FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. CARLOS FRANCISCO OTALVARO (CRD No. 2294420), Respondent.	Disciplinary Proceeding No. 2010024837301 Hearing Officer – RLP **HEARING PANEL DECISION** March 21, 2013

Respondent is barred from associating with any FINRA member firm in any capacity for misusing customers' funds, in violation of FINRA Rules 2150(a) and 2010 and for failing to provide documents in response to staff requests, in violation of FINRA Rules 8210 and 2010. Respondent also is ordered to pay restitution.

Appearances

Michael A. Gross, Esq., and Kathryn M. Wilson, Esq., Boca Raton, FL, for the Department of Enforcement.

Carlos Francisco Otalvaro, *pro se*.

DECISION

I. Introduction

The Department of Enforcement filed the complaint in this disciplinary proceeding on November 30, 2011, charging, in three causes of action, that Respondent Carlos Francisco Otalvaro misused the funds of two customers, LF and SWI, in violation of FINRA Rules 2150(a) and 2010 (Causes One and Three), and that he failed to provide requested documents, in violation of FINRA Rules 8210 and 2010 (Cause Two). On March 9, 2012, Otalvaro filed an answer, denying that he misused customer funds, asserting an inability to admit or deny the

alleged failure to supply requested information, and asking that Enforcement provide him with copies of documents he had already supplied.

A hearing was scheduled for November 14, 2012. With the approach of the hearing, however, Otalvaro stated he would not appear. Consequently, Otalvaro was given the option either to waive his right to a hearing and have the Hearing Panel determine the case on the record or to be found in default.[1] Otalvaro chose to waive the hearing. Accordingly, with the parties' agreement, the Hearing Officer canceled the hearing and granted both parties leave to supplement the record with sworn declarations and any other documentary evidence they might wish to introduce. Enforcement filed its submission—the affidavit of Greg A. Brown, the lead examiner on the investigations that led to this proceeding, and 38 exhibits—on November 20, 2012. Otalvaro did not submit evidence. Instead, on February 4, 2013, he filed a "Response to Affidavit," asserting, without providing any specifics, that in its review of his investigative testimony (submitted by Enforcement), the Panel would "find strong evidence that the [complaint's] allegations . . . are unfair and unwarranted."[2]

For the reasons set forth below, the Hearing Panel finds, based on a preponderance of the evidence, that Otalvaro engaged in violative conduct as alleged in the complaint and, further, that it is appropriate to impose a bar for each violation.

[1] Where a hearing has been waived, FINRA Rules 9221(c) and 9267(a) authorize a hearing panel to decide a disciplinary proceeding on the record.

[2] Otalvaro's submission was more than one month late. Moreover, the submission does not controvert Enforcement's evidence. The Hearing Officer nevertheless permitted the filing of the response. In addition, the Panel carefully considered Otalvaro's investigative testimony and this decision addresses the bearing that testimony has on liability and sanctions.

II. Jurisdiction

Otalvaro is not now registered with a FINRA member firm.[3] Nevertheless, Otalvaro is subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the complaint: (1) was filed within two years after the termination of his registration with a member firm; and (2) charges him with failing to respond to requests for information during the two-year period following that termination.

III. Findings of Fact[4]

A. Otalvaro Misused Customer Funds

In 1997, Otalvaro commenced his association with WallStreet*E Financial Services, Inc. ("WSE"), a former FINRA member firm headquartered in Florida that operated a general retail securities business.[5] At all times pertinent to this decision, Otalvaro was WSE's majority owner and served as the firm's President, Chief Compliance Officer ("CCO"), and Limited Principal–Financial and Operations ("FINOP").[6] In these capacities, Otalvaro had control over the firm's books, records, and accounts, including its bank accounts.[7]

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[3] *See infra* n.7.

[4] The following facts are uncontroverted, unless otherwise indicated. They are drawn from the Affidavit of Greg A. Brown ("Brown Aff.") and attached exhibits, referred to as "CX-__" (excepting Otalvaro's January 28, 2011 on-the-record interview, CX-38, which is referred to as "Tr." __).

[5] Brown Aff. ¶¶ 3-4; CX-1, at 4; CX-36, at 7.

[6] Brown Aff. ¶ 5; Tr. 7-8, 10, 12. By 2009, Otalvaro had Series 4, 7, 24, 27, 63, and 66 licenses. Brown Aff. ¶ 3; CX-1, at 3.

[7] Brown Aff. ¶ 6; Tr. 10. WSE had a net capital deficiency on October 18, 2010, and, in November 2010, began the process of dissolving. CX-16, at 2. On December 2, 2010, the firm's registration with FINRA was canceled for nonpayment of fees, and Otalvaro's registration was therefore terminated the same day. CX-2, at 1; CX-1, at 5. Otalvaro has not been associated with any FINRA member firm since then.

1. Customer LF's Funds Were Improperly Deposited into WSE's Bank Account and Otalvaro Failed to Rectify the Defalcation

As of December 2009, LF was a WSE customer who maintained a rollover IRA account carried by Ridge Clearing & Outsourcing Solutions, Inc.[8] Around the middle of December, LF sent WSE a check issued by the trustee of LF's 401(k) plan, dated December 14, 2009, drawn on LF's retirement account, and made payable to "TR WALLSTREET E FINANCIAL SERV RIDGE CLEARING FBO [CUSTOMER'S NAME], FBO [CUSTOMER'S NAME]."[9] Thus, as reflected on the face of the check, the funds were to be deposited into a Ridge Clearing account for credit to LF's rollover IRA account.[10] Instead, as Otalvaro admitted he later learned, WSE deposited the check into its own checking account on December 22, 2009, and thereafter used the proceeds to pay WSE operating expenses. According to Otalvaro, he did not make the deposit and, at the time it was made, he was not aware of it.[11]

Around six months later, LF contacted Otalvaro to inquire about the check, letting him know that there "was a check that was supposed to be directed or deposited into her account, and the check was never deposited into her account."[12] Otalvaro investigated LF's inquiry and

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[8] Brown Aff. ¶ 11; CX-6.

[9] Brown Aff. ¶¶ 7-8; CX-3; Tr. 29-31, Ex. 3, at 4.

[10] CX-3.

[11] Brown Aff. ¶¶ 7-10, 12; CX-3; CX-4; CX-5, at 7; Tr. 23, 31. According to Otalvaro, he did not handle the check or make the deposit in December 2009 and he claimed not to have been aware of any deposit until July or August 2010. In responding to the question "what happened to [LF's] funds?" Otalvaro presumed that the deposit was mistakenly made by a member of the "skeleton crew" working at WSE during the holidays—perhaps one of the firm's "errand guys"—because the check could "have been easily confused with a check for a variable annuity or an insurance commission." Tr. 27-30; *see* Tr. 35-37. We disagree with Otalvaro's assessment of the clarity of the check's payee designation. Given that "FBO [customer's name]" appears twice in the payee designation and given that the check was issued by a retirement plan trustee, we do not believe the check could have been easily confused with a commission check. Instead, we conclude that any mistake in depositing the check was attributable to carelessness and lax supervisory controls. As Otalvaro himself conceded, "clearly, it's not a good procedure to have in place just to leave it to the errand individuals to deposit the checks." Tr. 37.

[12] Tr. 22; *see* CX-8, at 5 (October 24, 2010 email from LF to Otalvaro referring to the "several months" that had passed with "no action from you and your firm" to restore her funds).

informed her "that there was never a check received."[13] LF responded, in July or August 2010, by supplying Otalvaro with a copy of the check showing that the check had been deposited into WSE's checking account on December 22, 2009.[14]

Otalvaro was thus aware by summer 2010, at the latest, that WSE had not dealt with LF's check as she had intended.[15] Nevertheless, and despite LF's repeated and continuing entreaties, Otalvaro failed to see to it that her account was credited for the amount of the check or that she was reimbursed.[16] Instead, throughout the latter months of 2010 and into early 2011, Otalvaro engaged in what LF aptly described in a contemporaneous email as "stalling tactics"—acknowledging that the firm owed a debt to LF, issuing frequent, but ultimately unfulfilled, promises to pay restitution, and blaming the delay in "reducing [WSE's] balance" owed to LF on the firm's ongoing dissolution.[17] Even as of the time Otalvaro testified in late January 2011 in connection with FINRA's investigation of this matter, he was issuing promises to work out a payment plan for restoring her funds.[18]

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[13] Tr. 22.

[14] Tr. 22, 29-31, Ex. 3 at 4; *see also* CX-8, at 1-2 (November 8, 2010 email from LF to Otalvaro stating that she had provided him proof of the date the check was "cashed," the check number, the amount, and the endorsement on the back of the check "showing you that it was cashed by you/company").

[15] During his OTR, Otalvaro admitted that LF had provided him with a copy of the check in July or August 2010—showing that it had been deposited into WSE's checking account on December 22, 2009. Tr. 22, 31. Thereafter, however, he claimed that it was not until November 2010, after he had made at least three inquiries of the bank and the bank provided him a copy of the deposit slip, that he learned that the check was deposited in WSE's account and the date it was deposited. *E.g.*, Tr. 32-33. As stated above, the Hearing Panel concludes that Otalvaro knew, no later than August 2010, that LF's check was improperly deposited into WSE's checking account on December 22, 2009.

[16] Brown Aff. ¶¶ 14-16; CX-8; CX-9.

[17] CX-8, at 4 (October 25, 2010 email from LF to Otalvaro); CX-9, at 1 (December 23, 2010 email from Otalvaro to LF); CX-9, at 1 (December 30, 2010 email from Otalvaro to LF); CX-10, at 1-2 (January 12, 2011 email from Otalvaro to LF); Tr. at 24 (Otalvaro testified that he had informed LF that her check "had been deposited erroneously into the firm account and that obviously she was due the funds and that [WSE] . . . would do its best at providing her restitution for those funds"). As to the firm's dissolution, *see* n.7 *supra*.

[18] Tr. 25.

Otalvaro never rectified his firm's misappropriation of the proceeds of LF's check. Instead, the Securities Investor Protection Corporation ("SIPC") ultimately honored a claim LF made for the return of her funds.[19]

2. After Otalvaro Declined Cash that Customer SWI Had Delivered for Deposit Into Its Account, Otalvaro Refused to Return the Cash to the Customer

In 2009, SWI, a Swiss corporation, was a WSE customer and its account was carried by Ridge Clearing.[20] On November 4, 2009, CS, SWI's president, had $5,302 in cash delivered via FedEx to WSE's Coral Cables office. He instructed WSE to have the money deposited into SWI's brokerage account at Ridge Clearing.[21]

After the cash arrived on November 6, 2009, WSE did not have it deposited into SWI's account. Instead, Otalvaro informed CS that WSE did not accept cash and "filed" the cash away.[22] Then, according to Otalvaro, after CS suggested that Otalvaro return the cash via FedEx, Otalvaro contacted FedEx and was told that FedEx would not deliver cash.[23]

Thereafter, Otalvaro offered to return the funds via Western Union. After CS countered with instructions that Otalvaro wire $5,302 to CS' Swiss bank account, Otalvaro responded with an email "apologiz[ing] that [WSE could not] forward directly to your bank" and promising instead to "forward funds by Western Union . . . in hopes of being able to resolve this for you once and for all."[24]

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[19] Brown Aff. ¶ 17.

[20] Brown Aff. ¶ 34; CX-25.

[21] Brown Aff. ¶¶ 34-35; CX-24; Tr. 41.

[22] Brown Aff. ¶ 36; Tr. 41, 51. Otalvaro testified that WSE did not accept cash and that the firm could not send cash to Ridge Clearing directly "because they would have a field day with it." Tr. 50-52.

[23] Tr. 52, 55.

[24] CX-28; Brown Aff. ¶¶ 37, 39-40; CX-27; Tr. 51-53.

By this time, more than seven months had passed since CS had sent the cash to WSE and, while expressing his incredulity about the situation, CS acceded to Otalvaro's proposal.[25] Accordingly, by an email dated June 23, 2010, Otalvaro informed CS that, to transfer the money, he would need three "valid government issued identification cards with picture" from CS. He also asked that CS provide a "personal email address other than the one [CS was] using."[26]

On June 25, 2010, CS responded by (a) providing Otalvaro with a copy of his passport and driver's license; (b) informing Otalvaro that Switzerland issues only those two forms of identification; (c) acknowledging a $230 fee for the transfer; and (d) requesting that Otalvaro execute the wire.[27] Otalvaro did not send the money on June 25, 2010.

Instead, because CS did not provide three forms of identification (something that Western Union does not, in fact, require) nor supply Otalvaro with another email address, Otalvaro refused to send CS the money.[28] Thereafter, despite CS' repeated demands, Otalvaro did not return the cash; rather, he claimed to have placed it in storage. Indeed, during his OTR, Otalvaro suggested that he might "deliver the funds to [the FINRA investigators] and [they could] handle it from there."[29]

B. Otalvaro Provided an Incomplete Response to FINRA's Document Requests

On December 31, 2010, in connection with the investigation of a complaint LF made about Otalvaro's handling of her funds, FINRA staff sent Otalvaro a letter requesting that he provide documents and information specified in the letter. One category of documents requested

[25] *See* CX-29 (June 23, 2010 email from CS to another WSE employee asking "[w]hat problems prevent . . . Otalvaro . . . to return the funds?" but noting that WSE would need to send him the transaction number to effect the money transfer via Western Union).

[26] Brown Aff. ¶ 42; CX-30.

[27] Brown Aff. ¶ 44; CX-31.

[28] Tr. 52-53, 57-59; Brown Aff. ¶ 43.

[29] Tr. 59; Brown Aff. ¶¶ 45-47; CX-32; CX-33; CX-34; Tr. 41-42.

was copies of account statements for the bank account into which LF's funds were deposited, for the period from December 1, 2009, through the date of production (set for no later than January 12, 2011). Otalvaro did not respond by January 12, 2011.[30] Accordingly, on January 18, 2011, FINRA staff sent a second letter to Otalvaro, again requesting the account statements (and the other information and documents) previously requested.[31]

By letter dated February 1, 2011, Otalvaro provided a response to FINRA's requests. The response was incomplete, however, because Otalvaro did not produce the requested bank statements. Instead, the letter stated, "We have requested copies of the bank statements and will forward them as they become available."[32]

When the bank account statements were not forthcoming, the FINRA examiner called Otalvaro on March 3, 2011, told him that FINRA had not received the statements, and emphasized that Otalvaro needed to provide them. On the same date, the examiner also sent Otalvaro another letter requesting that Otalvaro fully respond to the previous information requests by supplying the requested bank statements. Otalvaro did not respond.[33]

On October 3, 2011, FINRA staff sent a letter to Otalvaro requesting that he complete his response to the information requests. Again, Otalvaro did not respond. As did its predecessors, the October 3 letter informed Otalvaro that his failure to comply with the request might subject him to disciplinary action.[34]

On October 19, 2011, Enforcement counsel sent Otalvaro a letter informing him that the staff had made a preliminary determination to recommend disciplinary action against him based

[30] Brown Aff. ¶¶ 18-19; CX-13.

[31] Brown Aff. ¶ 20; CX-14; CX-15.

[32] Brown Aff. ¶ 22; CX-16, at 2.

[33] Brown Aff. ¶¶ 23-25; CX-17; CX-18.

[34] Brown Aff. ¶¶ 26-28; CX-19.

on, among other things, his failure to supply the bank account statements. By email dated November 2, 2011, Otalvaro informed Enforcement counsel that the bank statements would be produced "by the end of the week or early next week." The statements were not produced.[35]

Although the examiner in this matter was able to obtain some of the requested statements—for December 2009 through May 2010—from another staff member to whom Otalvaro had supplied them in connection with an unrelated matter, Otalvaro has yet to supply the remaining statements.[36]

IV. Conclusions of Law

A. Otalvaro Violated FINRA Rules 2150(a) and 2010, by Misusing Customer Funds

Based on the foregoing facts, the Hearing Panel concludes that Otalvaro misused LF's and SWI's funds, in violation of FINRA Rules 2150(a) and 2010.

FINRA Rule 2150(a) provides that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and

[35] Brown Aff. ¶¶ 30-32; CX-22; CX-23.

[36] Brown Aff. ¶¶ 29, 32.

just and equitable principles of trade."[37] Rule 2010 thus articulates a "broad ethical principle," rather than prohibiting specific acts.[38]

As is well established, "[a]n associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer."[39] Based on the record before us, it is plain that Otalvaro misused funds of WSE customers LF and SWI. As for LF's funds, even crediting Otalvaro's testimony that someone else deposited the check into WSE's bank account by mistake,[40] once he became aware that the deposit had been made, he was obliged, as the firm's owner, president, CCO, and FINOP, to see to it that LF's IRA account was credited or her funds were returned promptly.[41] Instead, Otalvaro provided LF with nothing but invalid excuses and empty promises.[42]

As for SWI's cash, even assuming that WSE was justified in refusing to accept it, Otalvaro was under an obligation to return it promptly.[43] Instead, while promising to return the

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[37] Rule 2010 applies to Otalvaro through Rule 0140, which provides that persons associated with a FINRA member have the same duties and obligations as the member.

[38] *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (N.A.C. June 2, 2000) (*quoting Timothy L. Burkes*, 51 S.E.C. 356 (1993), *aff'd mem.*, *Burkes v. SEC*, 29 F.3d 630 (9th Cir. 1994)). Indeed, a violation of Rule 2010 does not depend on whether the registered representative has committed a legally cognizable wrong (*e.g.*, *id*.) and so long as the challenged activity occurs "in the conduct of" a representative's business and violates high standards of commercial honor, the representative may run afoul of Rule 2010 even if a security is not involved. *Dep't of Enforcement v. DiFrancesco*, No. 2007009848801, 2009 FINRA Discip. LEXIS 45, at *8 (O.H.O. Dec. 1, 2009) (*citing Dep't of Enforcement v. Foran*, No. C8A990017, 2000 NASD Discip. LEXIS 8, at *12-14 (N.A.C. Sept. 1, 2000)); *Shvarts*, 2000 NASD Discip. LEXIS 6, at *16-17 (noting that predecessor Rule 2110 was "not limited to securities-related conduct; instead, it covers all unethical business-related conduct"). Otalvaro's misconduct was undertaken in the course of his business relationship with WSE and its customers, and therefore is within the ambit of Rule 2010. *See*, *e.g.*, *Foran*, 2000 NASD Discip. LEXIS 8, at *13.

[39] *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (N.A.C. May 23, 2001).

[40] *See* p. 4 & n.11 *supra*.

[41] *See*, *e.g.*, *Daniel Joseph Alderman*, 52 S.E.C. 366, 368-69 & n.10 (1995), *pet. denied*, *Alderman v. SEC*, 104 F.3d 285 (9th Cir. 1997).

[42] Although Otalvaro claimed that the firm was not financially able to repay LF after it began the dissolution process in November 2010 (*e.g.*, CX-16), Otalvaro has not shown that WSE could not have repaid LF in the late summer or early fall of 2010.

[43] *Alderman*, 52 S.E.C. at 368-69 & n.10

funds, Otalvaro made demands of CS—for three forms of identification and another email address—that were not required to effect that return. That Otalvaro claims to have kept the cash in storage and has offered to provide the money to FINRA staff does nothing to undercut our finding that he has misused SWI's funds.

Otalvaro's misuse of his customer's funds violated not only Rule 2150,[44] it also ran afoul of Rule 2010 because it "reflects directly on [his] ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money."[45] It was thus "patently antithetical" to Rule 2010's exacting ethical standards.[46]

B. Otalvaro Violated FINRA Rules 8210 and 2010, by Providing an Incomplete Response to Document Requests

FINRA Rule 8210(a) authorizes FINRA staff "to require a member, person associated with a member, or person subject to FINRA's jurisdiction" to provide information or access to books, records, and accounts "with respect to any matter involved in [an] investigation, complaint, examination, or proceeding."[47] Subsection (c) further provides that "[n]o member or person shall fail to provide information or testimony … pursuant to this Rule."

It is undisputed that Otalvaro did not and has not provided a complete response to the staff's repeated requests for WSE's bank account statements. Moreover, Otalvaro raises nothing

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[44] FINRA Rule 2150(a) superseded NASD Rule 2330(a) on December 14, 2009. Although Otalvaro's misuse of SWI's funds began in November 2009, given that the rules are substantively identical, this opinion refers only to Rule 2150(a).

[45] *James A. Goetz*, 53 S.E.C. 472, 477 (1998).

[46] As the Securities and Exchange Commission has recognized, the misuse of customer funds is "patently antithetical to the high standards of commercial honor and just and equitable principles of trade that the NASD seeks to promote." *Joel Eugene Shaw*, 51 S.E.C. 1224, 1226-27 (1994) (*quoting Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976) (*internal quotation marks omitted*)); *see also Patel*, 2001 NASD Discip. LEXIS 42, at *10, 24-26 (affirming a hearing panel decision barring a representative for misusing customer funds by using them for his own purposes rather than investing them as directed by the customers).

[47] Rule 8210 has been revised; the new version became effective on February 25, 2013. The previous version applies here.

that excuses his noncompliance. Instead, as the record reflects, Otalvaro has offered only repeated, but ultimately unfulfilled, promises to supply the information. Accordingly, the Hearing Panel concludes that Otalvaro's incomplete response to the staff's request for bank records ran afoul of Rule 8210's clear requirements and proscriptions[48] and was inconsistent with Rule 2010's high standards of commercial honor.[49]

V. Sanctions

A. Otalvaro Will Be Barred for Misusing Customer Funds

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."[50] Accordingly, the FINRA Sanction Guidelines direct adjudicators to consider a bar when a respondent makes improper use of a client's funds or, in cases where the improper use results from a misunderstanding of the customer's intentions or some other mitigation exists, suspension pending restitution is recommended.[51]

There is no mitigation in either LF's or SWI's case. On the other hand, there are many aggravating factors. With respect to LF, we find three aspects of Otalvaro's misconduct aggravating. First, Otalvaro's contention that he could not confirm that the funds had been received and deposited for some four months after he was presented with a copy of the check

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[48] Because the requests were made as part of an investigation, they were authorized by Rule 8210(a). *See Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *12-13 (Nov. 8, 2007), *pet. denied*, *Erenstein v. SEC*, 316 F. App'x 865 (11th Cir. 2008) (stating that whether a requested record is "with respect to any matter involved in" an investigation is a determination made by the staff and the staff is not required to explain its reasons for making the information request or justify the relevance of any particular request). Because the requests were mailed to Otalvaro's CRD address, Otalvaro received proper notice under Rule 8210(d). *See generally John H. DeGolyer*, 46 S.E.C. 324, 326-27 (1976) ("The obligation of a broker to receive and respond to notices mailed by [FINRA] to the address furnished it has also been established."). Finally, it is undisputed that Otalvaro controlled WSE's bank account, including account documents.

[49] *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

[50] *Dist. Bus. Conduct Comm. v. Westberry*, No. C07940021, 1995 NASD Discip. LEXIS 225, at *24 (N.B.C.C. Aug. 11, 1995).

[51] FINRA Sanction Guidelines 36 (2011), available at www.finra.org/Industry/Enforcement/SanctionGuidelines.

clearly showing the deposit is not credible. Second, his failure to return the funds, even after his many acknowledgements of a restitution obligation, shows that his acceptance of responsibility was feigned. Third, we agree with LF's assessment that Otalvaro's repeated promises to pay her what she was owed were, in reality, simply attempts—albeit unsuccessful ones—to lull her into a false sense of security. In sum, we conclude that, although Otalvaro knew that LF's funds had been misused, he never intended to rectify the situation.[52] As a consequence, we conclude that Otalvaro is unfit to remain in the securities industry and only a bar will suffice as a remedy.

With respect to SWI's funds, again, we find incredible Otalvaro's claims that the only means to return the cash was Western Union and that SWI failed to supply the information required to effectuate that return. We also find it aggravating that, for more than one year after receiving SWI's funds, all Otalvaro delivered to CS were empty promises in an attempt to quell CS' legitimate concerns as to the whereabouts of the money. Moreover, Otalvaro has not accepted responsibility for his wrongdoing and, even in the face of repeated requests, he has failed to make restitution.[53] Again, we conclude that only a bar will sufficiently remedy this misconduct.

B. Otalvaro Will Pay Restitution to SWI

As set forth in the Sanction Guidelines, restitution "is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss." Under the Guidelines, adjudicators may order restitution "when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct."[54]

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[52] Sanction Guidelines 6-7 (Principal Considerations 2, 4, 9, 10, 13).

[53] Sanction Guidelines 6 (Principal Considerations 2, 4, 9, 10).

[54] Sanction Guidelines 4 (General Principle 5); *see Dep't of Market Regulation v. Jaloza*, No. 2005000127502, 2009 FINRA Discip. LEXIS 6, at *65-66 (N.A.C. July 28, 2009) (*citing David Joseph Dambro*, 51 S.E.C. 513, 518 (1993)).

Given that SIPC compensated LF for her lost funds, Enforcement does not seek, and the Panel does not order, Otalvaro to pay restitution to LF. On the other hand, Enforcement does seek, and the Panel orders, Otalvaro to pay restitution to SWI in the amount of $5,302, which is the amount of money CS forwarded to WSE and which Otalvaro claims to have "filed away" in storage rather than returning it as he was obliged to do.

C. Otalvaro Will Be Barred for Violating Rules 8210 and 2010

Because FINRA lacks subpoena power, it must "rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons."[55] It is therefore well established that when a person fails to respond to FINRA's information requests and thereby "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets,"[56] the person commits a "serious violation justifying stringent sanctions . . . ."[57] For this reason, the Sanction Guidelines provide that, when a person provides "a partial but incomplete response, a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request."[58] Principal considerations include the importance of the information that was not provided as viewed from FINRA's perspective, the number of requests made, the time the respondent took to respond, the degree of regulatory pressure required to obtain a response, and whether the respondent thoroughly explained valid reasons for the deficiencies in the response.

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[55] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (quotation omitted).

[56] *PAZ Securities, Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *pet. denied*, *PAZ Securities, Inc. v. SEC*, 566 F.3d 1172 (D.C. Cir. 2009).

[57] *Elliot M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99, at *10 (Jan. 19, 2006), *pet. denied*, *Hershberg v. SEC*, 210 F. App'x 125 (2d Cir. 2006).

[58] Sanction Guidelines 33.

Otalvaro did not substantially comply with all aspects of the staff's information requests or explain the deficiencies in his response. His repeated promises to supply the requested bank account statements demonstrate that, although he could have complied, he chose not to. FINRA staff made multiple requests for the information and, although significant regulatory pressure was brought to bear, the information was not forthcoming. Moreover, according to the examiner conducting the investigation, the missing account statements were important because, among other things, they would show whether, after LF brought the misappropriation of her funds to his attention, Otalvaro withdrew a like amount from the firm's checking account for his own benefit. Accordingly, based on the foregoing facts, the Hearing Panel concludes that a bar is appropriate in this case.[59]

Throughout this decision, the Hearing Panel has touched on many of the principal considerations that have shaped its determination of the appropriate sanction for each violation. The Hearing Panel also took into account Otalvaro's disciplinary history, which is a significant aggravating factor. In the past three years, Otalvaro has been disciplined three times. First, in November 2009, the Chief of the New Jersey Bureau of Securities issued an administrative consent order finding that WSE and Otalvaro failed to reasonably supervise agents so as to prevent outside business activities and unauthorized securities transactions that resulted in harm to investors.[60] Second, in December 2010, the Florida Office of Financial Regulation issued a default final order directing Otalvaro to cease and desist from further violations of the Florida Securities and Investor Protection Act, revoking Otalvaro's and the firm's registrations, and

[59] Enforcement has also requested that the Hearing Panel impose a fine as well as a bar. However, the Sanction Guidelines provide that, in cases involving failure to respond under Rule 8210, adjudicators "generally should not impose a fine if an individual is barred and there is no customer loss." Sanction Guidelines 10.

[60] CX-35. Ultimately, WSE agreed to withdraw its broker-dealer registration and never to reapply for registration in any capacity. Otalvaro agreed not to reapply for registration as an agent or investment adviser representative and not to supervise any person registered with the Bureau as an agent or investment adviser representative. *Id.*

assessing a $162,500 fine, predicated on allegations that Otalvaro and WSE failed to reasonably supervise associated persons to prevent, among other things, unregistered activity and excessive trading.[61] Third, in June 2011, a FINRA hearing panel suspended Otalvaro for one year, barred him from acting as a principal for any FINRA member firm, and fined him $15,000 for, among other things, willfully failing to disclose material information and timely update his Uniform Application for Securities Industry Registration or Transfer, in violation of FINRA Rules 1122 and 2010.[62]

This disciplinary history serves to reinforce our determination that FINRA's goal of protecting investors can be appropriately served only by assessing bars for the misconduct we have found in this proceeding. By his past misconduct, Otalvaro has evidenced a general disregard for regulatory requirements that calls for severe sanctions.[63]

VI. Order

For the foregoing reasons,[64] the Hearing Panel finds, with respect to the complaint's first and third causes of action, that Otalvaro misused the funds of LF and SWI, in violation of FINRA Rules 2150(a) and 2010 and, with respect to the complaint's second cause of action, that Otalvaro failed to respond to requests for information, in violation of FINRA Rules 8210 and 2010 by. For each of these violations, the Hearing Panel bars Otalvaro from associating with any FINRA member in any capacity. The bars shall become effective immediately if this decision becomes FINRA's final disciplinary action.

Otalvaro also is ordered to pay restitution to SWI in the amount of $5,302 with interest from November 7, 2009, until paid. Interest will be paid at the rate established under Section

[61] CX-36.

[62] CX-37.

[63] Sanction Guidelines 2 (General Principle 2).

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

6621(a)(2) of the Internal Revenue Code.[65] The restitution shall be due and payable on May 20, 2013.

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Rada Lynn Potts
Hearing Officer
For the Hearing Panel

[65] 26 U.S.C. § 6621(a)(2). 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 SWI and its president, CS, are identified in the addendum to this decision, which is served only on the parties.