FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. STEPHEN GRIVAS (CRD No. 1829703), Respondent.	Disciplinary Proceeding No. 2012032997201 Hearing Officer – David R. Sonnenberg **HEARING PANEL DECISION** **February 14, 2014**

Respondent is barred from associating with any member firm in any capacity for converting funds, in violation of FINRA Rule 2010, and ordered to pay hearing costs.

Appearances

For the Department of Enforcement, Complainant, Vaishali S. Shetty, Esq., and Kathleen Lynch, Esq., Jericho, New York.

For Stephen Grivas, Respondent, Martin P. Unger, Esq., Garden City, New York.

DECISION

I. Introduction

Respondent Stephen Grivas formed an investment fund to purchase privately held shares of Facebook, Inc. stock in advance of its initial public offering ("IPO"). Grivas then withdrew $280,000 of investor money from the fund and transferred it to a financially struggling broker-dealer in which he had an indirect ownership interest. Following an investigation by FINRA staff, the Department of Enforcement filed a one-cause complaint charging him with violating FINRA Rule 2010[1] by converting investor funds to his own use and/or misusing investor funds.

[1] FINRA Rule 2010 requires FINRA members and their associated persons to observe high standards of commercial honor and just and equitable principles of trade in connection with the conduct of their business.

Grivas filed an answer in which he denied committing the alleged violation and requested a hearing.[2]

At the hearing, Grivas did not dispute most of the facts. He admitted withdrawing the funds and transferring them to the broker-dealer. Grivas disputed, however, that his actions were improper. Rather, he contended that the withdrawal was permissible, consisting partially of a loan and partially of an advance against a future management fee payable by the investment fund to his management company. He claimed that he withdrew the $280,000, in part, to benefit the investment fund, as it needed the services of the broker-dealer he was trying to save. Grivas also asserted that the withdrawal was consistent with his understanding that as head of the management company, he was entitled to withdraw funds, as long as he ultimately repaid any amounts owed.

In addition to these factual arguments, Grivas asserted two legal defenses. First, he argued that FINRA lacked jurisdiction over his alleged misconduct because it did not involve a sufficient nexus to the securities business or the business of a broker-dealer. Second, Grivas argued that under New York conversion law, which he claimed applies here, he did not engage in conversion because: (a) the funds belonged to the investment fund, not to its investors, and (b) the investors had no greater right to the funds than did Grivas.

The Hearing Panel rejected Grivas's defenses and found that he withdrew the $280,000 without authority, with intent permanently to deprive the investment fund of that money, and used it for his own purposes. Additionally, the Panel found that Grivas's conduct was business and securities-related and within FINRA's jurisdiction. The Panel also found that it was not

[2] The hearing was held in New York, New York, on November 21 and 22, 2013, before a Hearing Panel composed of a Hearing Officer and two current members of FINRA's District 10 Committee. FINRA has jurisdiction over this proceeding because, at the time the complaint was filed, Grivas was registered with FINRA through a member firm.

bound by New York law but, rather, by the conversion standards under FINRA Rule 2010. Accordingly, the Hearing Panel concluded that Grivas violated FINRA Rule 2010 by converting funds and barred him from associating with any member firm in any capacity.

II. Findings of Fact

A. Stephen Grivas And Certain Relevant Entities

Grivas began his securities career in 1992.[3] Over the succeeding years, he worked at 15 broker-dealers before joining Obsidian Financial Group, LLC ("Obsidian Financial") in April 2008 where he became registered as a Corporate Securities Representative and General Securities Representative.[4] At the time the complaint was filed, Grivas was registered at Obsidian Financial. By the time of the hearing, however, his registration had been suspended.[5] Obsidian Financial is owned by Obsidian Capital Holdings, LLC,[6] ("Obsidian Capital Holdings"), of which Grivas is an approximately 25% owner.[7] Grivas is also the sole owner of Olympus Capital Holdings LLC ("Olympus Capital Holdings"), an entity which he uses for his own investment purposes.[8] There are no other officers or employees of Olympus Capital

[3] CX-1, at 16.

[4] *Id*. at 2.

[5] Tr. (Grivas) at 55. Grivas testified that he was suspended on October 29, 2013, for failing to pay an arbitration award or settlement agreement or to satisfactorily respond to a FINRA request to provide information concerning the status of the compliance. *Id.* at 227–28.

[6] Stip. ¶ 4.

[7] *Id*. ¶ 3. Obsidian Capital Holdings is a disclosed outside business activity of Grivas. *Id.*

[8] *Id*. at ¶ 16. Olympus Capital Holdings is a disclosed outside business activity of Grivas. *Id.*

Holdings.[9]

Grivas has a disciplinary history. On May 16, 1997, without admitting or denying the charges, in connection with an action brought by the Iowa Securities Bureau for unethical practices related to misrepresentations and omissions to a customer, Grivas consented to cease and desist from future violations of Iowa Code Chapter 502; paid a $2,000 fine; and withdrew for one year as a securities agent in the State of Iowa.[10]

B. Grivas Creates The Obsidian Social Networking Fund I, LLC And Obsidian Social Networking Management, LLC, Raises Funds From Investors, And Purchases Restricted Facebook Stock

In May 2011, in advance of Facebook's much-anticipated initial public offering, Grivas created the Obsidian Social Networking Fund I, LLC ("Fund").[11] Its purpose was to pool investor funds to invest in, acquire, hold, and/or sell restricted Facebook securities in private transactions through direct purchases from holders of those securities.[12] The Fund had three accounts: an escrow account; an operating account; and a management account.[13] Except for the escrow account, Grivas was the sole signatory for the Fund's bank accounts.[14]

Also in May 2011, Grivas formed Obsidian Social Networking Management, LLC

[9] *Id.*

[10] CX-1, at 35–38. Additionally, based on that disciplinary action, Grivas, entered into a restrictive agreement with the State of Indiana Securities Division on August 7, 1998, in which he agreed, among other things, to strict supervision as an agent. *Id*. at 39–42.

[11] Stip. ¶¶ 5–6. The Fund is a disclosed outside business activity of Grivas. *Id.* at ¶ 6.

[12] *Id*. ¶ 6; CX-17 at 4, 10, 19.

[13] Tr. (Grivas) at 67–68.

[14] *Id.* at 68.

("Obsidian Management")[15] to manage the Fund.[16] Grivas was the manager and sole member of Obsidian Management.[17] The Fund's operating agreement, contained in its private placement memorandum, set forth Obsidian Management's rights and obligations to the Fund's members.[18] Under the agreement, Obsidian Management was responsible for the daily management of the Fund[19] and was given "full and complete authority, power and discretion to make any and all decisions and to do any and all things which [it] shall deem to be reasonably required in light of the [Fund's] business and objectives."[20] Obsidian Management was to receive an initial annual management fee equal to the greater of $50,000 or two percent of the gross proceeds of the Fund's offering.[21] Thereafter, a second year management fee was contemplated, payable on the anniversary date of the initial closing.[22]

The operating agreement did not, however, explicitly authorize Obsidian Management to make a loan to itself (or Grivas). Nor did it explicitly authorize Obsidian Management (or Grivas) to take an advance against a future management fee. And nothing in the agreement

[15] Stip. ¶ 7.

[16] *Id.* Obsidian Management is a disclosed outside business activity of Grivas. *Id.*

[17] *Id.*

[18] CX-17, at 52–57.

[19] *Id*. at 4; *see also id*. at 52 ("All of the business and affairs of [the Fund] shall be managed exclusively by [Obsidian Management].")

[20] *Id*. at 52, §5.1.

[21] *Id.* at 5, 11, 47.

[22] *Id.* at 5, 11–12. The operating agreement limited the payment of the management fee to a period of two years. *Id*. at 12, 56.

permitted the withdrawal of funds for their personal use. Indeed, the operating agreement recognized that Obsidian Management owed a fiduciary duty to the Fund.[23]

To assist in the daily management of the Fund, Obsidian Management retained a consulting firm, whose sole manager was SM.[24] The consulting firm was hired to, among other things, locate Facebook stock that the Fund would purchase and to maintain spreadsheets tracking funds from Fund investors and costs incurred by the Fund.[25]

The Fund conducted its offering initially only through Obsidian Financial but later through two additional broker-dealers.[26] Monies from the offering were first received in the Fund's escrow account in September 2011,[27] and then were placed in the Fund's operating bank account.[28] The Fund's offering closed in March 2012. By that time, it had raised $11,202,305 from 54 investors,[29] 24 of whom were Obsidian Financial customers.[30] On or about April 4 and 17, 2012, the Fund, in two purchases, acquired 260,000 shares of Facebook at a cost

[23] CX-17, at 54, § 5.4. ("[Obsidian Management] shall not be liable or obligated to the Members for any mistake of fact or judgment or for the doing of any act or the failure to do any act by [Obsidian Management] in conducting the business, operation s and affairs of the Company" unless, among other things, "a wrongful taking by [Obsidian Management" or "a breach of [Obsidian Management's] fiduciary duty" is established).

[24] Stip. ¶ 20; CX-17, at 10.

[25] Tr. (Grivas) at 60–61, 194–95.

[26] Stip. ¶ 8.

[27] *Id*. ¶ 10.

[28] *Id*. ¶ 11.

[29] *Id*. ¶ 9. Additional funds received in the Fund's escrow account were returned to potential investors when the Fund closed its offering. *Id*.

[30] *Id*.

of $9,976,750.[31] These shares were paid for from the Fund's operating account.[32] Each member would receive a number of Facebook shares based the member's percentage interest in the Fund.[33]

C. Grivas Wires $224,046 From The Fund To His Management Company And Then Transfers $280,000 From The Fund To Obsidian Financial

On May 9, 2012, on behalf of the Fund, Grivas wired $224,046 from the Fund's operating account to Obsidian Management's bank account.[34] This sum constituted a management fee of two percent of the gross proceeds ($11.2 million) raised by the offering.[35] On May 18, 2012, Facebook began its IPO and its stock began trading on the Nasdaq Stock Market.[36] At that point, there was approximately $297,094 remaining in the Fund.[37]

Beginning in about February[38] or May 2012,[39] Obsidian Financial began experiencing net capital difficulties. To alleviate those difficulties, on June 14 and 15, 2012, Grivas transferred $280,000 from the Fund to Obsidian Financial. He did not do this by a direct transfer, but, rather, by a series of transactions over two days. On June 14, 2012, Grivas: (1) on behalf of the Fund,

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[31] *Id*. ¶ 12.

[32] *Id*.

[33] Tr. (Grivas) at 180. Virtually all of the Facebook shares purchased by the Fund were distributed to its members. The remaining three Facebook shares have been sold. Stip. ¶ 23.

[34] Stip. ¶ 13.

[35] *Id*.

[36] *Id*. ¶ 14.

[37] *Id*.

[38] Compl. ¶ 3; Ans. ¶ 3.

[39] Stip. ¶ 2.

wired $280,000 from the Fund's operating account to Obsidian Management's bank account;[40] (2) then, on behalf of Obsidian Management, he transferred that entire amount to Olympus Capital Holdings;[41] and (3) next transferred that sum to Obsidian Capital Holdings.[42] The following day, June 15, 2012, Grivas transferred $280,000 from Obsidian Capital Holdings' bank account to Obsidian Financial's bank account.[43]

Before withdrawing the funds, Grivas made no effort to determine if the withdrawal was permissible. He did not review the private placement memorandum.[44] Nor did he did consult with anyone,[45] including the Fund's two attorneys[46] or SM.[47] In addition to not seeking legal advice or consulting with anyone before withdrawing the funds, Grivas did not disclose to

[40] *Id*. ¶ 15.

[41] *Id*. ¶ 15. Before Grivas wired the $280,000 into Olympus's bank account, it held a balance of approximately $34,936. *Id*. ¶ 17.

[42] Stip. ¶ 15.

[43] *Id*. On that day, the firm submitted a Securities Exchange Act of 1934 Rule 17a-11(b) notification, indicating that the firm had a net capital deficiency of $110,000 during the period May 15, 2012, through June 15, 2012. Stip. ¶ 18. The notification also indicated that the firm had received a capital contribution of $280,000 on June 15, 2012, which allowed it to get back into capital compliance. *Id*. Notwithstanding this capital deposit, on or about February 22, 2013, Obsidian Financial ceased operating a securities business, Compl. ¶ 3; Ans. ¶ 3; Stip. ¶ 2, and on October 16, 2013, it was expelled from FINRA membership. Tr. (Grivas) at 55.

[44] *Id*. at 81.

[45] *Id*.

[46] Specifically, he did not speak with JS, an attorney for the Fund, *Id.* at 73, 177, about withdrawing the $280,000. *Id*. at 215. Nor did he speak with another attorney for the Fund, ME, about the propriety of withdrawing these funds as a loan/advance. *Id*. at 557, 563–64, 584–585. And Grivas did not assert reliance on advice of counsel as a defense in this proceeding.

[47] Grivas testified that at the time of the withdrawal he did not tell SM because their relationship had become strained and he did not want to get into a dispute with her about whether she was due money from the Fund. *Id.* at 187–92, 234–35. Such a concern on Grivas's part was well-founded, as SM has since filed an arbitration claim against Grivas seeking recovery of additional fees predicated upon his assertion that he was entitled to a second year management fee. Tr. (SM) at 299, 371–76; (Grivas) at 224. In evaluating SM's credibility, the Hearing Panel considered the fact that relations between them were strained and that they are in an adversarial relationship as a result of SM's arbitration claim. Nevertheless, the Hearing Panel found SM to be a credible witness. She demonstrated an excellent recollection of events, she was precise and articulate, and her testimony on key points was corroborated by the email evidence. Her testimony was not called into doubt by cross-examination (though she was hostile and combative under questioning by Grivas's counsel). Moreover, on the issues most relevant to the case, her testimony and Grivas's were not contradictory.

anyone that he was planning to withdraw the $280,000.[48] And, after withdrawing the funds, he did not tell anyone that he had done so,[49] including the Fund's members.[50] At the hearing, Grivas testified that he did not disclose the withdrawal to the members because he "didn't think [disclosure] was prudent."[51]

Grivas did not document the withdrawal as a loan or advance,[52] and neither he nor Obsidian Management entered into a loan agreement with the Fund.[53] Grivas testified at the hearing that he did not prepare any paperwork reflecting the transfer of funds because he was on "both sides" of the transaction and therefore, in his view, "it didn't make any sense" to do so.[54]

D. Grivas Permits False Information To Be Sent To Fund Members

In the months following the withdrawal, SM prepared and sent to the Fund members spreadsheets she had prepared. These spreadsheets reflected, among other things, the balance contained in the Fund's operating account and preliminary data about refunds due to the Fund members as a result of there having been an insufficient number of Facebook shares available for

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[48] Tr. (Grivas) at 570.

[49] *Id*. at 570–71.

[50] *Id*. at 82.

[51] *Id*. at 84. Following the withdrawal of funds, Grivas spoke to two members who had complained about their failure to receive, or the size of, their refunds. SM had told a member that he would receive a refund because there had been an insufficient number of Facebook shares available to purchase. *Id*. at 156–57. After complaining in January 2013 that he had not yet received his refund, the member spoke to Grivas, who did not inform him of the withdrawal. Tr. (Grivas) at 156–158. Grivas also did not disclose the withdrawal to another member who had complained about the size of his refund. Instead, Grivas simply told that member, without further explanation, that there had been "additional" or "other expenses" and that he should consult the private placement memorandum. Tr. (DS) at 251, 276. (The Hearing Panel found DS credible. His testimony on this point was consistent with Grivas's testimony that he did not disclose the withdrawal to the members and Grivas did not dispute DS's testimony on this point. Additionally, DS appeared forthright during direct examination, and his direct testimony was not undercut on cross examination).

[52] Tr. (Grivas) at 218–219.

[53] Tr. (Grivas) at 81–82; Stip ¶ 19.

[54] *Id*. at 220, 229–30.

purchase. Grivas knew SM was maintaining these spreadsheets,[55] and that they tracked the use of the funds.[56] Grivas reviewed the spreadsheets, saw that information on them was not accurate (as a result of his undisclosed withdrawal of funds), but said nothing to SM about it. Grivas was also aware that SM was sending the spread sheets to the Fund members which included preliminary refund amounts, but did not ask her to stop sending them.[57] Nor did he tell her the actual balance in the operating account[58]—or that it was not over $290,000,[59] as reflected on certain spreadsheets—even though she had written to him several times asking him to review and approve her calculations.[60] Specifically, Grivas did not tell SM that the balance in the Fund's operating account was closer to $17,094, as a result of his $280,000 withdrawal.[61] Grivas knew that the withdrawal, and its effect on the balance in the operating account, would affect SM's final accounting of funds to be returned to investors.[62]

Additionally, on June 19, 2012, SM emailed Grivas (and the Fund's legal counsel) regarding her calculation of the monies available for refunding to members and proposed setting

[55] Tr. (Grivas) at 117.

[56] *Id*.

[57] *Id*. at 561.

[58] *Id.* at 124.

[59] *Id*. at 129–30.

[60] *See, e.g*., CX-23 ($297,094); CX-24 ($297,094); CX-25 ($297,094); CX-26 ($297,094); CX-28 ($297,064); CX-30 ($292,083.63); Tr. (Grivas) at 139. On December 11, 2012, SM provided Grivas with a spreadsheet listing the amount of funds to be refunded to each investor. Tr. (Grivas) at 84, 86. The spreadsheet reflected a total amount of $292,079 to be refunded to the investors. CX-29, at 7. At that time, however, Grivas knew that the Fund's operating account did not contain $292,079. Tr. (Grivas) at 88.

[61] *Id*. at 130.

[62] *Id*. at 132– 34.

aside a reserve of $50,000 to cover various anticipated fees and expenses.[63] She did not budget for a second year management fee.[64] At no time did Grivas question the amount of the reserve as being too low or question why a second year management fee was not included as an anticipated expense.[65]

E. Grivas Tells FINRA Staff And SM Of The Withdrawal Of Funds And Remits The Withdrawn Funds

The first time Grivas told anyone about the $280,000 withdrawal was during the FINRA staff's investigation, when he told an examiner that he had withdrawn the funds as an advance.[66] It was also during the investigation, on February 20, 2013, shortly before her investigative testimony,[67] that he first told SM of the withdrawal.[68] He explained to her that he had borrowed the funds because he needed them for his broker-dealer, and pledged to return them.[69] On May 8, 2013, two months after he testified during the investigation, Grivas repaid the Fund by depositing $280,000 into the Fund's operating account.[70] Up through the time of the hearing, however, Grivas had not informed the Fund's members of the withdrawal.[71]

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[63] CX-23, 1–2; Tr. (SM) at 322–24.

[64] Tr. (SM) at 330. She stated that "there was no anticipation that a second year management fee was going to be charged, and I wasn't asked to put one in." *Id.*

[65] *Id*. at 324–25.

[66] Tr. (Grivas) at 104, 588–89.

[67] *Id*. at 545.

[68] Stip. ¶ 21; Tr. (Grivas) at 140.

[69] Tr. (SM) at 369–70.

[70] Tr. (Grivas) at 88; Stip. ¶ 22. Two days later, on May 10, 2013, Grivas withdrew $224,092 from the Fund, and (via the management account) deposited that sum into the bank account for Olympus Capital. Tr. (Grivas), at 162–64; RX-U, at 10. According to Grivas, this amount represented the second year management fee earned in April 2013. Tr. (Grivas) at 533, 566.

[71] *Id*. at 88.

On November 18, 2012, the six-month lock-up period for the Facebook shares expired.[72] At that point, the Fund could take delivery of the Facebook shares,[73] and the shares were eventually distributed to the Fund's members.[74] As of the time of the hearing, the Fund still existed for the limited purpose of distributing Schedule K-1 tax forms to its members.[75]

F. Respondent's Defenses And Arguments

Grivas asserted a number of legal and factual defenses and arguments, which the Hearing Panel considered and rejected. Each is discussed below.

1. Grivas's Claim That The Withdrawal Was An Authorized Loan/Advance, Used To Further The Fund's Interests, And Consistent With His Understanding That He Could Withdraw Funds As Long He Repaid Any Amounts Owed

Grivas argued that he did not intend to convert or misuse the Fund's monies. He contended that it was permissible for Obsidian Management to take loans and advances from the Fund, as long as it repaid any amounts due. He characterized the $280,000 withdrawal as an advance/loan, with approximately $224,000 comprising a management fee advance, and approximately $54,000 consisting of a loan.[76] He claimed that at the time of the withdrawal, he understood that the loan portion, which was non-interest bearing, would have to be repaid when

[72] *Id.* at 84. As SM explained, the purpose of the Fund was to acquire Facebook shares and to distribute the shares after the expiration of a six-month lockup period (following the IPO), i.e. the pre-IPO transacted shares were considered insider shares and were subject to a six-month waiting period before they could be transacted. Tr. (SM) at 336.

[73] Tr. (Grivas) at 105.

[74] *Id*. at 532–33. Virtually all of the Facebook shares purchased by the Fund were distributed to its members. According to Grivas, the shares were distributed in July 2013. *Id*. The remaining three Facebook shares have been sold. Stip. ¶ 23.

[75] Tr. (Grivas) at 175.

[76] *Id*. at 552.

the numbers for the Fund were finalized. And, if the second year management fee had not yet been earned by that time, the advance would have to be repaid as well.[77] He emphasized that Obsidian Management has since repaid the loan/advance [78]

Grivas also justified the withdrawal on the grounds that using the Fund's $280,000 to support Obsidian Financial was in the Fund's best interests. Specifically, he argued that the Fund needed the services of a broker-dealer to hold and distribute the Facebook shares. Therefore, he considered it important to ensure Obsidian Financial's viability so that it could hold the Facebook shares for distribution to the Fund's members.[79]

a) The Fund's Private Placement And Operating Agreement Do Not Authorize The Purported Loan/Advance, As It Was Not Made To Further The Fund's Interests

Contrary to Grivas's assertion that the withdrawal was authorized, the Hearing Panel finds otherwise. As discussed above, the private placement memorandum and operating agreement set forth Obsidian Management's rights and duties. Those documents do not explicitly permit Obsidian Management or Grivas to borrow money, or take advances, from the Fund. Nevertheless, they grant Obsidian Management broad authority to take actions necessary to further the Fund's interests. And Grivas claimed he acted, in part, to further the Fund's interests.

The Hearing Panel, however, did not find this claim credible. First, Grivas made this assertion for the first time in this proceeding when he testified at the hearing. It is not contained in his answer to the complaint, in his pre-hearing brief, or in his counsel's opening statement. Additionally, his testimony was implausible because the Fund did not need to open an account,

[77] *Id*. at 229–32.

[78] Ans. ¶ 29.

[79] Tr. (Grivas) at 526–529, 557–59. The Fund did open an account at Obsidian Financial and the Facebook shares obtained by the Fund were held in that account before distribution to the Fund's members. *Id*. at 566–67.

and in fact did not open one, until months after Grivas withdrew the funds. Grivas withdrew the funds in June 2012. The lockup period for the Facebook shares did not expire until five months later, in November 2012. Grivas did not begin looking for a brokerage firm at which to open an account for the Fund until October or November 2012,[80] and an account was not opened at Obsidian Financial until the middle of December 2012.[81] Thus, Grivas failed to demonstrate any plausible linkage between the $280,000 transfer into Obsidian Financial in June, and the Fund's need to have a brokerage account five or six months later. Accordingly, the Hearing Panel rejected this attempted justification for the withdrawal. In any event, substantially depleting the Fund's operating account to ensure the availability of a particular broker-dealer to hold the Facebook shares is not an act that furthered the Fund's best interests.

b) The Withdrawal Was Neither A Loan Nor An Advance

Not only was the withdrawal unauthorized, but the evidence did not demonstrate that it was either a loan or an advance against a future management fee. First, there is no supporting documentation or witness corroboration for Grivas's characterizations of the withdrawal. Second, Grivas's actions regarding the transaction were secretive, providing circumstantial evidence that he appreciated that the withdrawal was improper. Specifically, he told no one about the withdrawal—including the Fund's legal counsel, SM or the Fund's members—either beforehand or until long afterward when he was under FINRA investigation.[82] Third, Grivas's failure to request that SM include a reserve for a second year's management fee is inconsistent

[80] *Id*. He testified that he did not seek to open an account earlier because SM had told him "there was nothing we could do till the stock comes off lockup. To open up a brokerage account takes two minutes,. . ." *Id*. at 581.

[81] *Id*. at 529.

[82] Grivas's failure to disclose the withdrawal to SM was especially telling: he was so determined not to let the withdrawal come to light that rather than disclose it, he knowingly permitted her to send spreadsheets to Fund members reflecting an inflated balance in the operating account and unduly raising the expectations of at least one member of a refund larger than the available funds permitted.

with his claim that part of the withdrawal constituted an advance against a second year management fee.[83] Fourth, he did not return the $280,000 to the Fund until 11 months following the withdrawal and only after FINRA had begun its investigation of his conduct and taken his investigative testimony.

c) Grivas Could Not Reasonably Have Believed That, As Long As He Repaid Any Amounts Due The Fund, The Withdrawal Was Permissible

Although Grivas did not assert a reliance on advice of counsel defense in this case, [84] he referenced a conversation he had with the Fund's legal counsel as another basis for his belief that the withdrawal was permissible. Grivas testified that before the withdrawal, he had a conversation with one of the Fund's attorneys, ME, on an unrelated subject, namely, various issues concerning the transfer of monies from the Fund to the management account.[85] As a result of that conversation, Grivas testified that he thought it was permissible for him to withdraw funds as a loan/advance as long as he ultimately repaid any sums due the Fund, or, in his words, as long as "everything matches out at the end."[86] At the time he withdrew the funds, he stated that he believed the only limitation on his ability as the Fund manager to withdraw funds was that "it all has to even out."[87]

The Panel finds that Grivas could not reasonably have believed that he was permitted to withdraw the $280,000, as long as he ultimately repaid it. First, Grivas's testimony regarding the

[83] Grivas testified that at the time he withdrew the funds, he did not know whether the Fund would exist after November or December 2012. Tr. (Grivas) at 80.

[84] Tr. (Grivas) at 557, 563–64, 576, 584–85.

[85] Tr. (Grivas) at 555.

[86] *Id*. at 558; 575–79.

[87] *Id.* at 571–73. Grivas did concede, however, that it would be impermissible and unethical to use the Fund monies to take his children to a ball game. *Id.* at 573–75.

purported conversation with Fund counsel lacked credibility. His testimony was uncorroborated and ME did not testify. Further, it is unlikely that an attorney for the Fund would advise Grivas that there were basically no constraints on his ability to make withdrawals from the Fund, as long as he eventually returned any monies owed. Second, even if Grivas was left with that impression, it was unreasonable for him to believe he had virtually limitless authority, as the manager to a fiduciary, to use the Fund's money as he wished, even for patently personal purposes. In short, therefore, the Hearing Panel concludes that the withdrawal constituted an act of unauthorized self-dealing by Grivas, and he could not reasonably have believed otherwise.

In sum, the totality of the circumstances belies Grivas's claim that the withdrawal was a loan/advance that he intended to later repay by the time of the Fund's final accounting. Rather, his characterization of the withdrawal constituted an after-the-fact rationalization by someone caught engaging in self-dealing. The withdrawal was an unauthorized taking intended permanently to deprive the Fund of some or all of its $280,000.[88]

[88] The withdrawal was discovered before the Fund's final accounting occurred. As a result, the evidence did not exclude the possibility that had it not been uncovered, Grivas may have, nevertheless, returned the $280,000 at that later time. The possibility of repayment, or, indeed actual repayment of improperly taken funds, however, is not inconsistent with a finding of intent to permanently deprive the victim of its funds. *See Dep't of Enforcement v. Tucker*, No. 2009016764901, slip op. at 7 n.17 (NAC Dec. 31, 2013), available at (http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p421733.pdf), *citing Joel Eugene Shaw*, 51 S.E.C. 1224, 1225–26 (1994) (finding that representative converted customer funds even though representative repaid those funds after his firm discovered the misconduct). *See also Dist. Bus. Conduct Comm. v. Davis*, No. C8A970040, 1998 NASD Discip. LEXIS 45, at *6 (NAC Oct. 22, 1998) (rejecting respondent's claim that he did not intend to permanently deprive customer of his funds based upon respondent's attempt to repay customer within two weeks of conversion after customer complained, and holding that these attempts do "not change the fact that he converted the check"); *Joel Eugene Shaw*, 51 S.E.C. 1224, 1227 (1994) (affirming finding that representative converted funds despite representative's repayment of funds to customers after discovery of misconduct); *Dep't of Enforcement v. Mullins*, Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *26–28 (NAC Feb. 24, 2011), *aff'd*, 2012 SEC LEXIS 464 (Feb. 10, 2012) (affirming hearing panel's rejection of respondent's claim that he intended to repay customer for his personal use of its property, noting that repayment did not occur until 10 months after the firm had fired him, 11 to 15 months after he used the property, and well after FINRA began an investigation into his conduct).

2. Grivas's Claim That The Complaint Must Be Dismissed Because Enforcement Did Not Demonstrate That His Conduct Constituted Conversion Under New York Law

Grivas requested that the complaint be dismissed because Enforcement charged him with conversion and/or misuse of *investor* funds and: (1) the funds were, in fact, those of the Fund, not the investors; and (2) based on New York law, the legal elements of conversion are not met because the members of the Fund had neither legal title to the funds, a right to immediate possession or return of the funds, nor a superior claim to them than Grivas.[89]

Whether the $280,000 constituted monies of the Fund or the investors is a technical distinction without a difference in the context of this case, and does not compel dismissal of the complaint. The gravamen of the charge is that Grivas misappropriated funds belonging to another and used them for unauthorized purposes.[90] Further, as explained below, Grivas's misconduct constituted a violation of FINRA Rule 2010 based on conversion, as defined by the National Adjudicatory Council ("NAC"). The Hearing Panel is not bound by New York law.[91]

[89] Resp. Pre-Hrg. Br. 3–4.

[90] *Compare Dep't of Market Regulation v. Proudian*, No. CMS040165, 2008 FINRA Discip. LEXIS 21, at *21 n.22 (NAC Aug. 7, 2008) (finding that a complaint complies with the "reasonable detail" requirement of Rule 9212(a) "when it provides sufficient notice to a respondent to 'understand the charges and adequate opportunity to plan a defense.'"), *quoting Dist. Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (NBCC July 28, 1997) *with Dep't of Enforcement v. Zenke*, No. 2006004377701, 2009 FINRA Discip. LEXIS 37, at *8–11 (NAC Dec. 14, 2009) (reversing hearing panel's findings and dismissing charge because respondent was found liable for misconduct that was beyond the scope of the allegations in the complaint and which was based on a theory of liability not alleged in the complaint) and *James L. Owsley*, 51 S.E.C. 524, 528 (1993) (dismissing "findings of misconduct on matters that have not been charged and which respondents [did not have] a fair chance to rebut").

[91] *Cf. Mullins*, 2011 FINRA Discip. LEXIS 61, at *28 (rejecting the argument that Enforcement must establish a violation of the state criminal law conversion statute in order to prove a violation of NASD Rule 2110 based on conversion; Rule 2110 is an ethical provision and can be violated even if there is not a legally cognizable wrong).

3. Grivas's Claim The Complaint Must Be Dismissed Because His Conduct Fell Outside The Scope Of Both FINRA's Jurisdiction And FINRA Rule 2010.

Grivas argued that the alleged misconduct is beyond the scope of FINRA's jurisdiction[92] and FINRA Rule 2010[93] because it had no viable connection to the securities industry[94] and related solely to, and implicates only, a reported outside business activity.[95] Additionally, Grivas asserted that he could not reasonably have known that his alleged misconduct violated FINRA Rule 2010. Grivas is incorrect both factually and legally. As discussed in the following section, Grivas's conduct fell within the scope of both FINRA's jurisdiction and FINRA Rule 2010, and he should have realized that his conduct was prohibited by that Rule.

III. Conclusions of Law—Grivas Violated FINRA Rule 2010 By Converting Funds

The complaint charged Grivas with violating FINRA Rule 2010 by converting and/or misusing investor funds.[96] The NAC has defined conversion as "the wrongful exercise of dominion over the personal property of another."[97] In distinguishing conversion from improper use of funds, the NAC explained (in the context of a customer) that "improper use rises to the

[92] Ans. ¶¶ 26–27.

[93] *Id.* at ¶ 23.

[94] *Id.* at ¶ 28.

[95] *Id*. at ¶ 23.

[96] In its closing, Enforcement argued that the evidence demonstrated conversion, rather than improper use of funds. Tr. at 620–21.

[97] *Mullins*, 2011 FINRA Discip. LEXIS 61, at *21, *quoting Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (NAC Mar. 7, 2008). *See also*, FINRA Sanction Guidelines (2011), available at (www.finra.org/sanctionguidelines) at 36 n.2 ("Conversion, generally, is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.") (hereafter "Guidelines").

level of conversion 'when the associated person intends permanently to deprive the customer of the use' of his funds or securities."[98]

Here, as explained above, the Hearing Panel rejected Grivas's characterization of the withdrawal as a permissible loan/advance. Rather, the Hearing Panel finds that Grivas, without authorization, withdrew $280,000 with intent permanently to deprive the Fund of some or all of these funds. Accordingly, Grivas's conduct constitutes conversion (and not merely improper use of funds).

FINRA Rule 2010 requires that members "observe high standards of commercial honor and just and equitable principles of trade."[99] The SEC has held that "conduct that reflects negatively on an [associated person's] ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade."[100] Additionally, according to the SEC, "FINRA's disciplinary authority under [FINRA Rule 2010's predecessor, NASD Rule 2110] is also 'broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.'"[101] Nor must the misconduct directly relate to the securities industry in

[98] *Tucker*, at 6 n.13, *quoting Mullins*, 2011 FINRA Discip. LEXIS 61, at *21.

[99] This Rule applies to Grivas through FINRA Rule 140(a) which provides that persons associated with a member have the same duties and obligations as a member.

[100] *John M.E. Saad*, Exchange Act Rel. No. 62178, 2010 SEC LEXIS 1761, at *13 (May 26, 2010), *pet. granted, remanded on other grounds, Saad v. SEC*, 718 F.3d 904 (D.C. Cir. June 11, 2013), *remanded, John M.E. Saad*, 2013 SEC LEXIS 3133 (Oct. 8, 2013).

[101] *Saad*, 2010 SEC LEXIS at *13, *citing Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that representative violated just and equitable principles of trade by misappropriating funds belonging to a political club while serving as that organization's treasurer), *aff'g* 52 S.E.C. 339, 342 (1995). *See also, Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *26 (NAC Dec. 12, 2012). Effective December 15, 2008, FINRA Rule 2010 superseded NASD Rule 2110. The language of the rule remains unchanged. *See SR-FINRA-2008-028*, Exchange Act Rel. No. 58643, 2008 SEC LEXIS 2279 (Sept. 25, 2008).

order to violate FINRA rules.[102] Finally, "[t]he principal consideration . . . is whether the misconduct 'reflects on the associated person's ability to comply with the regulatory requirements of the securities business.'"[103]

The SEC and FINRA have found that associated persons violate FINRA Rule 2010 (and its predecessor, NASD Rule 2110) by conversion, even where funds are stolen from non-brokerage firm customers.[104] Most apt is *Vail v. SEC*. While serving as treasurer to a political club, Vail misappropriated its funds and misrepresented that they were in an account at the firm at which he was registered. In affirming the imposition of sanctions for violating NASD Rule 2110, the Fifth Circuit Court of Appeals held that the misconduct was securities-related, and therefore within the scope of Rule 2110, because Vail misrepresented the existence of an account at a brokerage firm. The Court also held that NASD's disciplinary authority extended to business-related conduct that did not involve a security. Therefore, the Court ruled, because Vail was a fiduciary of the club and managed its funds, he engaged in business-related conduct falling within the prohibition of the rule.[105]

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[102] *See Dep't of Enforcement v. Manoff*, No. C9A990007, 2001 NASD Discip. LEXIS 4, *20 (NAC Apr. 26, 2001), *aff'd, Daniel D. Manoff*, Exchange Act Rel. No. 46708, 55 S.E.C. 1155, 1162 (Oct. 23, 2002), *citing Leonard John Ialeggio*, Exchange Act Rel. No. 37910, 52 S.E.C. 1085, 1089 (Oct. 31, 1996) (upholding NASD's finding that respondent violated Rule 2010's predecessor by inducing his employer to reimburse him for country club dues he did not incur and stating that "[w]e consistently have held that misconduct not directly related to the securities industry nonetheless may violate [just and equitable principles of trade]"), *aff'd*, 185 F.3d 867 (9th Cir. 1999).

[103] *Gallagher*, 2012 FINRA Discip. LEXIS 61, at *26, *quoting Manoff*, 55 S.E.C. at 1162 (2002); *See also, Manoff*, 2001 NASD Discip. LEXIS, at *22 ("[C]onduct unrelated to securities can violate Conduct Rule 2110 if it is unethical business-related conduct that could occur in the context of employment as a securities representative").

[104] *Dist. Bus. Conduct Comm. v. Vail*, No. C06920051, 1994 NASD Discip. LEXIS 192, at *13 (NBCC Sept. 22, 1994), *aff'd*, *Henry E. Vail*, 52 S.E.C. 339, 342 (1995), *aff'd*, 101 F.3d 37 (5th Cir. 1996) (barred for misappropriation of funds of private political club); *Manoff*, 55 S.E.C. at *162 and n.8 (sustaining bar for unauthorized use of co-worker's credit card numbers); *Dist. Bus. Conduct Comm. v. Kwikkel-Elliott*, No. C04960004, 1998 NASD Discip. LEXIS 4, at *6–7 (NBCC Jan. 16, 1998) (barring respondent for converting funds from employer by submission of false expense reimbursement requests).

[105] 101 F.3d 37, *39 (5th Cir. 1996).

In this case, as in *Vail*, Grivas's conduct was both securities and business-related. It was not, as he argued, far-removed from the securities business or of his member firm employer. He withdrew $280,000 while acting as a manager of Obsidian Management, the management firm which provided services to the Fund. Obsidian Management had a fiduciary duty to the Fund. The Fund existed to, among other things, purchase and distribute securities to its members, 24 of whom were customers of Obsidian Financial, the firm at which Grivas was registered (and, after the withdrawal, the firm at which the Fund had a brokerage account).[106] Accordingly, the Hearing Panel concludes that Grivas's conduct was both securities and business-related and therefore subject to FINRA's jurisdiction.[107]

Finally, the Hearing Panel rejects Grivas's argument that he could not reasonably have known that his conduct violated FINRA Rule 2010. The Hearing Panel concludes that Grivas could not reasonably have believed otherwise. He converted funds, and conversion of funds, including those of non-brokerage firm customers, is a long-standing violation of just and equitable principles of trade. Accordingly, the Hearing Panel concludes that Grivas engaged in conversion and therefore violated FINRA Rule 2010. At a minimum, Grivas's withdrawal of the funds for the purpose of easing Obsidian Financial's distress constituted an improper use of Fund monies.

IV. Sanctions—Grivas Is Barred For Conversion, In Violation Of FINRA Rule 2010

The FINRA Sanction Guidelines recommend a bar for conversion, regardless of the amount converted.[108] Consequently, Grivas is barred for converting $280,000 from the Fund.

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[106] As noted above at n.7, 8, 11 and 16, Obsidian Capital Holdings, Olympus Capital Holdings, the Fund, and Obsidian Management were all disclosed by Grivas as outside *business* activities.

[107] *See Manoff*, 2001 NASD Discip. LEXIS at *22 ("Manoff's conduct was business-related and therefore subject to NASD jurisdiction).

[108] *Guidelines*, at 36.

If Grivas's misconduct is viewed as an improper use of funds, rather than conversion, the Guidelines direct the adjudicators to consider a bar. But where the improper use resulted from respondent's misunderstanding of his or his customer's use of the funds, or other mitigation exists, the adjudicators should consider a suspension of six months to two years and thereafter until respondent pays restitution. It also recommends a fine of $2,500 to $50,000.[109]

Applying the Guidelines for improper use of funds, a bar is the appropriate sanction for Grivas's Rule 2010 violation. Grivas could not reasonably have understood that his authority extended to using the Fund's monies for his own purposes, namely, to support a financially distressed broker-dealer in which he held an indirect ownership interest. Additionally, there are numerous aggravating circumstances. First, his conduct was intentional.[110] Second, Grivas caused Obsidian Management to violate its fiduciary duty to the Fund when, acting on its behalf, he withdrew funds without authorization (and without documentation) for his own self-interest and contrary to the interests of the Fund. Similar conduct has been found to violate NASD Rule 2110.[111] Third, by his silence, Grivas permitted SM to send misleading information to members about the size of their potential refunds and he did not disclose the withdrawal when he spoke

[109] *Id*.

[110] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13) (adjudicators should consider whether respondent's conduct was intentional).

[111] *Cf. Mullins*, Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *22 (finding that a registered representative serving as an officer of his corporate customer has a fiduciary duty to that entity that forbids him from diverting corporate assets for his own self-interest. Rule 2110 is violated if he diverts corporate assets for his own interests and contrary to the interests of the corporation).

with two members about their refunds.[112] Fourth, he did not repay the funds until 11 months after the withdrawal and until two months after FINRA staff took his investigative testimony. Fifth, not only did Grivas display a lack of remorse and acceptance of responsibility, but he has maintained throughout these proceedings that he acted properly and, to the extent he did anything wrong, the Fund's attorney, ME, is partially to blame.[113] Grivas's purported belief that he was permitted to withdraw funds, at will, for virtually any purpose, as long as he eventually returned the funds, and his further assertion that he was acting in the Fund's best interests by his actions, demonstrates an appalling lack of appreciation for the ethical standards applicable to associated persons, especially those who act on behalf of an entity that has a fiduciary duty. Finally, Grivas has a disciplinary history that includes making misrepresentations.[114] Taken in their totality, these considerations compel the conclusion that Grivas should be barred, even if his misconduct is construed as an improper use of funds, rather than conversion. A bar would also deter others from engaging in such egregious misconduct.[115] Accordingly, Grivas will be barred from association with any member firm.

[112] *Cf. Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10) (adjudicators should consider whether an individual attempted to conceal his or her misconduct from their member firm).

[113] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2) (adjudicators should consider whether an individual accepts responsibility for and acknowledged the misconduct).

[114] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1) (adjudicators should consider respondent's relevant disciplinary history). Although the disciplinary history dates back to 1997, the Hearing Panel considered it relevant because of the nature of the underlying misconduct.

[115] *See Tucker*, at 12.

V. Order

Stephen Grivas is barred from associating with any member firm in any capacity for conversion in violation of FINRA Rule 2010. Grivas is also ordered to pay the costs of the hearing in the amount of $5,649.95, which includes a $750 administrative fee and the cost of the transcript. The costs 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. The bar shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding.[116]

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David R. Sonnenberg
Hearing Officer
For the Hearing Panel

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[116] The Hearing Panel considered and rejected without discussion all other arguments by the parties.