FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LEVINSKI DEALEXIS BARNES, (CRD 2292179), Respondent.	Disciplinary Proceeding No. 2010024271001 Hearing Officer—LOM **HEARING PANEL DECISION** July 18, 2013

Respondent took money from his securities firm customer, allegedly for an investment in an accounting practice. The investment was not made, but Respondent returned only a portion of the money. Respondent's misuse of customer funds violated NASD Conduct Rules 2330(a) and 2110, for which he is barred from associating with any FINRA member firm in any capacity. Respondent is also ordered to pay restitution to the customer in the amount of $36,700, plus pre-judgment interest, and to pay costs.

Respondent failed to provide documents requested pursuant to FINRA Rule 8210 in a timely and complete manner, violating FINRA Rules 8210 and 2010. For this misconduct, Respondent is separately barred from associating with any FINRA member firm in any capacity.

Appearances

William Brice La Hue, Atlanta, Georgia, and Sean W. Firley, Boca Raton, Florida, representing the Department of Enforcement.

Respondent, Levinski Dealexis Barnes, representing himself.

HEARING PANEL DECISION

I. INTRODUCTION

The Financial Industry Regulatory Authority, Inc. ("FINRA") Department of Enforcement ("Enforcement") filed a Complaint against Levinski Dealexis Barnes ("Barnes" or

"Respondent"),[1] who was, at the time of the events in issue, a registered representative with J.P. Turner & Company ("JPT" or the "Firm").[2] The Complaint contains two Causes of Action. The First Cause alleges that Barnes misused customer funds by exercising unauthorized control over the funds and failing to return them to the customer as promised. Enforcement charges that this conduct violated NASD Rules 2330(a) and 2110. The Second Cause alleges that Barnes failed to produce in a timely or complete manner documents requested pursuant to FINRA Rule 8210 in connection with an investigation of his misuse of customer funds. Enforcement alleges that this conduct violated FINRA Rules 8210 and 2010.

For the reasons set forth in more detail below, the Hearing Panel finds that Barnes committed the violations alleged in the Complaint and imposes sanctions.

In brief, with respect to the charge of misusing customer funds, Barnes does not dispute that he took $50,000 from his securities firm customer ostensibly to invest in an accounting practice. Nor does he dispute that the investment was never made, or that he failed to return most of the money. He claims that he lost the money in a "scam," and that he is as much a

[1] FINRA is a self-regulatory organization that is responsible for regulatory oversight of securities firms and associated persons who do business with the public. It was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange ("NYSE"). FINRA is developing a new "Consolidated Rulebook" of FINRA Rules that includes NASD Rules. The first phase of the new Consolidated Rulebook became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA's Procedural Rules apply to the proceeding. The applicable FINRA and/or NASD Conduct Rules are those that existed when the conduct in issue occurred. FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

[2] Although Respondent Barnes is no longer registered, FINRA has jurisdiction over this disciplinary proceeding pursuant to Article V, Section 4 of FINRA's By-Laws. That provision of the By-Laws specifies that FINRA retains jurisdiction with respect to conduct that occurs while a person is registered for two years after that person's registration is terminated. That provision further specifies that if an amended notice of termination is filed within two years of the original notice, and the amendment discloses that a person may have engaged in actionable misconduct while registered, then FINRA retains jurisdiction for two years after the amendment. Here, the Complaint alleges that Barnes engaged in misconduct while he was registered. Respondent's registration was initially terminated on August 6, 2009, but his Firm filed an amended Uniform Termination Notice for Securities Industry Registration ("Form U5") on October 28, 2010, within two years of the original Form U5. The amended Form U5 disclosed the potential misuse of customer funds that is charged in the Complaint. The Complaint was filed August 29, 2012, within two years of the amended Form U5.

victim as the customer. Barnes produced no evidence corroborating his story, and the panel does not find his story credible. Barnes' conduct raises a suspicion of conversion. However, even if his story were true, Barnes still misused his customer's funds by handling them in a reckless manner, without regard for the safety of the funds, and giving another control over the funds without the customer's approval. Barnes did so without the customer's authorization to do anything other than invest the funds in the accounting practice or return them. This misconduct violated NASD Rules 2330(a) and 2110, as alleged.

With respect to Barnes' failure to produce documents pursuant to FINRA Rule 8210 in the course of FINRA's subsequent investigation of the disappearance of the customer's funds, it appears that Barnes purposely withheld his bank statements to make it impossible to charge and prove that he converted the funds he received from the customer. Proof of conversion invariably leads to a bar from the securities industry, so Respondent acted in a manner he hoped would avoid that inevitable result. Respondent did not produce the documents necessary to understand exactly what he did with his customer's money and whether he converted the funds to his own personal use. Respondent's refusal to cooperate by producing requested documents plainly hindered the investigation and was a violation of FINRA Rules 8210 and 2010, as alleged.

II. FINDINGS OF FACT

A. Respondent's Customer Alleges Fraud

HS was Barnes' brokerage firm customer. Barnes estimated that he managed roughly $600,000 for HS in securities investments with Barnes' Firm.[3]

According to HS, Barnes had presented an investment opportunity to him and his wife that was outside of their brokerage account with Barnes' Firm. That business opportunity was to

[3] Hearing Tr. (Barnes) at 71. Elsewhere, Barnes indicated HS had $400,000-500,000 under management. Hearing Tr. (Barnes) at 106.

acquire an ownership interest in an accounting practice. HS said that he and his wife wired a total of $50,000 in three installments in August and September 2007 to a bank account of an LLC belonging to Barnes, MBA Group LLC ("MBA"). The money was a deposit to be used to "bid" on the purchase of the accounting business of an accountant who was retiring. Barnes then told HS that the "bid" was unsuccessful but that he was not able to return all the money.[4]

Although Barnes denies committing fraud, he does not dispute that HS gave him $50,000 to invest in an accounting practice, or that he failed to give it all back after their "bid" was not accepted.[5]

B. Respondent's Customer Entrusts Him With $50,000 To "Bid" On A Business

According to Barnes, HS lost his job and was searching for a source of steady income. HS also wanted to be involved in some kind of business, rather than simply invest in a security. It was in this context that Barnes told HS about the accounting business as a possible investment opportunity.[6]

HS wired $50,000 to an account designated by Barnes, the MBA account. HS understood that the money would be used to "bid" on an accounting practice. It was to be held in escrow and returned promptly if the "bid" was unsuccessful.[7]

Barnes acknowledges that HS wired the money in three installments to a bank account belonging to an LLC that Barnes controlled.[8] He acknowledges that he told HS that the money

[4] CX-1 (HS complaint to FINRA); CX-6 (information for wiring three payments to Barnes) at 2-5 of 7; CX-5 (HS email to examiner); Hearing Tr. (Examiner) at 21-22.

[5] Hearing Tr. (Examiner) at 23-24.

[6] Hearing Tr. (Barnes) at 71-72.

[7] CX-1 (HS complaint to FINRA); See also Hearing Tr. (Examiner) at 30-32; CX-6 (wire transfer information for three payments to MBA).

[8] Hearing Tr. (Barnes) at 74, 88.

would be used either in the "bid" for the accounting practice or, if the "bid" was unsuccessful, that it would be returned.[9] Barnes emphasized at the hearing that the investment in the accounting firm was an outside business activity and that he told HS so.[10]

Barnes acknowledged that HS wired money to a bank account belonging to MBA, but Barnes tried to distance himself from MBA.[11] At the hearing, he was quick to say that the money was wired to MBA, "not me."[12]

The evidence shows that wiring the money to MBA was the equivalent of wiring it to Barnes. Barnes testified that the two people who once were his partners in MBA are no longer in the business.[13] At one point, he testified that MBA was his LLC.[14] Barnes produced one bank statement for the MBA bank account that received the $50,000. That bank statement was for December 2007. The bank statement showed a balance of around $5,000 at the beginning of the month and less than $25 at the end of the month. It showed that a card linked to the MBA bank account was used to pay for what appear to be personal expenses. The card was used to pay for restaurant meals, a department store charge, Starbucks, 7-Eleven purchases, drugstore charges, a

[9] Hearing Tr. (Examiner) at 22-23; Hearing Tr. (Barnes) at 92, 107-09.

[10] Hearing Tr. (Barnes) at 90, 107-08, 111.

[11] Hearing Tr. (Barnes) at 72-74, 77, 87.

[12] Hearing Tr. (Barnes) at 77.

[13] Hearing Tr. (Barnes) at 121-22.

[14] Hearing Tr. (Barnes) at 74.

cleaning bill, and a car wash. The card was also used to withdraw money from ATMs at race tracks. The only checks issued on the account that month were signed by Barnes.[15]

C. Respondent Fails To Return All The Money When The "Bid" Is Not Accepted

A month or two after HS entrusted the $50,000 to Barnes, Barnes informed HS that their "bid" was not accepted. Although HS demanded the return of the $50,000, Barnes told HS he was unable to return all the money.[16]

D. HS Struggles To Get Repaid

Barnes made an initial payment of $10,000 in January 2008 to HS, and later he made three additional payments totaling $3,300. Barnes made his last payment in January 2009.[17]

Frustrated with trying to get repaid, in April 2009 HS hired legal counsel and eventually filed a civil action seeking repayment of the outstanding balance of $36,700. HS also complained to FINRA in late August 2010 that Barnes had defrauded him and his wife. In September 2010, FINRA initiated an investigation of the allegations made by HS.

On March 28, 2011, Barnes filed for bankruptcy.[18] The money owed to HS was listed as a debt that Barnes sought to have discharged in bankruptcy.[19]

HS and Barnes participated in a mediation of the debt claim in bankruptcy. The mediation was resolved by an agreement that was approved by the bankruptcy court in December

[15] CX-13 (Dec. 2007 bank statement). At the beginning of the month, the account had a balance of $4,795.09. Two deposits totaling $1,852.00 were received. Checks and debits totaling $6,623.74 were drawn on the account that month. The end balance for the month was $23.35. It is impossible to tell from the statement for only one month whether any of the monies then in that account came from Barnes' customer, HS.

[16] Hearing Tr. (Barnes) at 77-78, 107-11.

[17] Hearing Tr. (Barnes) at 78-81; CX-7, CX-8.

[18] Hearing Tr. (Barnes) at 81-82; CX-15 (petition for bankruptcy) at 5 of 8.

[19] Hearing Tr. (Barnes) at 82.

2011. In that agreement, Barnes promised to pay HS $39,500 at a rate of $400 per month, beginning on August 1, 2012.[20] Barnes failed to make any of the payments required under the mediation agreement.[21]

E. Barnes Contends He Is Justified In Not Repaying HS

Barnes claimed at the hearing that he was justified in not honoring the mediation agreement. The mediation agreement contained an agreement by HS and his wife to make their best efforts to withdraw any administrative complaints filed against Barnes relating to any professional licenses. Barnes also indicated that he and HS had an additional understanding, not reflected in the signed mediation agreement, that HS would do even more to end the investigation of Barnes' conduct. Barnes expected HS to write a letter in support of Barnes or withdraw his complaint about Barnes' conduct, so as to allow Barnes to work in the securities industry again.[22] Barnes said that HS had not complied with this aspect of their agreement. He said that HS "did not follow what our agreement was."[23]

HS did not appear at the hearing. Barnes suggested in his testimony that HS did not appear because the customer feared that doing so would diminish the possibility that he and his wife would be repaid by making it more likely that Barnes would be prevented from rejoining the industry and earning enough to provide restitution.[24] Barnes believes that HS should have caused an end to the investigation and staved off the filing of the charges against him. He views

[20] CX-17 (court order approving mediation settlement accompanied by handwritten term sheet); Hearing Tr. (Barnes) at 83-84.

[21] Hearing Tr. (Barnes) at 85.

[22] Hearing Tr. (Barnes) at 84-85, 114.

[23] Hearing Tr. (Barnes) at 85.

[24] Hearing Tr. (Barnes) at 84-85, 118.

the end of his regulatory woes as a prerequisite for reentering the securities industry, and reentry as a prerequisite for making restitution to HS.[25]

F. Respondent Provides No Credible Explanation For What Happened To The Money

Barnes claims that he did not have the $50,000 to return to HS when the "bid" for the accounting practice fell through because Barnes was defrauded. He told one fraud story early on to his customer, HS, and another fraud story at the hearing. Neither story is credible; and neither story is supported by any evidence other than Barnes' own assertions.

The story that Barnes initially told HS was that he had been "scammed." Barnes told HS that the attorneys for the seller of the accounting practice had persuaded him to turn over the money in escrow to them and that they had "somehow stole the money."[26]

The story that Barnes told at the hearing was also a story of a "scam," but a different "scam." Barnes testified that he gave the money to a man who was going to be one of the investors in the accounting practice, a man he knew as Derek Brown. Barnes said that he expected Brown to put the money into some kind of "trust account." Barnes testified that he obtained two money orders to effect the transfer of the $50,000 to Brown. At the hearing, Barnes testified that the money orders were made payable to Brown individually. Barnes said that Brown was supposed to set up a "trust account" with the money, but instead Brown took the

[25] Hearing Tr. (Barnes) at 84-85, 114. Barnes was under the misimpression that if he persuaded the customer to withdraw his complaint that the investigation of Barnes' conduct would end. Hearing Tr. (Barnes) at 123.

[26] CX-5 (HS emails to examiner) p. 1 of 18, p. 10 of 18.

money and disappeared. Barnes now suspects that "Derek Brown" was an alias.[27]

Barnes provided no corroborating evidence to support his assertions about what happened to the money. Barnes provided no receipt from Brown for the money, no copies of the money orders, and no record of the withdrawal of the $50,000 from the MBA bank account. There was no documentation of the trust account that was supposed to be set up.[28] There was no documentation by which Barnes retained any control over the $50,000.[29] Barnes had no explanation for why he would have transferred the money by two money orders instead of writing a check on the MBA account where the money had been deposited.[30]

Neither "scam" story makes sense, and neither has any evidentiary support. The Hearing Panel does not credit Barnes' testimony regarding the disappearance of the customer's $50,000 only a few months after it was entrusted to Barnes.

G. Respondent Fails To Provide Documents Requested Pursuant To FINRA Rule 8210

A FINRA examiner described the efforts that she and her predecessor on the investigation made to obtain Barnes' bank records.[31] Other than a single bank statement for the month of December 2007, Barnes failed to provide the documents requested pursuant to FINRA Rule 8210.[32] What he did provide gave no insight into what Barnes did with the money entrusted

[27] Hearing Tr. (Barnes) at 89-101. Barnes was not always consistent about the details of his story. The FINRA examiner testified at the hearing that he had previously told her that the money orders were made payable to cash, not Brown individually. However, Barnes was consistent as to where the money went. He told both the examiner and the Hearing Panel that he gave the money orders to Derek Brown and that Brown disappeared with the funds. Hearing Tr. (Examiner) at 24.

[28] Hearing Tr. (Barnes) at 95.

[29] Hearing Tr. (Barnes) at 96.

[30] Hearing Tr. (Barnes) at 97.

[31] Hearing Tr. (Examiner) at 24-26, 28, 34-40; CX-9, CX-10, CX-11, CX-12, CX-14.

[32] Hearing Tr. (Examiner) at 40; CX-13.

to him by HS. His failure to produce the requested bank statements for the entire six month period at the end of 2007 "prevented FINRA [staff] from being able to determine what exactly happened with [HS's] money."[33]

III. CONCLUSIONS OF LAW

A. Misuse Of Customer Funds

NASD Conduct Rule 2330(a) (now FINRA Rule 2150(a)) prohibits the "improper use of a customer's securities or funds." An associated person makes improper use of customer funds and violates this provision whenever he or she fails to apply the customer's money as the customer has directed.[34] That failure does not have to involve the intent to deprive the customer of the funds permanently.[35] All kinds of misuse are covered by the prohibition, including delay in repaying funds owed to the customer.[36] Barnes' delay in returning the $36,700 of his customer's funds that he still owes to HS

[33] Hearing Tr. (Examiner) at 25-26.

[34] *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001) (citing cases); *Dep't of Enforcement v. Triggs*, No. C04020006, 2002 NASD Discip. LEXIS 20, at *8 (Dec. 13, 2002) (use of customer funds for any purpose not directed by the customer violates Rule 2330(a)).

[35] Conversion generally implies that the party converting the funds does not intend to return the money, while misuse implies that the funds were not converted to the respondent's use but, rather, were misapplied. *Dist. Bus. Conduct Comm. v. Hoganson*, No. C8A920095, 1993 NASD Discip. LEXIS 242, at *11 (NBCC Aug. 26, 1993) (respondent's conduct was somewhere between conversion and negligent misuse where she used customer funds as her own only temporarily, for six days).

[36] *See Alderman v. SEC*, 104 F.3d 285, 289 (9th Cir. 1997) (misuse found where funds mistakenly transferred to wrong account were then deliberately withheld for two months); *Bernard D. Gorniak*, Exchange Act Rel. No. 35996, 52 S.E.C. 371 (July 20, 1995) (misuse found when representative retained customer funds indefinitely without applying them to intended purpose); *Robert L. Johnson*, Exchange Act Rel. No. 33217, 51 S.E.C. 828 (1993) (misuse found where principal failed to apply funds for intended purpose or to return them for almost two years).

for more than five years (since January 2008) is a misuse of customer funds in violation of NASD Conduct Rule 2330(a).[37]

In fact, the circumstances here demonstrate an egregious violation that gives rise to a suspicion of conversion. Barnes deposited the customer's funds in the MBA account, which he alone appears to control and to use as a personal account. The money was thus commingled with other funds controlled by Barnes and was not protected in the way that the customer thought it would be, in an escrow account.[38] The money disappeared from the MBA account without a credible explanation.

Even if Barnes' story of being defrauded by Derek Brown were accepted as true (which it is not), his conduct would constitute misuse of customer funds. First, Barnes had no authority to transfer control of the funds to anyone else, including Derek Brown. This was an improper use of the funds. Second, the manner in which Barnes says he transferred the funds was profoundly reckless and not within the scope of the customer's authorization. If his story is to be believed, Barnes handed over $50,000 of his customer's money without obtaining the customer's permission to cede control of the funds to another. He did so without obtaining a receipt or a record of any kind relating to the transaction. He conducted the transaction by money order rather than writing a check from the checking account where the money was deposited, choosing

[37] Barnes cites no authority suggesting that his delay might be justified by the bankruptcy filing. In any event, in Barnes' bankruptcy proceeding his obligation to repay HS was not discharged, but, rather, memorialized by the mediation agreement.

Furthermore, the listing of the debt owing to HS in Barnes' personal bankruptcy proceeding as a debt personal to Barnes indicates that the money was not segregated in an escrow account, as HS expected it to be. It confirms that the money was not applied in the manner that Barnes was authorized to apply it.

[38] *Mission Securities Corp.*, Securities Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010) (deposit of customer securities into firm account instead of segregated account for customer funds and securities contributed to finding of conversion). *See also Dist. Bus. Conduct Comm. v. Parks*, No. C8A930055, 1995 NASD Discip. LEXIS 206 (NBCC Apr. 6, 1995) (registered representative barred for misuse of customer funds, even though she did not intend to misappropriate customer funds she deposited in her personal account).

to conduct the transaction in a way that the funds were untraceable and unrecoverable. He had to have been aware of the risk of loss and yet he failed to protect against it in any way. No customer would authorize this manner of conducting business or anticipate that the person entrusted with customer funds would behave in such an irrational way.[39]

Finally, even Barnes admits that at some point he intentionally withheld the customer's funds. Pursuant to a mediation agreement approved by the bankruptcy court, Barnes owed his customer the unpaid funds, and yet he purposely made no payments. Barnes hoped to induce HS to withdraw his complaint and help Barnes be reinstated in the securities industry. The customer has been deprived of his funds for years, and at least some of that time it was Barnes' affirmative intention to deprive him of the funds in order to achieve a personal benefit to Barnes. At the point that Barnes intended to deprive the customer of funds that Barnes knew he owed the customer as a means of persuading the customer to withdraw his complaint against Barnes, Respondent's conduct strongly resembled a conversion of the customer's funds.[40]

Taken as a whole, Barnes' conduct is similar to conversion and clearly constitutes misuse of customer funds. He violated NASD Conduct Rule 2330(a).

The violation of Rule 2330(a) also constitutes a violation of NASD Rule 2110. NASD Conduct Rule 2110 (like its successor, FINRA Rule 2010) requires that "[a] member, in the conduct of [his] business, shall observe high standards of commercial honor and just and

[39] A customer has a right to expect that a registered representative will handle money entrusted to him or her in a professional manner, consistent with the customer's directions and with sound practices. *Dep't of Enforcement v. Selewach*, No. 2006005005301, 2008 FINRA Discip. LEXIS 5, at *24 (OHO Feb. 20, 2008).

[40] It is not unusual for a respondent with regulatory problems to attempt to trade repayment of funds to a complaining customer for withdrawal of the complaint. *See Patel*, 2001 NASD Discip. LEXIS 42 at *9 and n.6 (NAC May 23, 2001) (customer testified that he retracted complaint because respondent told customer he would have difficulty paying back the money he owed the customer if the complaint against him were not withdrawn). Such conduct is inconsistent with the duties an associated person owes to customers, however, and is akin to witness tampering under federal law. Such conduct could support an independent charge of violating the high standards of commercial honor and just and equitable principles of trade required by NASD Conduct Rule 2110 (and its successor, FINRA Rule 2010).

equitable principles of trade." It is inconsistent with the duties imposed by these Rules to violate other NASD and FINRA Rules.[41] As the SEC has explained, "Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money."[42] Barnes' conduct violates the ethical standards embodied in NASD Conduct Rule 2110.[43]

B. Failure To Provide Documents Requested Pursuant To FINRA Rule 8210

Barnes was required to produce the documents that FINRA's staff requested pursuant to FINRA Rule 8210. He failed to do so. His violation was serious and warrants stringent sanctions.

FINRA Rule 8210(a)(1) provides in relevant part that FINRA staff "shall have the right" to require a person subject to FINRA's jurisdiction "to provide information orally, in writing, or electronically" or to testify under oath or affirmation "with respect to any matter involved in the investigation, examination, complaint, or proceeding." FINRA Rule 8210(c) requires compliance with any Rule 8210 request. Rule 8210(c) prohibits any member or person from failing to provide information or testimony or access to books, records, or accounts pursuant to a Rule 8210 inquiry. This provision contains no exceptions. The Securities and Exchange

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[41] The Securities and Exchange Commission has consistently held that a violation of an NASD rule or regulation is inconsistent with NASD Rule 2110. *Alvin W. Gebhart*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *54 n.75 (Jan. 18, 2006), *rev'd and remanded in part on other grounds sub nom. Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183 (9th Cir. Nov. 21, 2007). *See also Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007).

[42] *Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, *12 (Oct. 23, 2002).

[43] Improper use of customer funds also can support an independent charge of violating NASD Conduct Rule 2110 (and its successor, FINRA Rule 2010). *Dist. Bus. Conduct Comm. v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 3, at *14 (NBCC Jan. 20, 1998). In this case, however, an independent violation was not separately or alternatively charged.

Commission ("SEC") describes the Rule as "'unequivocal' with respect to an associated person's obligation to cooperate with NASD [and its successor, FINRA's] information requests."[44]

Rule 8210 enables FINRA to conduct meaningful examinations and investigations in order to detect misconduct and protect the public interest. FINRA relies heavily on Rule 8210, and the SEC has "repeatedly stressed the importance of cooperation in NASD investigations ... [and] emphasized that the failure to provide information undermines NASD's ability to carry out its self-regulatory functions."[45] Indeed, Rule 8210 is widely accepted as FINRA's most important tool for investigating potential wrongdoing primarily because FINRA lacks subpoena authority and has limited power to compel the production of evidence from its members.[46] A failure to provide information requested pursuant to Rule 8210 is regarded as "a serious violation because it subverts NASD's [and FINRA's] ability to execute its regulatory responsibilities."[47] FINRA is therefore entitled to the "full and prompt cooperation" of all persons subject to its jurisdiction when investigative requests are made by members of its staff.[48]

As the SEC has declared: "Rule 8210 is an essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced."[49] The SEC more recently summarized the large body of precedent concerning the importance of FINRA Rule 8210, noting

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

[45] *Joseph Patrick Hannan*, Exchange Act Rel. No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (internal citations omitted).

[46] *See John B. Busacca, III*, Exchange Act Rel. No. 63312, 2010 SEC LEXIS 3787, at *57 n.67 (Nov. 12, 2010), *appeal docketed*, No. 10-15918 (11th Cir. Dec. 23, 2010).

[47] *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *20-21 (Sept. 10, 2010) ("Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.").

[48] *Michael David Borth*, Exchange Act Rel. No. 31602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

[49] *Jay Alan Ochenpaugh*, Exchange Act Rel. No. 54363, 2006 SEC LEXIS 1926, at *19 (Aug. 25, 2006).

that a failure to comply with an information request pursuant to that Rule "is a serious violation because it subverts [FINRA's] ability to execute its regulatory responsibilities."[50]

This case presents a prime example of how important compliance with FINRA Rule 8210 is. The MBA bank statements for the six months during which Barnes received the customer's $50,000 entrusted to him and then mysteriously lost – or spent – the money were critical to determining whether Barnes converted the money to his own use. It was Barnes' failure to produce the requested financial records that prevented Enforcement from figuring out what happened to the money – and from gathering the evidence necessary to charge conversion, if that is what happened.

Barnes violated FINRA Rule 8210, as charged in the Second Cause of Action. Because it is well-established that a violation of the duty to cooperate and provide information pursuant to Rule 8210 is also a violation of Rule 2010 (formerly NASD Rule 2110),[51] Barnes also violated FINRA Rule 2010, as charged in the Second Cause of Action.

IV. SANCTIONS

In determining sanctions for the violations, the Hearing Panel looks to the FINRA Sanction Guidelines for instruction.[52] The Sanction Guidelines set forth recommendations regarding sanctions for specific violations. In addition they instruct

[50] *Gregory Evan Goldstein*, Exchange Act Rel. No. 68904, 2013 SEC LEXIS 552, at *22 (Feb. 11, 2013) (quoting *Ricupero* and citing other cases). *See also Dep't of Enforcement v. Meyers Associates LP*, No. 2009017775601, 2011 FINRA Discip. LEXIS 31, at *13 (OHO Apr. 25, 2011) ("Rule 8210 serves as a key element in FINRA's oversight function and allows FINRA to carry out its regulatory functions without subpoena power.").

[51] *See CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009); *Stephen J. Gluckman*, Exchange Act Rel. No., 41628, 54 S.E.C. 175, 1999 SEC LEXIS 1395, at *22 (July 20, 1999); *Dep't of Enforcement v. North Woodward Fin. Corp.*, No. 2010021303301, 2012 FINRA Discip. LEXIS 32, at *18 and n.22 (OHO Mar. 29, 2012), *appeal docketed* (Apr. 23, 2012).

[52] FINRA Sanction Guidelines (2011) ("Sanction Guidelines"), available at www.finra.org/oho (then follow "Enforcement" hyperlink to "Sanction Guidelines").

adjudicators to consult the Principal Considerations applicable to all determinations of sanctions,[53] and the General Principles for all sanction determinations.[54]

A. Misuse Of Customer Funds

The Sanction Guidelines distinguish between misuse and conversion. Conversion is defined as an intentional unauthorized taking of another's property, or the unauthorized exercise of ownership, by one who neither owns it nor is entitled to possess it.[55] A bar is the standard sanction no matter how small the amount converted.[56] Improper use may result from a misunderstanding regarding the customer's intended use of the property or other mitigating factors, and lesser sanctions may be appropriate.[57] For misuse of customer funds, the Sanction Guidelines suggest that a suspension in any and all capacities may be imposed from six months to two years. A suspension may be extended even beyond two years until restitution is paid to the customer for the funds misused. The Sanction Guidelines also recommend a range of fines from $2,500 to $50,000.[58] The Sanction Guidelines authorize restitution "when an identifiable person … has suffered a quantifiable loss proximately caused by a respondent's misconduct."[59]

The Hearing Panel believes that Barnes should be barred for his misuse of customer funds and ordered to pay restitution to HS. Although conversion was neither

[53] Sanction Guidelines at 1, 36.

[54] Sanction Guidelines at 2-5.

[55] Sanction Guidelines at 36.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Sanction Guidelines at 4 (General Principle 5).

charged nor proven, the Hearing Panel finds that conversion cannot be ruled out and that Barnes' misuse of his customer's funds was egregious. Barnes was responsible for the loss of the money belonging to HS, whether Barnes converted it or recklessly lost it to a "scam" artist, and Barnes was culpable in connection with that loss.

Barnes' conduct also gives the Hearing Panel no confidence in his intention or ability to comply with his obligations under FINRA's Rules in the future. He attempted to portray himself as sorry that he lost his customer's money and as intending to repay it.[60] However, his conduct over the last five years belies that portrait. He tried to discharge the debt to HS in a bankruptcy filing that coincided with a proceeding in which he was about to be declared in default. Then he entered into the mediation agreement and promised to make small monthly payments, but never made a single one of those payments. He argued instead that he was justified in not abiding by the mediation agreement because HS had failed to make his regulatory woes disappear. Barnes displays no understanding of his own misconduct.[61]

Moreover, the Hearing Panel found that Barnes' explanation for the disappearance of the customer's funds was not credible. As the NAC has instructed, "In light of our duty to protect the investing public and to ensure the integrity of the market, we would be remiss in not acting decisively in cases, like the present matter, where the

[60] Sanction Guidelines at 6 (Principal Consideration No. 4). Adjudicators may consider whether the respondent has attempted to pay restitution or remedy the misconduct.

[61] Sanction Guidelines at 6 (Principal Consideration No. 2). Whether an individual acknowledges or takes responsibility for his misconduct may be a factor in crafting an appropriate sanction.

evidence calls into question the honesty and veracity of a person associated with a member firm."[62]

Our lack of confidence in Barnes' ability to conduct himself appropriately in the future bears on three concerns all adjudicators are instructed to consider. Sanctions should be designed to deter and prevent the recurrence of misconduct in the future, to improve overall standards in the industry, and to protect investors.[63] In this case, we believe that only a bar will serve these concerns.

The Hearing Panel further finds that restitution is appropriate under the Sanction Guidelines. In this case an identified customer has been deprived of $36,700 for more than five years.[64]

B. Failure To Provide Documents Requested Pursuant To FINRA Rule 8210

A bar is the standard sanction for a complete failure to respond to a request for documents and information pursuant to FINRA Rule 8210. Where there is a partial response, the analysis is more complicated and if there are mitigating factors a respondent may avoid a complete bar. However, to avoid a bar, a respondent must show that the partial response "substantially complied with all aspects of the request."[65]

Barnes failed to produce any of the financial records requested by FINRA staff pursuant to FINRA Rule 8210, until, about six weeks after the last deadline, he produced a bank statement for one month, December 2007. The Hearing Panel finds that Barnes'

[62] *Patel*, 2001 NASD Discip. LEXIS at *27.

[63] Sanction Guidelines at 2 (General Principle No. 1).

[64] The customer is identified here by his initials. In the addendum to this decision, which is served only on the parties, the customer is identified by name.

[65] Sanction Guidelines at 33.

production of the one bank statement was the equivalent of a complete failure to respond. The bank statement did not provide any insight into what happened to the customer's $50,000. The fact that Barnes could produce a meaningless bank statement but then not provide the others that were requested leads the Hearing Panel to conclude that Barnes purposely withheld the relevant information. A bar from association with any FINRA member in any capacity is warranted.

Even if Barnes' production could be considered an untimely and incomplete response, a bar is warranted. The Principal Considerations for this particular violation instruct adjudicators to take into account certain factors that all weigh in favor of a bar. The first of these is the importance of the missing information from FINRA's perspective. Here, as is abundantly clear, the missing information was critical to determining what happened to the customer's money and whether Barnes actually converted it to his own use. The second of these factors has to do with the staff's efforts to obtain a response and the amount of time required. Here, the staff pursued the inquiry both formally by letter and informally by telephone calls and e-mails. Barnes did not make his partial, insufficient response until weeks after the last deadline. The third factor to consider is whether the respondent had a valid reason for the delay or incompleteness of the response.[66] Barnes asserted that it would have been too expensive to produce all the financial records requested, but he has no good explanation why he could produce the

[66] Sanction Guidelines at 33.

one bank statement but not the others.[67] The Hearing Panel finds he has no credible, valid excuse for his failure to produce the other five months of bank records.

The Overview of the Sanction Guidelines makes plain that the function of the disciplinary process is to protect investors. The Overview states: "The regulatory mission of FINRA is to protect investors and strengthen market integrity through vigorous, even-handed and cost-effective self-regulation."[68] It continues: "As part of FINRA's regulatory mission, it must stand ready to discipline member firms and their associated persons by imposing sanctions when necessary and appropriate to protect investors…and to promote the public interest."[69]

The General Principles reiterate this theme. As noted above, General Principle 1 provides, "The overall purposes of FINRA's disciplinary process and FINRA's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public."[70]

The Hearing Panel believes that Barnes' violation of the Rule regarding the production of documents in connection with a FINRA investigation was purposeful and was highly damaging to the investigation. In light of the underlying concern with

[67] Barnes claimed that it would have cost him $25 per hour for the bank to "research" his old bank records and that he could not afford it. But he claimed that he obtained the December 2007 bank statement from someone who did him a favor in return for $10. Hearing Tr. (Barnes) at 70.

[68] Sanction Guidelines at 1.

[69] *Id.*

[70] Sanction Guidelines at 2.

whether Barnes had converted the customer's funds, the requested financial records were critical – and Barnes knew it.[71]

The Hearing Panel concludes that Barnes simply cannot be trusted to comply with his regulatory obligations. In light of that conclusion, his further participation in the industry would endanger the public. A bar is the suitable sanction.[72]

V. ORDER

The Hearing Panel finds that Respondent Levinski Dealexis Barnes violated NASD Conduct Rules 2330(a) and 2110, as alleged in the First Cause of Action. For this misconduct, Respondent is barred from associating with any FINRA member firm in any capacity, ordered to pay restitution in the amount of $36,700 (along with pre-judgment interest on any unpaid balance, starting on January 2008, until paid in full). Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).[73] If this decision becomes FINRA's final disciplinary action, the bar will take effect immediately and the restitution shall be due in full on October 4, 2013.

The Hearing Panel separately finds that Respondent Levinski Dealexis Barnes violated FINRA Rules 8210 and 2010, as alleged in the Second Cause of Action. For this misconduct, Respondent is barred from association with any FINRA member firm in any capacity.

Respondent also is ordered to pay the costs of the hearing in the amount of

[71] Barnes' failure to produce the relevant financial records made it impossible to establish with certainty what happened to the money belonging to HS. The circumstances support a reasonable inference that Barnes refused to make the bank statements available to FINRA because of what they would reveal on that issue.

[72] The Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.

[73] The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.

$2032.47, which includes a $750 administrative fee and the cost of the transcript. The cost shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

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Lucinda O. McConathy
Hearing Officer
For the Hearing Panel