

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C8A990017
	:	
v.	:	
	:	
DAVID L. FORAN	:	AMENDED HEARING
(CRD #861746),	:	PANEL DECISION¹
	:	
Royal Oak, MI	:	Hearing Officer - DMF
	:	
	:	November 19, 1999
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint charging that respondent David L. Foran, while associated with an NASD member firm as its financial and operations principal, “misapplied” commissions belonging to his employer or to other representatives at the firm, as well as “fictitious” commissions that the firm never received, by posting those commissions to his own account, in violation of NASD Rule 2110. Foran admitted that he moved commissions from the firm’s account to his own account, because he believed he was underpaid and deserved more money, but he denied that he knowingly took fictitious commissions or commissions that belonged to other representatives at the firm.

¹ The original hearing panel decision issued on November 15, 1999 contained an incorrect disciplinary proceeding number in the case caption. This amended decision corrects that error.

The Hearing Panel found that by paying himself more than \$5,000 in commissions that he took from the firm's commission account, Foran misapplied those funds and converted them to his own use, in violation of Rule 2110. The Hearing Panel rejected Foran's excuses for his actions, including his argument that he was free to post the commissions to his own account because the posting of commissions was within his area of responsibility and the firm had no established policies establishing who was entitled to the particular commissions in question. The Hearing Panel found that, in fact, the commissions in question belonged to the firm, as Foran himself admitted, and Foran had no basis for claiming those commissions himself. On the other hand, the Hearing Panel found that the evidence did not prove that Foran knowingly took for himself commissions that were fictitious or belonged to other representatives at the firm.

With regard to sanctions, the Hearing Panel found that (1) Foran's conduct amounted to conversion; (2) Foran acted intentionally, in secret, over a lengthy period, causing substantial injury to the firm; (3) Foran ceased his actions, and repaid the commissions he had taken, only when he was caught; and (4) Foran failed to accept responsibility for his misconduct, or to acknowledge that his actions were improper, all of which were aggravating factors under the NASD Sanction Guidelines, suggesting the need for substantial sanctions in order to accomplish the NASD's remedial goals. The Hearing Panel found no significant mitigating factors. Therefore, the Hearing Panel ordered that Foran be barred from associating with any member firm in any capacity and fined \$35,000, but suspended the fine until such time as Foran shall attempt to re-enter the securities industry. The Hearing Panel also ordered Foran to pay costs in the amount of \$2,728.75.

Appearances

Richard S. Schultz, Esq., Regional Counsel, Chicago, IL (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for the Department of Enforcement.

Raymond W. Henney, Esq. and Jean-Vierre Adams, Esq., Detroit, MI, for respondent.

DECISION

Procedural History

The Department of Enforcement filed the Complaint in this matter on February 16, 1999, charging that respondent David L. Foran, while he was registered with NASD member firm Bentley-Lawrence Securities, Inc., “misdirected [funds] from commissions owed to [Bentley-Lawrence], trailing commissions for registered representatives employed by [Bentley-Lawrence] at the time, trailing commissions for registered representatives who had left the employment of [Bentley-Lawrence] and fictional funds, all without the knowledge or consent of other officers or directors of [Bentley-Lawrence],” in violation of Rule 2110. On March 11, 1999, Foran, through counsel, filed an Answer to the Complaint in which he requested a hearing.

A hearing was held on the charges in Troy, Michigan, on September 8 and 9, 1999, before a Hearing Panel composed of a Hearing Officer and two current members of the District Committee for District No. 8. During the hearing, Enforcement offered the testimony of four witnesses and 15 Complainant’s Exhibits (CX 1-15); Foran offered the testimony of two witnesses (including himself) and 36 Respondent’s Exhibits (RX 1-28, 36, 40, 45-48, 51-52); and the parties offered 20 Joint Exhibits (JX 1-20).

Facts

1. Background

Foran became registered as a General Securities Representative, a General Securities Principal, and a Limited Principal – Financial and Operations (“FINOP”) in 1984. In 1987, Foran was registered with First Heritage Corporation, where he met Richard Coskey. Coskey left First Heritage and became owner of Bentley-Lawrence, and in December 1987 he hired Foran at Bentley-Lawrence. (CX 1; Tr. 25, 83-84, 296.)

Foran served as executive vice-president, general securities principal, and FINOP at Bentley-Lawrence, but initially he did not have an ownership interest in the firm. Prior to 1995, however, Foran and another individual, Dennis Columbus, received small ownership interests in Bentley-Lawrence. As of 1995, Coskey held about 81% of the ownership interest in the firm, while Columbus held about 12%, and Foran about 7%. (CX 1; Tr. 25-26, 83-84, 157, 300-302.)

As Bentley-Lawrence’s FINOP, Foran was generally responsible for the firm’s financial and operational management, as provided in NASD Rule 1022(b). In carrying out his responsibilities, Foran was assisted by Renee Noland (now known as Renee Hill) until June 1995, and by Kathleen Hofer from June 1995 until Foran left Bentley-Lawrence in November 1995. In addition to his FINOP responsibilities, Foran also serviced his own customer accounts and provided some services for “House” customer accounts, which included the accounts of customers of representatives who were no longer employed at Bentley-Lawrence. Coskey also serviced the House customer accounts. (CX 12; Tr. 29-30, 91, 156, 304, 308-309.)

One of Foran's responsibilities as FINOP was the posting of commissions, including trail commissions received from mutual funds, to the appropriate commission accounts.² Each month, Bentley-Lawrence received a commission statement from each mutual fund family listing the trail commissions paid to the firm that month. Foran or his assistant reviewed each statement and posted the commissions to Bentley-Lawrence's commission accounts, which, during the period in question, were maintained in a "Paradox" computer program. Each representative, including Foran, had a separate commission account number in the Paradox program to which the representative's commissions were posted. There was also a separately numbered House commission account in the Paradox program to which commissions earned by the House (including trail commissions for accounts of representatives who were no longer employed at the firm) were posted. Commissions posted to the House commission account had the effect of increasing the firm's capital position, and ultimately might have been paid to the firm's shareholders. (Tr. 29-30, 34, 44-45, 47, 60, 171-173, 182, 304-305, 312-314, 319, 324, 329, 396.)

2. Foran's Misapplication of Commissions

As of January 1995, Foran received as compensation from Bentley-Lawrence a general "draw" of \$3,000 per month and 70% of all commissions earned on his own customer accounts. Foran felt he deserved more money, because of his efforts servicing Bentley-Lawrence's House customer accounts, so he took steps to increase his compensation. (Tr. 26-27, 304, 307-309, 325, 379-380, 432-433.)

² "Trail commissions are fees paid to broker-dealers by mutual fund companies to compensate the broker-dealers for providing personal service and maintenance of shareholder accounts. They are funded,

Beginning in January 1995, at the end of each month, after Foran or his assistant had posted commissions to Bentley-Lawrence's commission accounts, Foran entered the Paradox program and moved various trail commission entries from the House commission account to his own commission account. This gave Foran the extra compensation he felt he deserved. (Tr. 325-326, 347-348, 379-380, 388, 432-433.)

Foran transferred the commissions to his own account in secret, after he or his assistant had previously posted them to the House commission account. He did not disclose his actions to Coskey or Columbus, or to his own assistants, and a peculiarity in the Paradox program allowed him to make the transfers without leaving any obvious trace. He did not seek the permission of Bentley-Lawrence's Board of Directors, which included the three owners, or the permission of Coskey individually, to increase his compensation, or to transfer commissions.³ (CX10; Tr. 34, 58, 75-76, 175-176, 383-385, 391, 432-433.)

Foran does not claim to have earned the specific commissions that he transferred. Although Foran testified that he provided services for House customer accounts, he also testified that he made no effort to "match up" his services with specific trail commissions received by the firm. Foran explained that this was because much of his work for House customer accounts did not generate commissions. Instead, Foran testified that each month he simply decided how much additional compensation he felt he deserved for all

typically, through fees assessed on mutual fund shareholders." In re Louis Feldman, Exchange Act Release No. 34993, 1994 SEC LEXIS 3428 (Nov. 3, 1994).

³ Sometime prior to November 1995, the Paradox commission program was changed, so that it was no longer possible to move commissions from one account to another without leaving a clear trail. The evidence was unclear as to when that change came into effect. (Tr. 397-398 "I think it was September actually, or July" (Foran); Tr. 185 "Somewhere maybe between August and October of '95" (Hofer).) Hofer testified that after this change came into effect, Foran posted the commissions personally, rather than

his work that month, and transferred trail commissions, essentially at random, from the House commission account to his own account to make up that amount. (Tr. 327-328, 347-348, 411-412.)⁴

3. Foran's Termination from Bentley-Lawrence

Coskey testified that in about June or July 1995, he could "sense" something was wrong with Foran, because Foran "glared" at him when Coskey opened mail or walked into the back office area. Coskey said that, as a result, he began to examine the firm's monthly commission account statements, comparing them to the trail fund statements received from mutual funds to see whether the trail commissions had been posted to the correct commission accounts. Coskey testified that his review showed that Foran was posting trail commissions that belonged to the House to his own commission account. (CX 10; Tr. 31-33.)

Nevertheless, Coskey did not confront or question Foran about these practices until November 15, 1995. By that time, Coskey had created a schedule of the commissions that he contended Foran had improperly posted to his own account, which showed that Foran had improperly taken commissions totaling \$5,747.46 during the period January 1, 1995, through October 31, 1995. According to Coskey's schedule, most of these commissions should have been posted to the House account, but commissions representing a small amount of the total should have been posted to the accounts of current Bentley-Lawrence representatives, and a substantial number of the

having her do it, and that he "locked [her] out of the computer system," which prevented her from seeing how the commissions were posted. (Tr. 186.)

⁴ Foran testified: "What I would do is at the end of the month, I would review what our total house accounts were, and then I would adjust some of those house account commissions over to mine based on the amount of work that I felt I was entitled to be compensated for that month." (Tr. 327.)

commissions, totaling \$2,091.55, were “fictitious” – that is, Coskey believed Foran simply made those commissions up and posted them to his commission account. (CX 10, 12; Tr. 51, 53-55, 106, 108.)

On November 15, 1995, after the markets closed, Coskey and Columbus confronted Foran. Both Coskey and Foran testified that Foran admitted he had transferred commissions from the House account to his own account and agreed to resign from Bentley-Lawrence. Both Coskey and Foran also testified that Coskey showed Foran the schedule and demanded repayment, and that Foran did not contest either Coskey’s calculations or his demand, but rather agreed on the spot to repay Bentley-Lawrence the full amount. (Tr. 55-56, 106, 367-368.)

On November 21, 1995, Coskey and Foran “closed” Foran’s departure from Bentley-Lawrence. During the hearing, there was some disagreement between Coskey and Foran about who had proposed certain of the terms that the parties agreed to, or when those terms were first proposed, but there was no disagreement about the substance of those terms, which were incorporated in several documents.

First, Foran signed a letter of resignation from Bentley-Lawrence that was dated November 21, 1995, but was “effective as of the market close November 15, 1995.” Second, Bentley-Lawrence and Foran entered into a Termination and Stock Redemption Agreement (“Termination Agreement”), which, among other things, included “Restrictive Covenants” in which Foran agreed that he would not “divulge ... the names or addresses of any of the existing clients of [Bentley-Lawrence] (exclusive of Foran’s clients) or any of its registered representatives.” Third, Bentley-Lawrence and Foran entered into a Letter Agreement (dated November 18, 1995), which provided that Bentley-Lawrence

would file a Form U-5 with the NASD concerning Foran's termination that would "indicate that you have left to pursue other opportunities. However, [Bentley-Lawrence] reserves the right to amend the U-5 if (i) it discovers any misfeasance or malfeasance on your part that [Bentley-Lawrence] was not aware of as of the date of termination, or (ii) you fail to cooperate with [Bentley-Lawrence] in any matter requiring such cooperation pursuant to [the Termination Agreement.]" (CX 8, 10; RX 7, 8, 12; Tr. 64, 370-373.)

In addition, at the closing Foran gave Coskey a check, payable to Bentley-Lawrence, for the full amount (\$5,747.46) of the commissions that Coskey claimed Foran took improperly. Coskey subsequently deposited the check to Bentley-Lawrence's bank account. He did not pay anything to the current Bentley-Lawrence representatives who, according to his schedule, were entitled to a small amount of the commissions. (CX 10; RX 10; Tr. 109, 113, 373.)

As promised in the Letter Agreement, Coskey prepared and filed with the NASD, on behalf of Bentley-Lawrence, a Form U-5 dated November 21, 1995, concerning Foran's termination. According to the Form U-5, Foran's termination was "voluntary." In filling out the Form U-5, Coskey responded, "No" to the question "Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct?" Coskey signed the Form U-5 directly below the statement: "I verify the accuracy and completeness of the information contained in and with this form." (RX 9.)

4. The Amended Form U-5 and the NASD's Investigation

After leaving Bentley-Lawrence, Foran became president of a start-up NASD member firm, BestVest Investments, Ltd., which was owned by a credit union. His

actions at Bentley-Lawrence remained undisclosed until February 1997 more than a year after he left Bentley-Lawrence. Coskey testified that, during this period, he “agonized” about his responsibility to disclose Foran’s actions to the NASD. Finally, he said, he could no longer live with what he had done, so he sent the NASD an Amended Form U-5 dated February 7, 1997, and a second Amended Form U-5 dated April 2, 1997, which alleged that “Foran journalized house mutual fund trail commissions to his own [commission] account, created fictitious commission entries and credited the resulting net commissions to his own account in the amount of \$5,747.46.” (CX 9; Tr. 65-67, 296-297.)

Although Coskey testified that his conscience led him to file the Amended Form U-5, the surrounding circumstances suggested other motivations. Apparently, during 1996 Foran hired several Bentley-Lawrence representatives at BestVest. On January 27, 1997, an attorney for Bentley-Lawrence sent Foran a letter charging that Foran had been “actively soliciting Bentley-Lawrence registered representatives,” and that those actions violated the Termination Agreement. The letter demanded that Foran immediately cease and desist soliciting Bentley-Lawrence representatives and pay Bentley-Lawrence \$10,000 in damages, and threatened that, if Foran failed to do so, Bentley-Lawrence would enforce its rights under the Termination Agreement, and also under the Letter Agreement concerning the Form U-5. On January 29, 1997, Foran’s attorney responded, denying that Foran had violated the Termination Agreement. Coskey then sent the first Amended Form U-5, dated February 2, 1997. Coskey sent the second Amended Form U-5 in response to a request from the NASD for more details about the circumstances. (CX 9; RX 14-16.)

Upon receiving the first and second Amended Form U-5, the NASD began an investigation. During the investigation, a Compliance Examiner sent Foran two written requests for information, dated January 13, 1998, and March 11, 1998. In response to these letters, Foran admitted that he had transferred commissions from the House commission account to his own account, but denied that he had posted fictitious commissions to his commission account. Foran also offered a number of excuses for his actions, claiming that Bentley-Lawrence had no established policies or procedures regarding trail commissions; that his responsibility for posting commissions as FINOP allowed him to determine who was entitled to trail commissions received for House customer accounts; and that he had “made a good faith determination that based on the work I was doing, including back office filings, [that] I was entitled to the trail commissions as they were received.” Foran argued that the commission issue was simply an intra-firm matter that Coskey had raised, through the Amended Form U-5, in response to Foran’s hiring of Bentley-Lawrence representatives. (CX 13-14.) Enforcement, not persuaded by these arguments, filed the Complaint initiating this proceeding.

5. Foran’s Arguments in his Answer and at the Hearing

In his Answer to the Complaint and in his testimony at the hearing, Foran repeated his admission that he transferred commissions from the House commission account to his own account, and offered essentially the same excuses and justifications for doing so. Foran denied that he knowingly took commissions that should have been posted to the commission accounts of representatives who were still employed at the firm or commissions that were fictitious. (Tr. 347-349.)

With regard to commissions that should have been paid to representatives, Foran testified at the hearing that in some instances he or his assistant accidentally posted to the House account commissions that should have been posted to the accounts of representatives at the firm, and he admitted later moving some of these commissions from the House account to his own account. Foran testified, however, that, in these cases, the original postings to the House account reflected honest mistakes, and that when he later moved the commissions to his own account he did not know the commissions had been posted to the House by mistake. (Tr. 340-341, 345-347, 353.)

In addition, however, Foran testified that he deliberately posted to the House commission account certain “small” commissions that were payable to representatives who were still with Bentley-Lawrence. Foran explained that some time prior to 1995, he decided that it was “burdensome” to post small commissions to the commission accounts of the representatives who had earned them. Instead, Foran decided that those commissions should be posted to the House commission account. In the beginning, Foran said, he followed this practice for commissions of less than “about” \$2.50, but by 1995 he had raised that amount to “about” \$5.00. He said he spoke briefly to Coskey about this practice, and Coskey approved it. Foran also said he was “fairly certain” he told Noland about the practice when she began helping him post commissions, but did not recall telling Hofer about it when she replaced Noland. In any event, Foran admitted that the practice was not followed consistently. He testified that when he did the posting of the trail commissions during the period in question, he posted commissions of “about” \$5.00 or less to the House commission account, even if those commissions had been earned by representatives who were still with the firm, but if his assistants posted the

commissions, they often posted those small commissions to the accounts of the representatives who had earned them. Foran testified that he did “not believe” the firm’s representatives were aware that he was posting their “small” commissions to the House commission account. (Tr. 311, 315, 332-333, 337-339, 399-400.)

Foran also admitted that some of these commissions made their way to his account when he moved commissions from the House commission account to his own account each month. Foran testified, however, that he did not knowingly choose those commissions for transfer to his account. Instead, he repeated his testimony that he moved commissions from the House account to his own account essentially at random to make up the total amount of extra compensation he wanted. (Tr. 330-331.)

With regard to “fictitious” commissions, Foran testified that, as a result of other mistakes, such as copying errors, addition errors, or keying errors, some commissions originally posted to the House account were inaccurate, and, in that sense, were “fictitious.” Foran also admitted that he later transferred some of these erroneous commissions to his account. Once again, however, Foran contended that he did not knowingly create fictitious commissions in the House account, or select those commissions for transfer to his own account. (Tr. 349-358.) In short, Foran testified that when he made the transfers, he believed he was putting real House commissions in his own pocket, not fictitious commissions or commissions that should have been paid to representatives who were working at the firm.

Discussion

1. Foran's Misappropriation of Firm Funds

The facts admitted by Foran are sufficient to sustain the charge that he misappropriated commissions from Bentley-Lawrence's commission account to his own commission account, in violation of Rule 2110. In law, Foran's actions amounted to "conversion," which 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." NASD Sanction Guidelines, p. 34 n. 2 (1998 ed.).

Foran's primary rationalization for his actions was that, because posting of commissions was his responsibility as FINOP, in the absence of any established policies regarding the posting of trail commissions, he was free to post those commissions to his own account, in order to pay himself whatever amount he felt he had "earned" each month. The Hearing Panel rejected this defense.

First, Foran did not simply post to his own account commissions that otherwise would have been unassigned. During his testimony, Foran was asked: "Were those [trail] commissions [for accounts of representatives who had left the firm] considered house – for the house or for someone else?" Foran replied: "Those would be house." (Tr. 329.) Subsequently, Foran was asked: "Do you agree that those house commissions are assets of the house, assets of the firm?" He replied: "House commissions would be assets of the firm, that's correct."⁵ (Tr. 425.) In fact, Foran or Foran's assistant, under his direction, initially posted all of the commissions that Foran took to the House

⁵ Coskey also testified that he understood that the trail commissions belonged to the firm, and that Foran had no authority to take them for himself. (Tr. 71-72, 159-161; CX 11.) This is consistent with the SEC's

commission account. Only later did Foran move commissions secretly to his own account. If Foran really believed he had a right to those commissions, he would have openly posted them to his own account, or told his assistant to do so, in the first place. The underhanded manner in which Foran carried out his actions confirms his testimony that he recognized the commissions belonged to the House.⁶

Second, Foran admitted that he did not take commissions from the House account on the theory that he had earned those commissions. On the contrary, Foran testified he could not obtain the compensation he wanted by doing that, because much of his work for the House accounts did not generate any commissions. (Tr. 411-413.) This confirms that Foran had no legitimate basis for claiming the House commissions he took. Transferring the commissions was just a means by which Foran was able to pay himself, in secret, money he had not earned.

Third, as a general matter, no employee of any business has the right to put money that belongs to the business into his or her own pocket just because the employee feels he or she deserves more compensation and is in a position to take the funds. To put the matter in strictly legal terms, every employee is an agent of the employer, and owes the employer a fiduciary duty of loyalty. See, generally, Restatement (2d) of Agency, §§ 387 et seq. In more practical business terms, an employee who believes he or she deserves more compensation must ask for a raise; the employee cannot simply take money from the employer's accounts in secret.

statement in Feldman (*supra*, n. 1) that trail commissions paid on House accounts are assets of the firm. 1994 SEC LEXIS at *5.

⁶ During his testimony, Foran contended that what he did was not hidden from others at the firm (Tr. 319, 380), but at the hearing Foran himself could not readily identify which entries in the commission records reflected his movement of commissions from the House account to his own account. (Tr. 389-390.) It is

Foran's other rationalizations for his actions are equally unpersuasive. He argues that this matter simply reflects an internal firm dispute about the proper allocation of trail commissions, and does not rise to the level of a violation of Rule 2110. There was no dispute, however. For there to have been a dispute, Foran would have had to make an open claim for the commissions; instead, he put them in his pocket in secret, and when he was caught gave them back without any protest.

Similarly unavailing is Foran's argument that Coskey only charged him with taking the commissions improperly after a dispute arose about Foran "stealing" representatives from Bentley-Lawrence. In fact, Coskey charged Foran with taking the funds improperly on November 15, 1995, when he and Columbus confronted Foran. When confronted, Foran admitted moving the commissions to his own account, agreed to resign, and wrote a check for the full amount that Coskey demanded. These are not the actions of a person who had an honest belief that he was entitled to the commissions.

Coskey should not have filed a false Form U-5; the Amended Form U-5 he filed more than a year later merely brought to light charges that should have been disclosed in the original Form U-5. The Hearing Panel did not accept Coskey's excuses for failing to disclose Foran's actions in the original Form U-5 he filed in 1995, or his explanation for filing the Amended Form U-5 in February 1997, but Coskey's actions did not cause, and do not excuse, Foran's misconduct in taking commissions that belonged to the firm.

quite clear that the manner in which Foran carried out his actions was designed to hide what he was doing from the other owners of the firm.

Therefore, the Hearing Panel finds that Foran misappropriated more than \$5,000 belonging to Bentley-Lawrence, in violation of Rule 2110.⁷

2. Fictitious Commissions and Commissions Belonging to Other Representatives

All of the facts establishing that Foran misappropriated funds belonging to Bentley-Lawrence were undisputed. Nevertheless, the hearing consumed two full days, as Enforcement tried to prove that some of the commissions Foran took were “fictitious,” and that others should have been paid to representatives who were working at the firm. The Hearing Panel found that Enforcement failed to prove either of these allegations, and that, in any event, given the undisputed facts, Enforcement’s efforts were unnecessary.

With regard to “fictitious” commissions, the evidence showed that some erroneous commissions were posted to the House commission account, and that Foran later transferred some of those erroneous commissions from the House account to his own account. The evidence, however, was consistent with Foran’s argument that the original postings to the House account reflected honest errors by Foran or his assistant. Given that Foran had no qualms about transferring real House commissions to his own account, he had no clear motivation for making up commissions for posting to the House account, and the evidence appeared to show that at least some of the “fictitious” commissions were posted to the House account by his assistant, apparently as a good

⁷ The Hearing Panel did not make a finding as to the precise amount that Foran misappropriated. As explained above, Coskey calculated that Foran had misappropriated \$5,747.46, and Foran repaid that amount. Enforcement, however, independently reviewed Bentley-Lawrence’s records and came up with a slightly different amount in CX 2. The calculation in CX 2, in turn, was revised on several occasions in response to respondent’s counsel’s analysis of the records. All of the calculations, however, establish that the total amount of commissions that Foran moved from the House account to his own account exceeded \$5,000, and for purposes of this Decision, the Hearing Panel finds it unnecessary to make any more precise finding.

faith error on her part. (Tr. 349-358.) In addition, the Hearing Panel accepted Foran's testimony that he did not recognize those errors when he transferred those commissions to his own account, and that he simply transferred commissions from the House account essentially at random to make up the additional amount of compensation he wanted.

In any event, Enforcement did not explain, and the Hearing Panel was unable to discern, why it mattered whether the commissions that Foran improperly took from the House account were "real" or "fictitious." In either event, Foran converted to his own use funds that belonged to the firm.

For similar reasons, the Hearing Panel found that the evidence did not prove that Foran knowingly transferred to his own account commissions that should have been paid to representatives who were still at the firm. As with the "fictitious" commissions, there was evidence suggesting that some commissions that should have been posted to the accounts of representatives were instead posted to the House account by mistake, and that Foran later transferred some of these commissions to his own account. (Tr. 340-341, 345-347.) The Hearing Panel accepted Foran's testimony that when he transferred those commissions to his own account, he did not realize that they had been posted to the House account in error. He thought he was taking money that belonged to the firm, not to representatives at the firm.

As described above, however, Foran also testified that he deliberately posted to the House account "small" commissions of less than "about" \$5.00 that were payable to representatives at the firm, without bothering to disclose this to the representatives who had earned the commissions. This was improper, and the Hearing Panel found that the excuses Foran offered for his actions were no more persuasive than his excuses for taking

commissions that belonged to the firm. But this conduct was not the basis for the charges in the Complaint; in fact, it was clear at the hearing that Enforcement did not know that Foran had engaged in such a practice. When Foran posted these commissions to the House account, he did so in order to benefit the firm. The Hearing Panel credited Foran's testimony that he did not later knowingly select those commissions to move to his own account, but rather took commissions from the House account essentially at random.

In any event, as with the "fictitious" commissions, the Hearing Panel finds it immaterial whether Foran meant to take commissions that properly belonged in the House account, or commissions that should have been posted to the accounts of individual representatives. What is significant is that, in any event, the funds did not belong to Foran, and he should have recognized that to be the case.

Sanctions

"Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry." NASD Sanction Guidelines, p. 3 (1998 ed.). The undisputed facts establish that serious and substantial sanctions are required to accomplish these goals in this case. Foran misappropriated more than \$5,000 from the House commission account deliberately, in secret, over a period of 10 months. He stopped, and repaid the funds, only when he was caught. His excuses and justifications for his conduct up to and including his testimony at the hearing suggest that he still has no remorse for his actions, and he still does not acknowledge that what he did was wrong, and a serious breach of the ethical standards established by Rule 2110. Under these circumstances, the Hearing Panel concluded that

there is a serious risk that Foran might engage in similar misconduct if he were allowed to remain in the securities industry.⁸

With regard to setting specific sanctions, Enforcement relies on the NASD Sanction Guideline concerning “Conversion or Improper Use of Funds or Securities.” Although that Guideline cites Rule 2330, which concerns improper use of customer funds or securities, the Hearing Panel finds that the Guideline also provides helpful guidance in this case.

The Guideline distinguishes between “Conversion” and “Improper Use.” For conversion, the Guideline recommends that the Hearing Panel fine the respondent \$10,000 to \$100,000, plus five times the amount converted, and bar the respondent regardless of the amount converted. For “Improper Use,” the Guideline recommends that the Hearing Panel fine the respondent \$2,500 to \$50,000, and that the Hearing Panel consider a bar, or, where mitigating factors are present, consider suspending the respondent for six months to two years.

As described above, Foran’s conduct amounted to conversion of funds belonging to Bentley-Lawrence. Foran took the funds intentionally; he had no authority to take House commissions, and his excuses for doing so were unreasonable and not credible; and Foran admitted that if Coskey had not discovered what Foran was doing and

⁸ During the hearing it was disclosed that Coskey and Bentley-Lawrence resolved charges that they filed a false Form U-5 through a letter of acceptance, waiver, and consent, pursuant to which they were censured and fined \$5,000 jointly and severally. (Tr. 118-119.) Although the Hearing Panel views Coskey’s filing of the false Form U-5 as very serious, because Coskey’s actions would have prevented the NASD from discovering Foran’s misconduct if a change in Coskey’s self-interest had not led him to file the Amended Form U-5, the Hearing Panel does not believe the fact that Coskey and Bentley-Lawrence escaped with very lenient sanctions prevents the Hearing Panel from imposing on Foran in this Decision the severe sanctions called for by his misconduct.

demanded repayment, Foran would have retained the commissions permanently. Even if the Hearing Panel looked to the recommended sanctions for “improper use,” rather than the recommended sanctions for “conversion,” it would conclude that there are no significant mitigating factors in this case. Foran took the commissions deliberately, in secret, over a period of 10 months, and stopped only because he was caught. As explained above, his explanations and excuses for his conduct were unconvincing and showed only that he still does not understand that his conduct was wrong.⁹

Therefore, the Hearing Panel concluded that the appropriate sanctions in this case were to bar Foran permanently from associating with any member firm in any capacity, and to fine him \$35,000, which amounts to approximately five times the amount of commissions he converted, plus \$10,000. In accordance with Notice to Members 99-86, however, the Hearing Panel also determined that, because Foran is being barred, is not presently registered, and repaid Bentley-Lawrence the amount of commissions he misappropriated, collection of the fine should be suspended until such time as Foran attempts to re-enter the securities industry.

Conclusion

Accordingly, respondent David L. Foran is barred from association with any member firm in any capacity and fined \$35,000, but collection of the fine is suspended until such time as Foran seeks to again become associated with a member firm in any capacity. Payment of the fine, in full, shall be a prerequisite for consideration of any

⁹ The Hearing Panel was also troubled by Foran’s testimony at the hearing that he transferred to the House account small commissions earned by firm representatives, without disclosing this to the representatives who had earned the commissions. This testimony revealed another instance in which Foran decided for himself, in secret, to reallocate funds belonging to others, and Foran did not evidence any recognition that this conduct was improper.

application by Foran for association with a member firm. In addition, Foran is ordered to pay costs in the amount of \$2,728.75, which includes an administrative fee of \$750 and the hearing transcript cost of \$1,978.75. These sanctions shall take effect on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary decision of the NASD, except that the bar shall become effective on the date that this Decision becomes the final disciplinary decision of the NASD.¹⁰

HEARING PANEL

By: David M. FitzGerald
Deputy Chief Hearing Officer

Dated: Washington, DC
November 19, 1999

Copies to:

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¹⁰ The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.