither JL nor Marshall exercised his option. They allowed the options to expire, believing them to be worthless.

As for the second cause of action, the Panel finds that Enforcement established by a preponderance of the evidence that Marshall borrowed funds from JL, who was a customer, in violation of NASD Conduct Rules 2110 and 2370.

Finally, the Panel finds that Enforcement established by a preponderance of the evidence that Marshall failed to provide a timely response to requests for bank statements, in violation of FINRA Conduct Rule 2010 and Procedural Rule 8210, as alleged in the third cause of action. As set forth below, however, the Panel finds that the evidence supports the conclusion that Marshall

[9] *Black's Law Dictionary*, 1418 (6th ed.).

[10] *Dictionary of Finance and Investment Terms*, 416 (5th ed.).

cooperated with Enforcement's investigation, and his untimely response to the request for records did not impede the investigation.

B. The Relationship Between Respondent and Customer JL

Marshall and JL met approximately 17 years ago in Atlanta where they were neighbors. They developed a friendship, and Marshall became JL's financial advisor. There was a hiatus in the relationship when JL moved to Florida, but the men renewed it in 2004 when Marshall resumed his role as JL's financial advisor.[11] By that time, Marshall had moved from another FINRA member firm to Oppenheimer.[12] JL informed Marshall of a business venture in which he was engaged to develop real estate in Rosemary Beach, Florida, by building eight "Italian-style homes."[13] JL claimed that he had obtained the requisite permits, zoning, and loan pre-approval, and that the project only lacked funding.[14] JL invited Marshall to become his partner and half owner of JL's real estate development company, Emerald Coast Group, LLC ("ECG"). Marshall agreed.[15]

ECG obtained a bank loan for $5.3 million and an additional $2.5 million from two individual investors to fund the development.[16] To obtain these funds, JL represented to the bank, to Marshall, and to the investors that he had obtained all the necessary permits and approvals to build the eight homes on the property to be developed.[17] The representations were untrue. JL had not obtained zoning approval from the county government. When he was unable

[11] Tr. 17-20. JL's Account Information form reflects that he opened his account at Oppenheimer on November 10, 2004. CX-2.

[12] Tr. 19-20, 252; CX-2.

[13] Tr. 252.

[14] Tr. 252-253.

[15] Tr. 21-23, 249; RX-3.

[16] Tr. 250.

[17] Tr. 85-86, 94-96, 115-116, 252-253.

to do so, the project failed. The bank obtained a $7.7 million judgment against JL and Marshall.[18] Marshall testified that as a result of the failed project, he lost over $1 million and is subject to judgments against him by the bank and one of the individual investors totaling more than $8 million.[19]

In the aftermath of the failed project, in 2007 JL and Marshall attempted to work out a settlement of issues between them relating to the business, but were unsuccessful.[20] In June 2008, JL called James Gianni, a Deputy Director of Compliance at Oppenheimer, to make a complaint about Marshall. Gianni asked JL to put it in writing.[21] In an e-mail he sent Gianni on June 24, 2008, JL described purchasing the option to buy DSI stock from Marshall; claimed he never received any confirmation of the purchase from Marshall; and asked "WHERE ARE MY OPTIONS?" (emphasis in original). JL also described lending Marshall $25,000 and not being repaid.[22]

Gianni testified that after receiving JL's complaint, Oppenheimer conducted an internal investigation that led to Marshall's discharge.[23] When Oppenheimer filed a Form U5 describing Marshall's discharge for borrowing from a customer and engaging in a private securities transaction, FINRA investigated.[24]

[18] Tr. 120-121.

[19] Tr. 254-255.

[20] Tr. 129-130, 259-261.

[21] Tr. 164, 168-169.

[22] CX-14.

[23] Tr. 169-170. Marshall submitted his resignation in writing on July 16, 2008. Tr. 172-173; CX-15. Marshall testified he was not told he had been discharged when he resigned. Tr. 243

[24] Tr. 201.

C. The Alleged Misappropriation

1. The DSI Stock Option

Separate from his work at Oppenheimer and his relationship with JL, Marshall served on the DSI advisory board. On December 9, 2005, DSI gave Marshall an option to purchase 100,000 shares of the company's stock at $3.82 per share.[25] The option was to expire in one year.[26]

DSI had a software program for architects that was purportedly capable of creating architectural renderings in three dimensions, showing all of the components of a construction project, down to bolts and nails.[27] JL was interested in DSI and the potential of using its software in his business.[28] According to JL, in mid-2006, Marshall told him of his option and that DSI was about to merge with another company, which he expected to result in an increase in the price of its stock.[29] Marshall sent JL an e-mail on June 30, 2006, stating: "If you want to participate in 10000 options at $3.82 let me know. DSI is about to announce the merger … that will make these options price around $6.00," to which JL replied "I will be doing this on Monday."[30]

On July 6, 2006, JL sent an e-mail to Marshall to say he was transferring funds to his Oppenheimer account for "DSI 1000 (sic) shares today." Marshall replied that the "shares are coming from my options at $3.82. Nothing to do with Oppenheimer," and gave JL instructions

[25] Tr. 278-279.

[26] Tr. 281.

[27] Tr. 25-26.

[28] Tr. 262.

[29] Tr. 29-30; CX-4.

[30] CX-4.

to wire the funds to a personal account Marshall maintained at Wachovia Bank.[31] Marshall testified that had the merger taken place, and the price risen, he would have exercised the option to purchase the shares at $3.82 per share, in return for which he would have expected to receive $6.00.[32]

At Marshall's direction, JL wired $38,200 to one of Marshall's personal bank accounts.[33] Marshall testified that in order to document JL's option purchase, he prepared a written assignment of the option that he and JL signed, and that he gave it to JL.[34]

Marshall testified that he explained the risks of investing in the option to JL. He told JL that if the stock price declined, if the company went out of business, or if the option expired worthless, he could lose his money.[35] In addition, Marshall testified that JL knew the option would expire in December 2006.[36]

JL testified that he had never purchased an option before the DSI transaction.[37] Nonetheless, despite the references to "shares" as well as "options" in the exchange of e-mails noted above, JL understood correctly, based on Marshall's explanation, that what he obtained was the option to purchase 10,000 shares at $3.82 per share; that after the merger, Marshall would buy the shares on his behalf; and that then JL could profit from the increased price.[38] He understood that Marshall would allocate 10,000 of the 100,000 DSI shares to him.[39] When asked

[31] CX-5.

[32] Tr. 305-306.

[33] Tr. 30-33.

[34] Tr. 271-273, 307.

[35] Tr. 261-262.

[36] Tr. 311.

[37] Tr. 153.

[38] Tr. 153-154.

[39] Tr. 154.

why he wired $38,200 to Marshall, JL said "To purchase 10,000 shares or options from Mr. Marshall."[40] When Enforcement asked if he ever did "receive the options," JL answered, cryptically, "I have never seen anything with that."[41] JL claimed that he never received any documentation of the assignment of the option to him.[42]

According to Marshall, the anticipated DSI merger never occurred; he was informed that DSI dissolved, and he did not exercise the option to purchase DSI shares.[43] JL testified that after the purchase, when he asked Marshall about the options, Marshall said he was "working on it," and "it was progressing." Later, Marshall was "quite upset" when he informed JL that "DSI was bankrupt, so there are no options, there are no shares."[44] JL said he assumed that "they were worthless."[45] Finally, JL testified, he made no attempt to exercise his option and wrote off the $38,200 investment as a loss for tax purposes.[46]

2. Enforcement's Arguments for Marshall's Liability

Enforcement's argument that Marshall misappropriated JL's funds is straightforward. Enforcement contends that: (i) JL sent Marshall $38,200 for the option to purchase shares of DSI stock; (ii) Marshall kept the money and used it for his own purposes instead of sending it to DSI; and (iii) Marshall never transferred the option to JL, and thus JL never received anything of value in return.[47] Enforcement argues that Marshall's denial of liability is not credible because during the investigation and at the hearing, Marshall gave "incompatible explanations regarding

[40] Tr. 33.

[41] *Id.*

[42] Tr. 153.

[43] Tr. 264-266.

[44] Tr. 34.

[45] Tr. 35.

[46] Tr. 100-102.

[47] Tr. 343-346; Department of Enforcement's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law, pp. 1-2.

the transfer of options."[48] The "incompatible explanations" relate to Marshall's descriptions of the creation of the document assigning the option to JL.

3. Marshall's Explanations

Enforcement is correct in arguing that Marshall has given varying and confusing accounts of how he documented the sale of the option to JL. During Enforcement's investigation, in the first of two on-the-record interviews, Marshall testified that before the transaction, he consulted with DSI's president to confirm that he could transfer the right to exercise the option.[49] Marshall testified that he and JL signed a document, prepared by JL's attorney, to evidence the assignment of the option.[50] In the interview, Marshall stated that he did not have a copy of the assignment; he had asked JL to give one to him, but JL refused to do so.[51]

In the second on-the-record interview, Marshall testified that he gave JL a letter documenting JL's ownership of the portion of Marshall's option to purchase DSI shares. Marshall kept a copy in a desk he had used in JL's office in Rosemary Beach, but JL refused to send it to him.[52]

In a resignation memorandum dated July 16, 2008, that Marshall submitted to Oppenheimer, he wrote: "I told [JL] to draw up the paperwork with the attorneys so that it could be in writing, which he did. He did receive the options."[53] This assertion was repeated in a letter

[48] *Id*. at p. 2.

[49] Tr. 305; CX-18, p. 43.

[50] CX-18, pp. 41-44.

[51] CX-18, p. 44.

[52] CX-21, pp. 50-51.

[53] CX-15, p. 2.

written on Marshall's behalf by his counsel, dated December 2, 2008, containing a "narrative summary" in response to a request for information made by FINRA pursuant to Rule 8210.[54]

Later, in a written response to a request FINRA staff made on September 10, 2010, to explain "in detail the process of transferring the right to exercise options to purchase DSI shares," Marshall wrote: "Transferable per CEO. Never did due to bankruptcy."[55]

At the hearing, Marshall testified that although he initially asked JL to prepare the assignment, JL did not do it. Consequently, Marshall prepared the paperwork and took it to Florida for JL to sign. He testified that he gave the paperwork to JL, and, in turn, JL gave it to his attorneys. Marshall conceded that this differed from the written accounts he had submitted previously. Marshall testified that he should not have written that JL "did receive the options," but to be accurate should have stated that JL received the *assignment* of the option to purchase the shares.[56]

4. Marshall Did Not Misappropriate JL's Funds

The Panel finds that there is insufficient evidence to conclude that JL did not receive an option to purchase 10,000 shares of DSI. Despite the confusion in the record concerning Marshall's documentation of the sale of the option, the Panel finds that Enforcement's emphasis on what it characterizes as Marshall's "incompatible" versions is misplaced. Marshall's several explanations, even if deemed incompatible, fail to establish that JL did not acquire the option he paid for.

Regardless of the origin and whereabouts of paperwork evidencing the assignment by Marshall, on the record of this case, it is undisputed that Marshall possessed an option to

[54] CX-17, pp. 2-3.

[55] CX-20, p. 1.

[56] Tr. 319-322.

purchase 100,000 DSI shares at $3.82 and gave JL the opportunity to acquire a portion of it. The investment was speculative, predicated on an expectation of a merger that could result in an increase in the shares' value to provide a handsome profit to both. It is clear that JL accepted the offer on July 6, 2006, when he wired $38,200 to Marshall. Contrary to the allegation in the first cause of the Complaint that JL wired the funds "for the purchase of shares of DSI,"[57] and despite the references to both "shares" and "options" in the e-mail interchange between Marshall and JL, the Panel finds that JL wired the money to purchase not *shares*, but an *option* to purchase shares, of DSI.

At that point, JL obtained what he was offered: the option to acquire 10,000 shares of DSI at $3.82 per share. The transfer of that right did not require Marshall to convey the funds to DSI, as argued by Enforcement[58] and alleged in the Complaint,[59] because Marshall, not DSI, owned the option, and therefore he was under no obligation to send JL's funds to DSI. That the expected merger did not occur, and the option expired unexercised, does not alter the agreement the parties reached.

Misappropriation or improper use of customer funds has been defined as "unauthorized, improper, or unlawful use of funds … for [a] purpose other than that for which intended."[60] Charged here as a violation of NASD Conduct Rule 2330(a), misappropriation is also characterized as conversion, or misuse of funds, and occurs when there "is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the

[57] Complaint ¶ 6.

[58] Tr. 344.

[59] Complaint ¶¶ 7-8.

[60] *Dep't of Enforcement v. Evans*, No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *34 (N.A.C. Oct. 3, 2011)(quoting *Black's Law Dictionary* 998 (6th ed.), and citing *Dist. Bus. Conduct Comm. v. Pinchas*, No. C1093001, 1998 NASD Discip. LEXIS 59, at *17-18 (N.A.C. June 12, 1998)).

property nor is entitled to possess it."[61] One example is obtaining and using firm funds to which one is not entitled.[62]

Here, the Panel finds that the record lacks "definitive, credible evidence demonstrating by a preponderance of the evidence"[63] that Marshall misappropriated JL's funds when JL wired $38,200 to him to purchase the option offered by Marshall. JL imposed no conditions on the use of the funds, other than to effect his purchase of the option.

Reviewing the record in its entirety, the Panel finds that Enforcement has failed to prove: (i) that JL did not receive the option he paid for; and (ii) that Marshall was not entitled to retain and use the funds with which JL paid for the option. Presumably, had the DSI merger occurred, both JL and Marshall would have exercised their options and reaped a profit. In that event, if Marshall withheld the profit to which JL would have been entitled, he may have been liable for conversion. But that is not this case. Enforcement adduced no evidence that if he had sought to exercise his option, JL would not have received what he was entitled to.

Under these facts, the Panel finds Enforcement failed to prove by a preponderance of the evidence that Marshall misappropriated JL's funds, and therefore Marshall is not liable for violating NASD Conduct Rules 2110 and 2330(a) as alleged in the first cause of action of the Complaint.

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[61] *FINRA Sanction Guidelines*, p. 36 (2011).

[62] *Dep't of Enforcement v. Saad*, No. 2006006705601, 2009 FINRA Discip. LEXIS 29, at *10 (N.A.C. Oct. 6, 2009).

[63] *Rafael Pinchas*, Exch. Act Rel. No. 41816, 1999 SEC LEXIS 1754, at *28 (Sept. 1, 1999). In *Pinchas*, the SEC sustained a hearing panel finding, based in part on the panel's credibility determinations, that the respondent was not liable for misappropriation where there was insufficient evidence that a customer had not consented to the respondent's use of the customer's funds.

D. The Loan

Oppenheimer prohibited its registered representatives from borrowing funds from customers without prior approval by the firm's compliance department.[64] The firm's policy echoed the restrictions on borrowing funds from customers embodied in NASD Conduct Rule 2370, which prohibits registered representatives from doing so unless certain conditions, not applicable here, have been met. Indeed, as Gianni, Oppenheimer's Deputy Director of Compliance, put it, the principle that registered representatives may not borrow money from customers without firm approval is "basically Registered Rep 101, frankly."[65]

Equally basic and undisputed is the definition of what constitutes a loan: "[d]elivery by one party to and receipt by another party of [a] sum of money upon agreement, express or implied, to repay it with or without interest."[66]

On February 28, 2007, Marshall sent JL an e-mail stating that he needed $25,000 to cover a margin call and requesting a draw from ECG's funds.[67] Later that day, Marshall sent another e-mail requesting a check.[68] JL did not agree to give Marshall a draw, but directed Marshall to sell $100,000 worth of securities from JL's portfolio, from which he would "let [Marshall] use $25,000 … until next week."[69] On March 13, 2007, JL asked Marshall to return the $25,000.[70] In response, Marshall sent JL a check dated "4/2007" made out to ECG.[71] On April 3, 2007, JL informed Marshall by e-mail that he was going to deposit Marshall's check. Marshall responded

[64] Tr. 166.

[65] Tr. 196.

[66] *Black's Law Dictionary* 936 (6th ed.).

[67] CX-9, p. 3.

[68] *Id.* at 2.

[69] Tr. 41; CX-9, p. 2.

[70] CX-10.

[71] CX-12.

by asking JL to wait.[72] JL deposited it, however, and when he informed Marshall that the check was not honored, Marshall replied that he would repay JL with Oppenheimer stock he expected to receive soon.[73]

Marshall, conceding that "you can't take loans from clients," testified that he viewed the $25,000 as a draw to which he was entitled, not a loan.[74] At the time, Marshall needed funds and was relying on a monthly draw of $10,000 he believed he was entitled to as a result of his partnership with JL and ownership interest in ECG. JL had provided draws previously but had stopped, saying he could no longer afford to do so.[75] Desperate for cash, Marshall testified he was willing to "say anything" to JL to get the money.[76] He explained that was why in his second message on February 28 he wrote "I need to deposit a check today. I can as I said recompensate next week."[77]

Marshall conceded that JL's offer to "let [Marshall] use $25,000 … until next week," his promise to "recompensate" JL, and sending JL a check for $25,000 supported JL's inference that the initial request for a draw morphed into a loan.[78]

Based on these facts, the Panel finds that JL gave, and Marshall received, money upon condition that Marshall repay it. Therefore, regardless of how Marshall chooses to view the transaction, it was a loan.

By borrowing money from a customer, Marshall violated Oppenheimer's policy and NASD Conduct Rules 2110 and 2370, as alleged in the second cause of action of the Complaint.

[72] Tr. 47.

[73] Tr. 49-50.

[74] Tr. 259, 325.

[75] Tr. 257.

[76] Tr. 327.

[77] CX-9, p. 2.

[78] Tr. 327.

E. The Requests for Information

FINRA Principal Examiner Janet Williams testified that on September 10, 2010, in the course of the investigation, she sent Marshall a letter requesting information pursuant to Rule 8210.[79] Among other things, the letter sought statements from May 2006 through May 2009 for the Wachovia Bank account to which Marshall's July 6, 2006, e-mail directed JL to wire the funds for the option.[80] Marshall provided a response but it did not include the bank statements sought by Williams.[81]

In October 2010, Williams informed Marshall that he needed to supply the missing statements. He said he was willing to do so.[82] Marshall followed up with an e-mail saying he had spoken with the bank and it was preparing to forward the records. Marshall still did not provide them.[83]

Julie Murphy, a FINRA Principal Investigator, testified that she hand-delivered a request pursuant to Rule 8210 to Marshall during an on-the-record interview with him on November 17, 2010, that renewed FINRA's request for the bank statements. The request required Marshall to provide the bank statements no later than November 22, 2010.[84] At the interview, when asked about what he had done to obtain the records, Marshall admitted his effort to comply with the request "[had] not been a very, very good effort" but that he had called people at the bank, and had been "given the runaround," partly because the account was four and a half years old and the

[79] Tr. 210.

[80] CX-19, p. 1; CX-5, p. 1.

[81] CX-20; Tr. 210.

[82] Tr. 211.

[83] Tr. 211-212.

[84] Tr. 231-232; CX-22.

ownership of the bank had changed.[85] He stated he would make providing the records a priority.[86] Nonetheless, Marshall failed to provide the account records by the deadline. When he filed his Answer to the Complaint, however, he did attach account statements.[87]

At the hearing, Marshall testified that when he asked the bank for the account statements, the bank initially told him that records of the account had been purged because the account had been closed. He testified that it took several calls to find someone who agreed to do the necessary research and locate the statements. According to Marshall, the bank then sent the statements to Marshall's previous address, which by that time was the residence of his ex-wife, who refused to provide him with access to his records.[88] He testified that he had tried to comply with the information request; had not attempted to hinder or delay the investigation; and ultimately had provided the records.[89]

Enforcement argues that Marshall's response was late and incomplete. Enforcement also argues that the fact that the December 2006 statement showed an outstanding balance is evidence that the account was open beyond the date Marshall testified it had been closed.[90] Nonetheless, the statements show Marshall's receipt and use of the funds JL wired, which is the information Enforcement sought.

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[85] CX-21, p. 84

[86] *Id.* at 85.

[87] Tr. 234.

[88] Marshall testified that the financial debacle resulting from his partnership with JL was a major factor leading to his divorce, and that his ex-wife has denied him access to the computers and records he kept at their former home. Tr. 268-269.

[89] Tr. 267-269.

[90] Department of Enforcement's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law, p. 6; RX-7, p. 36.

The Panel finds that Marshall did not provide FINRA with a timely response to the request issued to him pursuant to Rule 8210, and thereby violated FINRA Conduct Rule 2010 and Procedural Rule 8210.

III. Sanctions

A. Violation of NASD Conduct Rules 2110 and 2370

Enforcement suggests that a bar is arguably the appropriate sanction to impose upon Marshall for borrowing from JL. Alternatively, if the Panel finds that Marshall intended to repay JL and does not impose a bar, Enforcement urges the Panel "at the very least" to suspend Marshall for a year, require him to repay the money to JL, and impose a fine of $5,000.[91] Enforcement argues that by borrowing the money, Marshall committed "a very serious offense" and that, because Marshall failed to repay the loan, it was "tantamount to a conversion."[92] Asserting that it is an "unusual" and a "highly dangerous circumstance" for Marshall to continue to work in the securities industry, Enforcement contends that because Marshall was "willing to do these things" to a friend of 18 years, "he poses a danger to the investing public."[93]

The Sanction Guidelines do not contain a recommended sanction for borrowing from a customer. However, a Notice to Members points out that regulatory concern about loans obtained by registered persons from their customers has resulted in disciplinary actions against registered persons who take "unfair advantage of their customers by inducing them to lend

[91] Tr. 355; Summary of the Department of Enforcement's Case, p. 7. Enforcement cites *Dep't of Enforcement v. Tischler*, No. 20070083707001, 2009 FINRA Discip. LEXIS 25 (O.H.O. May 8, 2009). The Panel notes that each case must be viewed in the context of its own unique circumstances, and that adjudicators are required to tailor sanctions "to address the misconduct involved in each particular case." *Guidelines* at 3.

[92] Tr. 350-351.

[93] Tr. 354.

money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers."[94]

The Panel does not share Enforcement's assessment that Marshall presents a real danger to the investing public. The Panel notes that even though Enforcement argues Marshall's failure to repay is "tantamount" to a conversion, Enforcement did not charge him with conversion in connection with the loan.

Importantly, Marshall's relationship to JL was not just that of broker to customer. The loan must be viewed in the context of their contentious business relationship and the unfortunate state to which it had devolved, with both men feeling aggrieved and likely to initiate litigation. JL claimed in testimony that Marshall owes him $2,011,101 and before complaining to Oppenheimer, he offered to settle their differences if Marshall paid him $250,000, including the $25,000 loan and the $38,200 for the DSI option.[95] Marshall declined the offer,[96] and has hired counsel intending to sue JL for fraud.[97]

The Panel notes that Marshall knew borrowing from a customer was wrong, but that he believed himself entitled to the $25,000 he requested as a draw. His assertion of entitlement, however, does not change the fact that one facet of his relationship to JL was that of broker to customer, and that when JL refused to give him the money as a draw, the two agreed to a $25,000 loan.

The Panel concludes that an appropriate sanction under the circumstances of this case, to deter Marshall and others from such misconduct in the future, is to suspend Marshall from

[94] NASD Notice to Members 03-62 (Oct. 2003).

[95] Tr. 129-134.

[96] Tr. 130.

[97] Tr. 255.

associating with any FINRA member firm in any capacity for thirty days, impose a fine of $1,000, and order him to pay restitution to JL in the amount of $25,000, plus interest.

B. Violation of FINRA Conduct Rule 2010 and Procedural Rule 8210

Enforcement argues that Marshall's failure to provide a timely response to the request for his account statements should result in a bar. Enforcement argues that FINRA's Sanction Guidelines justify such a severe sanction when Enforcement is "forced to exert an extraordinary amount of pressure, in this case filing a Complaint, to effectuate compliance" with a Rule 8210 document request.[98] The Guidelines recommend a fine of $2,500 to $25,000, and consideration of a suspension in any or all capacities for up to two years, for an individual who fails to respond in a timely manner to a request issued pursuant to Rule 8210.[99] Enforcement notes that the Guidelines specify that adjudicators should treat a failure to respond to a request under Rule 8210 until after the filing of a complaint with the presumption that it constitutes a complete failure to respond.[100]

The Panel notes that the section of the Guidelines addressing violations of Rule 8210 is titled "Impeding Regulatory Investigations." This is important because it emphasizes that the purpose of Rule 8210 is to enable FINRA to investigate and gather information essential for it to fulfill its regulatory mission.

In this case, the Panel finds that Marshall's delay in providing the requested bank statements did not impede Enforcement's investigation. Further, the Panel is unpersuaded by Enforcement's argument that it was "forced" to file the Complaint in this case in an effort to "effectuate compliance" by Marshall with its request for his account records. The FINRA

[98] Tr. 356.

[99] *Guidelines* at 33.

[100] Summary of the Department of Enforcement's Case, p. 7; *Guidelines* at 33.

Examiner testified that Marshall was cooperative; that she did not need Marshall's bank statements to prove he had received funds from JL for the option; and that she did not conclude that Marshall was trying to impede the investigation.[101] This is consistent with Marshall's testimony that he attempted to provide the records in a timely fashion but encountered obstacles because the account had been closed, and his ex-wife refused to provide the statements when the bank sent them to her instead of to him.

FINRA's Sanction Guidelines identify certain Principal Considerations in Determining Sanctions. Applicable here is the "Importance of the information requested as viewed from FINRA's perspective."[102] In this case, the Panel concludes that Marshall's admission that he obtained the funds from JL, and used them for his own purposes, diminished the importance of obtaining the bank records to reflect that he had done so. Certainly, the case could have proceeded, and Enforcement would have established that JL wired $38,200 to Marshall's account for the option, without the bank statements.

The Panel is mindful that Enforcement was justified in issuing the request, for Rule 8210 gives FINRA "the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation." And it is fundamental that compliance with such requests is important, since Rule 8210, by giving FINRA "the right to require a … person associated with a member to provide information," is a crucial component of FINRA's examinations and investigations.[103]

In this case, however, Marshall presents mitigating circumstances with regard to difficulties he encountered in complying in a timely fashion. Furthermore, the Panel finds the

[101] Tr. 227-229.

[102] *Guidelines* at 33.

[103] *Dep't of Enforcement v. Masceri*, No. C8A040079, 2006 NASD Discip. LEXIS 29, at *35-36 (N.A.C. Dec. 18, 2006).

evidence does not establish that Marshall impeded, or tried to impede, FINRA's investigation into the loan.

Characterizing Marshall's efforts to comply in a timely fashion with the document request as "meager," Enforcement's position appears to be that Marshall could, and should, have done more than he did to comply in a timely fashion.[104]

Therefore, although the Panel finds mitigating factors present in this case, for the reasons set forth above, and because Marshall and others similarly situated must make diligent efforts to comply in a timely fashion with requests issued under the authority of Rule 8210, the Panel imposes a fine of $2,500 upon Marshall for failing to provide the bank statements requested by Enforcement in a timely fashion.

IV. Conclusion

For borrowing funds from a customer, in violation of NASD Conduct Rules 2110 and 2370, as alleged in the second cause of action of the Complaint, Respondent Paul James Marshall is suspended for 30 business days, fined $1,000, and ordered to pay restitution to JL in the amount of $25,000, plus interest from February 28, 2007, until paid. Interest shall be calculated at the rate set forth in the Internal Revenue Code at 26 U.S.C. 6621(b)(2).[105]

For not responding timely to requests for records, in violation of FINRA Conduct Rule 2010 and Procedural Rule 8210, as alleged in the third cause of action of the Complaint, Respondent is fined $2,500.

Respondent is also directed to pay the costs of this proceeding in the amount of $2,739.15, consisting of an administrative fee of $750 and the cost of the hearing transcript.

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[104] Tr. 352.

[105] The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. Customer JL is identified in the Addendum to this Decision. The Addendum is served only on the parties.

Respondent is not liable for misappropriating customer funds, in violation of NASD Conduct Rules 2110 and 2330(a), as alleged in the first cause of action of the Complaint. That cause of action is therefore dismissed.

If this Decision becomes FINRA's final disciplinary action, Respondent's suspension shall become effective on the opening of business on March 19, 2012, and shall end at the close of business on April 30, 2012. The fine and costs shall be due and payable upon Marshall's return to the securities industry.[106]

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

Copies to:

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