BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of Department of Enforcement, Complainant, vs. Daniel D. Manoff Poolesville, Maryland, Respondent.	DECISION Complaint No. C9A990007 Dated: April 26, 2001

Enforcement failed to prove that registered representative's transfer of customer funds to firm was unauthorized, but evidence established that registered representative made unauthorized use of co-worker's credit cards. Held, Hearing Panel's findings and sanctions affirmed.

Respondent Daniel D. Manoff ("Manoff") appealed the June 6, 2000 decision of a Hearing Panel making findings of violation under cause two of the complaint pursuant to Procedural Rule 9310. We also called the decision for review pursuant to NASD Procedural Rule 9312 to examine all of the findings made and sanctions imposed under both causes of the complaint. After a review of the entire record in this matter, we affirm the Hearing Panel's findings that the Department of Enforcement ("Enforcement") failed to prove unauthorized transfers by a preponderance of credible evidence (cause one), but that Enforcement did prove that Manoff made improper use of a credit card (cause two). We order that Manoff be barred from associating with any NASD member in any capacity and that he pay costs of $4,342.25.

Background

Manoff first became an associated person in 1987.[1] From July 1997 through April 21, 1998, he was employed as an investment company/variable contracts representative by

[1] He is not currently employed in the industry.

Guardian Life Insurance Company ("Guardian Life") and its wholly-owned subsidiary, Guardian Investor Services Corporation ("Guardian"), a member of the NASD. During this time, Manoff was also employed by First Financial Group ("FFG"), which was owned and operated by Quincy M. Crawford, Jr. ("Crawford"). Crawford was a general agent for Guardian Life. For purposes of the actions alleged in the complaint, there is no significant distinction between FFG and Guardian.[2] Guardian terminated Manoff on April 21, 1998. Manoff's NASD registration terminated on May 11, 1998. Enforcement filed the complaint on September 3, 1999.[3]

The complaint contained two causes. The first count charged that Manoff made unauthorized transfers of a customer's money to Guardian. The second count charged that Manoff made unauthorized use of a co-worker's credit card by charging certain personal and professional expenses without permission. We will consider each of these counts separately.

Facts

Alleged Unauthorized Transfer of Customer Funds. In early 1998, Manoff told one of his clients, CPD, that she could save costs and administrative fees by consolidating and transferring her various annuity and IRA account funds to Guardian. On January 23, 1998, CPD completed and signed a new account agreement with Guardian. CPD testified that she told Manoff and his business associate, Rodger Louie ("Louie"), that she would transfer her funds if they could demonstrate why doing so would be advantageous to her. CPD claimed that Manoff made the transfer before she had received the analysis. Manoff, on the other hand, testified that he had presented CPD with a "detailed analysis" of the benefits, that CPD had signed forms authorizing the transfer, and that he had then made the transfer.

It is undisputed that on March 13, 1998, CPD signed transfer authorization forms, and on March 16, 1998, CPD signed a check for $25,341, payable to Guardian drawn on her Fidelity Investments ("Fidelity") money market account. CPD wrote the words "to close account" on the front of the check, and she endorsed the back of the check, writing "For Deposit Only to the Account Of [CPD]." CPD claimed that she drew the check so that Manoff could show a "good faith" copy to Guardian. In contrast, Manoff testified that CPD drew the check to liquidate her Fidelity fund so that it could be transferred to Guardian.

On March 26, 1998, a Fidelity agent called CPD and told her that she would incur costs and penalties by transferring funds from Fidelity to Guardian. CPD tried to stop the transfers that Fidelity had not yet made. She also contacted Guardian, which reversed the

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[2] The term "Guardian" will therefore refer to both the member firm and FFG.

[3] Manoff remains subject to the jurisdiction of NASD Regulation, Inc. ("NASD Regulation") for purposes of this proceeding pursuant to Article V, Section 4(a) of the NASD By-Laws, which prescribes a two-year period during which NASD Regulation retains jurisdiction for conduct occurring prior to termination.

transfers at her request. Enforcement did not allege that CPD sustained any losses as a result of the transfers.

CPD's contemporaneous notes of her conversation with the Fidelity agent did not indicate that the transfer of funds was unauthorized, nor did her detailed memorandum to Manoff and Louie, which she wrote that same day, assert that Manoff lacked authority to make the transfer. CPD actually noted in this memorandum that she had "anticipated [the call] since [she] was closing out the accounts with [Fidelity]." At the close of the memorandum she stated, "I am sure you can tell by reading this fax that I am upset but I really feel that I did not make an intelligent decision."

On March 30, 1998, four days later, CPD wrote another memorandum to Manoff and Louie, in which she stated that she had stopped the rollover of the annuity and IRAs. She wrote that "[she] realize[d] this [might] cause some unrest but it [was] what [she] felt comfortable doing" and that "[she was] upset at [that] point but not directly with either of [them] but more with [her]self, for not being clear on what [was] actually taking place."

On May 11, 1998, CPD wrote a letter to William Young at Guardian summarizing her version of events and requesting that her funds be returned to Fidelity and American Century Investments.[4] On May 26, 1998, Louie wrote a letter to Guardian, stating that he had read CPD's May 11, 1998 letter. He stated that he had not attended all of the meetings between Manoff and CPD, but that he had witnessed the conversation during which CPD opened her account with Guardian and said that she was placing her trust in Manoff. Louie stated that he did not attend the meeting at which CPD wrote the check payable to Guardian.

Alleged Improper Use of Credit Card. In January 1998, MLF, a co-worker of Manoff's at Guardian, asked Manoff for financial advice. MLF, a clerical employee at Guardian, was a subordinate of Manoff. She was a single parent with a college-aged daughter. She earned an annual salary of $30,000. Manoff offered to take MLF through the LEAP Systems, Inc. ("LEAP") process, a financial planning program that he, like other representatives at Guardian, was licensed to use. LEAP was Guardian's principal sales program. MLF testified that after their initial meeting, Manoff told her that he could help her remove her former husband's name from her mortgage documents, purchase life insurance for her daughter's benefit, and pay off her credit card debts.

The LEAP process required MLF to give Manoff detailed personal financial information, which he would analyze and use to make financial recommendations. MLF testified that as part of this process, she completed a detailed questionnaire and gave Manoff financial documents, including her personal credit card statements, which bore her credit card

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[4] Guardian ultimately returned her funds (totaling $35,341.62) plus an additional $500, which represented accrued interest computed at an annual rate of eight percent. In addition to the $25,341 from Fidelity, $9,279.62 had been transferred from CPD's American Century Investments account into the Guardian Park Avenue Portfolio.

numbers. The record contains MLF's completed LEAP questionnaire, which shows debt balances from both her Chevy Chase Bank Visa card and her First USA Visa card.

Manoff gave conflicting testimony about MLF's participation in the LEAP process. During the 1998 NASD investigation, Manoff denied having received a LEAP questionnaire from MLF. During the proceedings below, however, Manoff testified that he had received her questionnaire, but immediately terminated the process, having determined that he could not help her. Manoff also asserted that he did not receive MLF's credit card statements. In contrast, MLF asserted that Manoff never told her that he had terminated the process. She testified that when the charges to her credit card were made, she was waiting for Manoff to conduct his analysis and report back to her.

In February 1998, Manoff learned that an immediate payment of $4,565 was due to New York University ("NYU") for his daughter's tuition. MLF agreed to lend Manoff the money. MLF testified that Manoff asked her if he could borrow the money from her. Manoff, however, testified that MLF offered to lend the money to him. He stated that he resisted the offer, but that MLF insisted. It is undisputed that on February 10, 1998, MLF called NYU in Manoff's presence and charged the $4,565 tuition payment to her Chevy Chase Bank Visa credit card. MLF and Manoff executed a written loan agreement that same day.

Over the course of the following two weeks, Manoff used MLF's credit cards for several other personal and professional expenses. MLF testified that she did not authorize any of these charges. Manoff stated that, to the contrary, MLF was more than happy to lend him the money and authorized all of these charges. Unlike the NYU loan, none of these alleged loans was memorialized by a written agreement.[5]

Each of these charges appeared on MLF's credit card statements. On February 11, 1998, $1,000 was charged to MLF's Chevy Chase Bank Visa card for an overdue expense Manoff had incurred from Serving the Nation, Inc. ("STN"). STN is a private investigation firm that Manoff had used in connection with his child custody dispute. On February 18, 1998, Manoff charged two separate orders of supplies that he needed for the LEAP program—one for $240 and the other for $310—to MLF's Chevy Chase Bank Visa card. The $240 order is evidenced by a completed order form that was allegedly faxed to the LEAP office.[6] Finally, a $2,195 registration fee for a mandatory LEAP training symposium was charged to MLF's First USA Visa card on February 24, 1998. The order form for the

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[5] Manoff claims that he wrote down on the original loan agreement, in MLF's presence, the amounts owed on the subsequent alleged loans. Notations of amounts appear on the document, but there is no indication that these sums were intended to become part of the loan agreement. The loan agreement does not contain any explanation of these amounts, nor did the parties sign the agreement again under these notations.

[6] The order form for the $310 is not in evidence, but Manoff admitted that the charge had been made.

symposium that was faxed to LEAP contains Manoff's name, address, and phone number. It also directs that the cost be charged to MLF's Chevy Chase Bank Visa card, not the First USA Visa card. MLF's purported signature is at the bottom of the order form. MLF testified that she neither signed the form nor authorized anyone to sign the form on her behalf.

Manoff offered conflicting testimony about these charges and how they were made. Manoff testified that MLF offered the use of her credit card for the STN payment. During the 1998 NASD investigation, Manoff testified that he called STN, MLF handed him her credit card, he read the credit card number to the STN employee over the phone, and then he handed MLF's card back to her. In connection with a related state court proceeding that same year, Manoff testified that when he called STN, he spoke with George Bradley ("Bradley"), the principal of STN, and told Bradley that he was using someone else's credit card to make the charge.

During the hearing before the Hearing Panel, however, Manoff testified that MLF, not Manoff, had called Bradley to make the charge. Manoff further testified that Bradley called him back several weeks later and said that MLF had called Bradley's assistant after the charge had been made. Manoff suggested that MLF tried to mislead Bradley's assistant about the charge, stating that the assistant told Manoff that MLF had given a "well orchestrated" explanation for the charge. When confronted with the fact that he had previously testified that he, and not MLF, had called STN, Manoff then stated that he had called, but had passed the phone to MLF to process the credit card payment.

Both MLF and Bradley contradicted Manoff's testimony. MLF testified that she never authorized the loan to STN. She stated that she was not present for any phone call to STN and that she did not learn of the charge until it appeared on her credit card statement the next month. Bradley testified that Manoff had attempted to pay STN previously with a check, but the check had bounced twice. STN finally located Manoff, and Manoff agreed to pay. Bradley testified that Manoff then called him and paid over the phone by credit card. Bradley stated that he did not know that Manoff had used MLF's credit card until MLF called him a month or so later and asked him why the charge had appeared on her statement. Bradley testified that he culled through all of his vendor copies of credit card receipts and matched MLF's credit card number to Manoff's receipt. Bradley testified that he then contacted Manoff, who told him that he had inadvertently confused MLF's credit card number, which he alleged he had written on a yellow sticky note, with his wife's credit card number. Bradley stated that Manoff promised to come to STN and pay.[7] Instead of paying MLF for the alleged loan, Manoff paid STN, and STN then reversed the $1,000 charge on MLF's credit card.[8]

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[7] Bradley stated that Manoff promised several times to stop by STN to make the payment, and that he finally did so in approximately October 1998.

[8] STN also inadvertently charged MLF's Chevy Chase Bank Visa card twice for the $1,000 payment. The second charge was also reversed.

Manoff also asserted that MLF authorized the use of her credit cards to pay for Manoff's LEAP supplies and attendance at the LEAP symposium. MLF consistently testified that she never authorized the use of her credit card for these purchases. Manoff testified that MLF had told Manoff that he was running low on LEAP supplies and that she would lend him the money to pay for them. During the 1998 NASD investigation, Manoff testified that MLF handed him her Chevy Chase Bank Visa credit card, he then called LEAP and made the payments with MLF's credit card, and he then gave MLF's credit card back to her. He stated that MLF subsequently faxed the order forms to LEAP. During the related state proceeding later that year, Manoff gave substantially similar testimony and stated that he had told the LEAP representative on the phone that he was using someone else's credit card. During the proceedings below, however, Manoff testified that MLF wrote her credit card number down on the LEAP forms and that he never spoke with anyone from LEAP on the phone.

During the 1998 NASD investigation, Manoff testified that MLF also agreed to lend him money to attend the LEAP symposium. Manoff stated that MLF actually handed him the card and was present when he called LEAP. Manoff testified that MLF had given him a different credit card, the First USA Visa card, to use for the LEAP symposium. As stated above, however, the application form for the LEAP symposium that was introduced into evidence contained the credit card number from MLF's Chevy Chase Bank Visa card, not the First USA Visa card. The fax cover sheet for the order forms for the LEAP supplies and symposium was signed by Manoff and contained the message, "Please process order and symposium payment, call me if any questions."

In her written declaration, MLF stated that after she discovered these charges on her credit card statements, she confronted Manoff and tried to allow him time to pay her back. Manoff submitted two checks—one for $117 and another for $174—to Chevy Chase Bank for the minimum payment due on MLF's credit card balance. Both of these checks were returned for insufficient funds. On April 17, 1998, Chevy Chase Bank sent MLF a letter informing her that her credit card balance had exceeded her credit limit. Chevy Chase Bank ordered MLF to pay $884.88 immediately in order to avoid termination of her credit privileges.

Soon thereafter, MLF informed Crawford about the credit card charges. She also wrote a letter to Robert Castiglione, the president of LEAP, informing him that Manoff had used her credit cards without her authorization or permission and had sent LEAP an order form with her forged signature. MLF sent a similar letter to Guardian's compliance director. Crawford fired Manoff on April 21, 1998.

Enforcement initiated these proceedings on September 3, 1999. On June 6, 2000, the Hearing Panel issued its decision, finding that (1) Enforcement had failed to show by a preponderance of credible evidence that Manoff had transferred CPD's funds without authorization, and (2) Manoff had violated Conduct Rule 2110 by making unauthorized use of MLF's credit cards. Thus, the Hearing Panel dismissed cause one, but barred Manoff from

associating with any NASD member firm in any capacity for the violation of Conduct Rule 2110 under cause two. The Hearing Panel also ordered Manoff to pay costs of $4,342.25.

Discussion

On appeal, Enforcement argued that the Hearing Panel had disregarded substantial evidence in support of count one, including evidence that allegedly corroborated CPD's testimony that she did not authorize the transfer of funds. In his brief on appeal, Manoff argued that the NASD lacked jurisdiction over him as to count two because he had no fiduciary or client relationship with MLF sufficient to trigger Conduct Rule 2110. Manoff also argued that the Hearing Panel's findings that he made unauthorized use of MLF's credit cards were based on speculation and conjecture and therefore should be reversed.

After reviewing the record and considering the arguments made on appeal, we find that (1) Enforcement failed to meet its burden of proof that Manoff transferred CPD's funds to Guardian without permission, and (2) the evidence established that the NASD had jurisdiction over this matter pursuant to Conduct Rule 2110 and that Manoff made unauthorized use of MLF's credit card in violation of Conduct Rule 2110. We therefore affirm the Hearing Panel's decision.

We will first explain that Enforcement failed to meet its burden of proof that the transfer of CPD's funds was unauthorized, and then address Manoff's unauthorized use of MLF's credit cards.

Alleged Unauthorized Transfer of Funds. We called count one for review to determine whether the Hearing Panel properly found that Enforcement had failed to establish Manoff's alleged unauthorized transfer of customer funds by a preponderance of the evidence. We find that Enforcement failed to meet its burden, and we therefore affirm the Hearing Panel's dismissal of count one.

The Hearing Panel properly found that CPD's actions were consistent with Manoff's testimony that CPD had decided to transfer her accounts to Guardian and had given Manoff authorization to do so. Specifically, the Hearing Panel relied on the following evidence: CPD had signed blank forms authorizing the transfer of her accounts to Guardian; she drew a check for $25,341 on her Fidelity account, payable to Guardian and marked "to close account"; she gave both the signed forms and the endorsed check to Manoff; and she told a Fidelity representative who called shortly thereafter that "[she] was closing out the accounts." The Hearing Panel concluded that these actions were inconsistent with an intent merely to prepare for a possible transfer of funds some time in the future. We agree.

The Hearing Panel also relied heavily on its analysis of CPD's testimony, which the Hearing Panel witnessed and heard first-hand. The Hearing Panel determined that CPD's testimony was not convincing and was at odds with her own documentary evidence. In reaching its conclusion, the Hearing Panel considered CPD's demonstrated knowledge of investment matters as well as her demeanor at the hearing. The Hearing Panel found CPD

to be cautious by nature and attentive to detail, and the Hearing Panel determined that such a person would not likely be careless about writing checks and filling out transfer authorization forms. We may reject credibility determinations by the initial fact finder only when the record contains "substantial evidence" for doing so. See Joseph H. O'Brien II, 51 S.E.C. 1112 (1994). We find no such substantial evidence in this case.

Enforcement argues that the Hearing Panel failed to give weight to Louie's testimony, which, Enforcement asserts, corroborated certain aspects of CPD's testimony. By his own admission, however, Louie was not present for all of the meetings between Manoff and CPD. He therefore could not corroborate all of CPD's testimony.[9] Furthermore, Enforcement argued that to the extent Louie's testimony before the Hearing Panel corroborated Manoff's testimony, it should be disregarded, as Louie was a subordinate and friend of Manoff.[10] The Hearing Panel had the opportunity to witness Louie's live testimony and determine his credibility. We do not find Louie's status as a friend and subordinate of Manoff's to be "substantial evidence" that warrants our disregarding the Hearing Panel's credibility determinations. See Joseph H. O'Brien II, supra.

In sum, the sequence of events, the contemporaneous documentary evidence, and the Hearing Panel's findings that CPD's testimony was not credible support the Hearing Panel's conclusion that CPD approved the transfers and later suffered "buyer's remorse." Therefore, we affirm the Hearing Panel's dismissal of count one.

Unauthorized Use of Credit Card. The complaint in this matter alleged, and the Hearing Panel found, that Manoff violated NASD Conduct Rule 2110 by engaging in unauthorized use of MLF's credit card. Conduct Rule 2110 provides that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."[11]

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[9] In his letter dated May 26, 1998, Louie confirmed that: CPD refused to allow the transfer of funds until she had received a detailed explanation of how she would benefit from the transfer; CPD had not received any such explanation by March 13, 1998; the LEAP process was not completed; and she signed blank forms, stating that she was putting her trust in Manoff. Even if accepted as true, these facts alone do not prove that the transfer of funds was unauthorized.

[10] Enforcement also argues that the Hearing Panel's finding that Manoff's testimony regarding cause two was not credible should be considered in evaluating the reliability of his testimony regarding cause one. We reject this reasoning. Manoff's testimony concerning cause two was contradicted significantly by other evidence. The Hearing Panel did not find the same inconsistencies in Manoff's testimony on count one, but it did find CPD's testimony inconsistent with her own documentary evidence. For the reasons stated above, we defer to the Hearing Panel's credibility determinations.

[11] Rule 2110 is applicable to associated persons pursuant to Rule 115(a), which states that "[t]hese Rules shall apply to all members and persons associated with a member.

It is well-established that conduct that is not directly related to securities may violate Conduct Rule 2110. See, e.g., Vail v. SEC, 101 F.3d 37, 38 (5th Cir. 1996) ("The SEC has consistently held that the NASD's 'disciplinary authority is 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.'") (citations omitted); Leonard John Ialeggio, Exchange Act Rel. No. 37910, at 7 (Oct. 31, 1996) (upholding NASD's finding that respondent violated Article III, Section 1 of the Rules of Fair Practice—now Conduct Rule 2110—by inducing his employer to pay for country club fees; the Commission emphasized that misconduct not directly related to the securities industry nonetheless may violate NASD rules); George R. Beall, 50 S.E.C. 230, 231-32 (1990) (finding that respondent's passing of bad checks to his firm in connection with options trading in his personal account was a violation of Article III, Section 1 of the Rules of Fair Practice, now Conduct Rule 2110). Furthermore, conduct 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. Vail v. SEC, 101 F.3d at 39 (petitioner's misappropriation of funds from Houston Young Professional Republicans Club while he served as treasurer violated Rule 2110 because petitioner's position as treasurer constituted business-related conduct). The test is thus whether the representative's misconduct "reflects directly on [his] ability to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money." James A. Goetz, Exchange Act Rel. No. 39796 (Mar. 25, 1998).

We find that Manoff's conduct was business-related and therefore subject to NASD jurisdiction. The Hearing Panel found that MLF was going through the LEAP process with Manoff when the credit card charges were made.[12] In conducting the LEAP analysis, Manoff acted as a fiduciary with respect to the information that he obtained from MLF as part of the process.[13] The LEAP questionnaire that MLF completed stated, "You may be sure that your documents will be professionally safeguarded under strict, confidential control during the analysis period." Although they may have been friends and colleagues, Manoff's relationship with MLF was also business-related. Manoff was performing for MLF a service that he performed for his other clients, and the circumstances under which he obtained her credit card statements were therefore business-related.

Persons associated with a member shall have the same duties and obligations as a member under these Rules."

[12] Manoff gave conflicting testimony about the extent of MLF's involvement in the LEAP process. The Hearing Panel chose to credit MLF's testimony that she was waiting for Manoff to perform his analysis when the misconduct occurred. We accept this credibility determination.

[13] Manoff himself testified that the LEAP process involves "a fiduciary responsibility to the client."

We also find that Manoff's conduct—the use of the credit cards—was business-related. Three of the four purchases that Manoff charged involved expenses related to the LEAP program, which was Guardian's principal sales program. Manoff's unauthorized use of MLF's credit cards therefore constituted unethical business-related conduct and unquestionably calls into doubt Manoff's ability "to fulfill his fiduciary responsibilities in handling other people's money."

We now turn to the underlying offense—the unauthorized use of the credit cards. As the Hearing Panel noted, the case turns on the credibility of the witnesses who testified before the Hearing Panel. The Hearing Panel found MLF's testimony more reliable than Manoff's testimony, which varied and was both internally inconsistent and contradicted by the testimony of other witnesses. We must give "considerable" weight to the credibility determinations of the Hearing Panel. Christopher J. Benz, Exchange Act Rel. No. 38440 (Mar. 26, 1997), aff'd, 168 F.3d 478 (3d Cir. 1998); Frank J. Custable, 51 S.E.C. 643, 648 (1993) ("credibility determinations of the decision makers that actually heard the witnesses' testimony are entitled to considerable weight"); Robert E. Gibbs, Exchange Act Rel. No. 32401 (June 2, 1993) ("credibility determination of the initial decision maker is entitled to considerable weight and deference, since it is based on hearing the witnesses' testimony"); cf. Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981) (although affidavits were contradicted and partially repudiated by other testimony, credibility issues that had been resolved by district court in favor of affiant should not be disturbed on appeal).

Bearing in mind this need for deference, we now turn to Manoff's specific arguments. Manoff argues that Enforcement failed to prove key elements of its case and that the Hearing Panel improperly ignored exculpatory evidence.

Manoff argues that there were fatal gaps in Enforcement's evidence that necessitate reversal of the Hearing Panel's decision. In support of his argument, Manoff cites a laundry list of unanswered questions that he alleges are relevant and essential to the proper resolution of this matter. In fact, none of these issues is material to the disposition of this case, and many of them actually support Enforcement's argument that Manoff made unauthorized use of MLF's credit cards.

For instance, Manoff notes that Enforcement did not explain why Manoff would even need the credit card statements from the LEAP process in order to make the allegedly unauthorized charges, since he already had access to MLF's Chevy Chase Bank Visa card number from the February 10, 1998 NYU loan agreement. Manoff, however, made charges both to MLF's Chevy Chase Bank Visa card and to MLF's First USA Visa card. The NYU loan agreement only contained information from the Chevy Chase Bank Visa card. According to MLF, she gave Manoff copies of statements from both cards. Indeed, the LEAP documents, unlike the NYU loan agreement, included references to both the Chevy Chase Visa card and the First USA Visa card. In any event, Manoff received the credit card statements from MLF as part of the LEAP process before they even entered into the NYU loan agreement. Enforcement therefore had no reason to prove why, in light of the

NYU loan agreement, Manoff would need the credit card statements from the LEAP materials.

Manoff also argues that Enforcement was required to explain why the $2,195 charge for the LEAP symposium was allegedly placed on the Chevy Chase Bank Visa card, but was "inexplicably posted to another of [sic] her accounts." The evidence on this issue, however, weighs overwhelmingly against Manoff's version of events. Manoff gave conflicting testimony on this issue. Manoff told an NASD Regulation investigator in 1998 that for the LEAP symposium charge, MLF had handed him a different credit card than the one they had been using (the Chevy Chase Bank Visa card) and told him that the new credit card (the First USA Visa card) was the one available for the LEAP symposium. He claimed that MLF read him the credit card number while he filled in the application, and she then faxed the application for him. During the proceedings below, however, Manoff changed his story and testified that MLF filled out the application form herself and faxed it to LEAP.

Furthermore, the record evidence contains the cover sheet for the LEAP forms, which were faxed on February 18, 1998. That cover sheet directs the LEAP office to call Manoff, not MLF, in the event that LEAP had any questions about the forms. Indeed, Manoff's phone number, not MLF's phone number, is on the LEAP forms. The charge for the LEAP supplies appeared on MLF's Chevy Chase Bank Visa card as of February 18, 1998. However, the charge for the symposium, which was initially made to the Chevy Chase Bank Visa card on the same day as the LEAP supplies were charged, ultimately appeared on MLF's First USA Visa card as of February 26, 1998. According to the directions on the fax cover sheet, a LEAP representative who might have found the $2,195 symposium charge beyond MLF's credit limit on the Chevy Chase Bank Visa card would have called Manoff to obtain another credit card number.[14] Because Manoff had obtained credit card statements for both the Chevy Chase Bank Visa card and the First USA Visa card, he would have been able to give the LEAP representative the First USA Visa card number for the symposium charge. We thus find that the only plausible explanation for the First USA Visa card charge is that LEAP tried to charge the symposium to the Chevy Chase Bank Visa card (as indicated on the application), Chevy Chase Bank refused the charge, LEAP called Manoff, and Manoff gave LEAP the First USA Visa card number.[15]

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[14] Manoff also argues that if Chevy Chase Bank had declined the LEAP charge, then LEAP would have called the cardholder. As explained above, however, LEAP had only Manoff's phone number, not MLF's.

[15] Manoff also argues that Enforcement's failure to produce the order form for the $310 charge for LEAP supplies requires dismissal of that charge. Manoff, however, admitted that he completed an order supply form for both the $240 charge and the $310 charge. Furthermore, MLF testified that these charges were made, and she denied authorizing the use of her credit card for them. The Hearing Panel credited her testimony, and so do we.

Manoff also argues that Enforcement's failure to proffer the opinion of a handwriting expert constitutes a lack of proof that MLF's signature on the LEAP form was forged. It is well-settled, however, that "expert opinion on handwriting is not necessary." United States v. Dozie, 27 F.3d 95, 98 (4th Cir. 1994); see also United States v. Clifford, 704 F.2d 86, 90 (3d Cir. 1983); United States v. Bell, 833 F.2d 272, 276 (11th Cir. 1987), cert. denied, 486 U.S. 1013 (1988). A fact-finder can compare a purported signature with a known signature to determine the purported signature's authenticity. See Fed. R. Evid. 901(b)(2) (trier of fact can determine the genuineness of handwriting). The Hearing Panel found that the "differences between MLF's actual signature and the purported signature on the LEAP supply order form support her version of events, rather than" Manoff's. We agree, and we affirm the Hearing Panel's finding.[16]

Manoff also argues that the Hearing Panel ignored favorable evidence that, if considered, mandates a finding in his favor. Specifically, Manoff notes that no criminal charges were filed against him and that MLF did not report the charges to her bank's fraud department. He asserts that he therefore must be innocent of these charges. He also points out that MLF's personal fax code appears at the top of the documents that were faxed to LEAP. Manoff insists that MLF's personal code evidences that she, not he, faxed the forms to LEAP.

Manoff's arguments are unpersuasive. MLF testified that after she discovered the unauthorized charges, she tried to work out a resolution with Manoff because they had been friends. When it became clear, however, that Manoff's checks were bouncing, she notified Crawford, the president of LEAP, and Guardian's compliance officer.

The appearance of MLF's personal fax code on the LEAP order forms is easily explained. The evidence shows that others at Guardian had access to the code, and it was most likely used to make it appear that MLF had faxed the forms.

Finally, Manoff argues that the Hearing Panel improperly ignored the testimony of Isaac Page ("Page"), a Guardian employee, who, according to Manoff, "specifically recalls discussing the LEAP forms with MLF while she attended the fax machine." In fact, Page had originally testified that he remembered speaking with MLF while she faxed LEAP forms. He stated, however, that MLF did so frequently. When Page was shown the LEAP order forms at issue in this case and asked whether he recalled seeing MLF fax those particular forms on February 18, 1998, he testified:

> I'm not really sure to be honest with you. [MLF] would take things to the fax machine and set them down to fax, put things in order, I don't know what she was faxing.

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[16] In its brief, Enforcement urges us to find that MLF's forged signature constitutes a separate rule violation. We decline to do so, as it was not charged as a separate violation.

Thus, Page's testimony does not support Manoff's argument, and the Hearing Panel properly ignored it.

Significantly, Manoff does not even acknowledge, let alone attempt to explain, the numerous material inconsistencies in his testimony. Indeed, his testimony was riddled with discrepancies. Manoff initially denied that he had ever asked MLF to complete a LEAP questionnaire, and he insisted that he had not had "any involvement" in preparing the questionnaire. Later, he recanted and admitted that he had supplied her with a questionnaire, which she completed and on which he drew a "velocity of money" diagram.

Manoff's testimony about the credit card charges was similarly inconsistent. He first told the NASD Regulation investigator that for the STN charge, MLF had handed him her card, and that he had called STN and read the credit card number to the STN representative over the phone. At the hearing below, however, he changed his story and stated that MLF had called Bradley and given him her credit card number over the phone. As for the LEAP order forms, Manoff first told the NASD Regulation investigator that he wrote MLF's credit card number on the forms as MLF read it to him. At the hearing below, however, Manoff initially testified that MLF wrote the number on the form. When told of his earlier statement to the investigator, he said that he did not remember writing the credit card number on the form, but that it was possible.

Nor did Manoff address the testimony of Bradley and Crawford, both of whom corroborated MLF's testimony. Both Bradley and Crawford corroborated MLF's statement that Manoff had told her that he had mistakenly used her credit card number, which he had written on a yellow sticky note, instead of his wife's credit card number. Bradley testified that Manoff called him, after bouncing two checks, and paid the STN charge over the phone with a credit card. Bradley testified that Manoff later told him that he had inadvertently confused MLF's credit card with his wife's card.

In sum, we find that the testimonial, documentary, and circumstantial evidence overwhelmingly supports the Hearing Panel's finding that Manoff made unauthorized use of MLF's credit cards for the $1,000 STN charge, the $240 and $310 LEAP supply charges, and the $2,195 LEAP symposium charge. We therefore affirm the Hearing Panel's finding that such conduct constituted a violation of Conduct Rule 2110.

Sanctions

The Hearing Panel ordered that Manoff be barred from association with any NASD member in any capacity and be charged $4,342.25 for costs associated with the proceedings. We do not find any facts that would warrant modification of the sanctions. We therefore affirm the bar and requirement to pay costs in the amount of $4,342.25.

Cause two alleged "Effecting Unauthorized Charges to Another Person's Credit Card," in violation of Conduct Rule 2110. There is no specific NASD Sanction Guideline ("Guideline") for the unauthorized use of a credit card. The Hearing Panel correctly used the

Guideline for "Conversion or Improper Use of Funds," which is the most analogous offense and is also grounded in Rule 2110.[17] The Guideline for "improper use of funds" advises that a bar be considered, unless mitigating circumstances exist.[18] A suspension of six months to two years is deemed sufficient if, for instance, the improper use resulted from the respondent's misunderstanding of the customer's intended use of the funds. The Hearing Panel found no mitigating circumstances that warranted a sanction less than a bar, and we agree.

The sanctions we impose are reasonable in light of the aggravating circumstances of this case. Manoff used information that he had obtained from MLF during the course of providing financial advice for his personal benefit and at her expense. In addition to being his client, MLF was also a subordinate employee who was earning $30,000 a year and trying to raise a child single-handedly. She could ill afford to incur these credit card charges and risk her credit rating. Manoff, however, exploited his position over her for personal gain and made four separate unauthorized charges to her accounts. Although Manoff's wrongdoing in this instance did not involve securities, MLF was a client with respect to the LEAP process. Manoff's willingness to make unauthorized charges to MLF's credit cards indicates a troubling disregard for fundamental ethical principles which, on another occasion, might manifest itself in a securities-related transaction. See Thomas E. Jackson, 45 S.E.C. 771, 772 (1975) ("Although Jackson's wrongdoing in this instance did not involve securities, the NASD could justifiably conclude that on another occasion it might."). As the Securities and Exchange Commission has noted, the securities industry "presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." Bernard D. Gorniak, Exchange Act Rel. No. 35996, at 5 (July 20, 1995) (citations omitted). See also Mayer A. Amsel, Exchange Act Rel. No. 37092, at 11 (Apr. 10, 1996) (noting that the securities industry is "rife with opportunities for abuse").

Furthermore, Manoff did not repay MLF promptly after she confronted him about the charges. Indeed, at least one of his repayment checks was returned for insufficient funds. The fact that he was repaying her at the time Enforcement brought this action against him is not mitigating. See Raymond M. Ramos, 49 S.E.C. 868, 872 (1988) ("[T]he fact that Ramos ultimately repaid the money back does not warrant permitting his return to the securities business where he poses a threat to other investors."). Moreover, Manoff went to great pains to conceal his misconduct. He gave conflicting accounts of what had transpired, and he was contradicted by MLF, as well as other witnesses. He has not showed remorse or admitted wrongdoing.

Thus, because we find that Manoff's continued participation in the securities industry presents a risk to the investing public, we find it appropriate to bar Manoff from association

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[17] See Guideline (1998 ed.) at 34 (Conversion or Improper Use of Funds).

[18] The Guideline for "conversion" requires that the respondent be barred regardless of the amount converted.

with any member firm in any capacity. See Henry Vail, supra, at 6 ("Through his mishandling of these funds, Vail demonstrated a serious misunderstanding of the fiduciary obligations he subjected himself to by becoming the Club's treasurer. His actions make us doubt his commitment to the high fiduciary standards demanded by the securities industry."); see also Stanley D. Gardenswartz, 50 S.E.C. 95, 97-98 (1989) (upholding NASD's decision to bar respondent for misappropriating funds belonging to his employer).

Accordingly, Manoff is barred from association with any member in any capacity, and assessed Hearing Panel costs in the amount of $4,342.25. The bar is effective upon service of this decision.[19]

On Behalf of the National Adjudicatory Council,

Joan Conley, Senior Vice President
and Corporate Secretary

[19] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein. The sanctions that we have imposed are consistent with the analogous applicable NASD Sanction Guideline.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.