NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ALBERTO E. ARGOMANIZ (CRD #2518033) Miami, Florida, Respondent.	Disciplinary Proceeding No. C07990013 Hearing Officer—Andrew H. Perkins **Hearing Panel Decision** October 18, 1999

Digest

Alberto E. Argomaniz was charged with forging a customer's endorsement to a check and converting the check proceeds in the sum of $7500 to his own use and benefit in violation of NASD conduct Rule 2110. The Respondent filed an Answer admitting the conduct charged in the Complaint but denying that the conduct amounted to forgery and conversion. The Hearing Panel found that the Respondent forged his customer's check and converted the proceeds. Accordingly, the Hearing Panel barred the Respondent and fined him $62,500 ($25,000 plus five times the amount converted). The Hearing Panel also ordered that the Respondent pay the costs of this proceeding.

Appearances

William Brice La Hue, Regional Counsel, Atlanta, Georgia, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, counsel for the Department of Enforcement.

Richard L. Martens, Boose Casey Ciklin Lubitz Martens McBane & O'Connell, counsel for Alberto E. Argomaniz.

DECISION

I. Introduction

On March 5, 1999, the Department of Enforcement (Enforcement) filed a two-cause Complaint in this disciplinary proceeding against Alberto E. Argomaniz (Argomaniz). The Complaint charges that Argomaniz cashed an insurance premium refund check by forging the payee's endorsement and converted the proceeds to his own use and benefit in violation of NASD Conduct Rule 2110. Cause One charges Argomaniz with forgery, and Cause Two charges him with misuse or conversion of funds.

In his Answer, Argomaniz admits that he signed his customer's signature to the check without authorization, cashed the check, and used the proceeds to pay his ongoing business expenses. But he disputes that he ever intended to permanently deprive his customer of the funds. Thus, Argomaniz argues that his wrongdoing should be viewed as improper use of customer funds, not conversion. Argomaniz also raises several mitigating factors in his Answer that he contends justify a suspension rather than a bar, which is recommended under the NASD Sanction Guidelines for conversion.

On May 21, 1999, the Parties filed Stipulations Of Fact And Stipulations Of Authenticity And Admissibility Of Documents ("Stipulation"). By the Stipulation, Argomaniz admits to the conduct charged in the Complaint.

A hearing was held in Boca Raton, Florida, on July 16, 1999, by a Hearing Panel composed of the Hearing Officer, a former member of the Committee for District 7, and a current member of the Committee for District 7. Enforcement called three witnesses, including the Respondent, and introduced 10 exhibits into evidence.[1] The Respondent introduced three exhibits into evidence.

II. Findings of Fact

The core, underlying facts are not disputed. From June 1994 until February 1997, Argomaniz was employed as a sales agent by The Equitable Life Assurance Society of the United States (Equitable). (Stip. ¶ 1; Ex. C-1.) In November 1994, Argomaniz registered with the National Association of Securities Dealers, Inc. ("NASD") as an Investment Company and Variable Contract Products Representative. He was also associated with Equitable's broker-dealer, EQ Financial Consultants, Inc. (Ex. C-1.) Argomaniz is currently employed by Allstate Insurance Company (Allstate) as a Life Specialist and is registered with LSA Securities, Inc., Allstates's broker-dealer subsidiary. As a Life Specialist with Allstate, Argomaniz works in agents' offices to generate leads and sell life insurance. (Tr. 67.) Beginning at the end of July 1999, Argomaniz also will sell securities products such as mutual funds through LSA Securities. (Tr. 83-84, 200.)

[1] References to the hearing transcript are cited as "Tr." Enforcement's exhibit references are "Ex. C-[number]," and the Respondent's exhibit references are "Ex. A-[number]." All transcript cites are to the transcript page numbers, not the exhibit page numbers.

From 1983 to 1986, Argomaniz was employed by Ficus Group, a dealer for several aircraft companies. (Tr. 174.) In 1986 or early 1987, he sold the company and with others founded Interstate Bank of Commerce. (Tr. 144, 174-75; Ex. C-1.) From 1986 until 1989, Argomaniz was an owner of and consultant for Interstate Bank of Commerce. (Tr. 144.) But in 1989, the bank failed. (Tr. 145.) After that, Argomaniz and another former director of the bank worked to restructure and collect a portion of the bank's loan portfolio and pay debts associated with the bank.

The failure of the bank ultimately led Argomaniz to file for bankruptcy protection in 1998. (Tr. 145.) Between 1986 and 1998, Argomaniz liquidated most of his assets to repay debts flowing from his investment in the bank. (Tr. 146.) He was not, however, able to pay all of them, including a debt to the Internal Revenue Service. (Tr. 146-47.) He filed for bankruptcy protection while he was employed by Equitable. All told, Argomaniz estimates that he lost approximately $900,000 from his investment in Interstate Bank of Commerce. (Tr. 145.)

The failure of Interstate Bank of Commerce and his efforts to pay the debts arising therefrom left Argomaniz in serious financial difficulty. (Stip. ¶ 14.) His checking account records indicate that he was overdrawn against a credit line every day between May 16 and July 15, 1996, the period applicable to this proceeding. (Ex. C-6.)

At Equitable, Argomaniz was paid on a commission basis, and he paid all travel and related selling expenses. (Tr. 156.) Equitable did not reimburse travel expenses for its agents. It did, however, have a program called Express Commission under which it advanced a portion of the commission to be earned on a new insurance policy without waiting for the application to be

approved. (Tr. 25, 91-92.) In the event that the policy was not issued for any reason, Equitable would recover the Express Commission.

The combination of Argomaniz's tight financial situation and Equitable's policy regarding the payment of commissions and expenses presented considerable financial pressure. His financial difficulties were exacerbated by his supervisor's desire that Argomaniz concentrate his sales efforts in the Dominican Republic, which involved high travel costs that Argomaniz had to pay in advance of his receipt of sales commissions. As a result, Argomaniz relied on a constant income stream to continue his selling efforts in the Dominican Republic. He did not have the necessary reserves to carry him if payments were delayed.

In or about March 1996, Argomaniz sold R.P. an insurance policy for which the annual premium was $7500. (Ex. C-7, at 2.) Thus, under the Express Commission program, Equitable advanced about $5000 to Argomaniz when the application was submitted for approval. R.P., however, did not obtain the needed medical information. (Tr. 91, 149; Ex. C-3.) Equitable therefore declined the application, recovered the $5000 advance it had paid Argomaniz, and refunded R.P.'s initial premium payment. (Stip. ¶ 10; Tr. 152; Ex. C-3; Ex. C-4.) The refund check in the amount of $7500 and dated June 14, 1996, was made payable to R.P. Under Equitable's procedures, Argomaniz was responsible for delivering the check to R.P.

The repayment of the Express Commission on the R.P. insurance policy was more than Argomaniz could afford while continuing to pay his travel expenses to the Dominican Republic. (Ex. C-3; Tr. 193.) Accordingly, Argomaniz told his supervisor, Cesar Lopez, that he planned to concentrate his sales efforts in Southern Florida. Argomaniz already had some local clients, and he felt that he could develop a sufficient client base in the Miami area. (Tr. 193.) However, Mr.

Lopez, encouraged Argomaniz to continue selling in the Dominican Republic, which Mr. Lopez called Argomaniz's "natural market." (Tr. 29.)[2] Mr. Lopez also reminded Argomaniz that he had a lot of pending business in the Dominican Republic and that he should not discontinue his efforts there because the bulk of his commissions came from that territory. (Tr. 193-94.) According to Argomaniz, Mr. Lopez then proposed that Argomaniz use R.P.'s premium refund check to cover his travel expenses. (Tr. 194.)

The day after Argomniz's conversation with Mr. Lopez, Argomaniz went to see Mr. Lopez who asked Argomaniz if he had cashed the check. When Argomaniz said he had not, Mr. Lopez said he needed $2000 and requested Argomaniz to go to the "restaurant" and get the check cashed. (Tr. 194.)

Argomaniz then forged R.P.'s endorsement and took the check to the restaurant where Mr. Lopez and Argomaniz had cashed checks before. (Tr. 216; Stip. ¶ 16.) Argomaniz told the restaurant owner that R.P. had asked him to cash the check on his behalf. (Tr. 217.) The owner cashed the check and gave Argomaniz $7500 less a 2% fee. Argomaniz took the proceeds back to Mr. Lopez and gave him $2000 in cash, keeping the balance for himself. (Tr. 154.)

Over the next five months, R.P., through his secretary, made two or three inquiries regarding the refund. (Tr. 160-61, 203.) On each occasion, Argomaniz covered up his wrongdoing and told R.P.'s secretary that he was sure the money was coming. (Tr. 160-61.) Argomaniz never disclosed that he had misappropriated the refund due R.P.

[2] Mr. Lopez encouraged the agents to develop business in Latin America. They did business in the Dominican Republic, Venezuela, Costa Rica, Brazil and Argentina. (Tr. 134.)

On or about October 24, 1996, Mr. Lopez returned the $2000 he had taken. (Tr. 162, 195-96.) And, thereafter, on November 21, 1996, Argomaniz wired $7500 from his personal account to R.P. (Tr. 197, 204; Ex. C-6, at 13.) Argomaniz contends that this was the earliest he could repay R.P. In support of his position, Argomaniz points out that his checking account was overdrawn 75% of the time between August 15 and September 13, 1996. (Tr. 197.)

In January 1997, R.P. sent a letter to Mr. Lopez requesting an explanation of the manner in which the refund was handled. (Tr. 31, 39; Ex. C-7.)[3] Upon receiving the letter, Mr. Lopez immediately took it to his supervisor, Mr. Musibay. (Tr. 39.) Mr. Musibay then called in a compliance officer, and together they called Equitable's home office. (Tr. 40.) They were told that an internal investigation was starting immediately, and Mr. Lopez was instructed to do nothing further pending the completion of the investigation. (Tr. 40.)

On or about January 17, 1997, Mr. Lopez and Mr. Musibay met with Argomaniz regarding R.P.'s complaint. (Tr. 162.) They told Argomaniz that Equitable was investigating the

[3] The Parties stipulated to the authenticity and admission of the Spanish version of the letter but not the English version. At the hearing, Mr. Lopez, who has spoken Spanish since approximately 1959, read the letter in English to establish his understanding of its contents. (Tr. 38.) His interpretation follows:

> Dear Mr. Lopez:
>
> Around mid-March of 1996, I was visited by Mr. Alberto Argomaniz offering me some protection and investment plans that you market. After completing all the required documentation and giving a check for U.S. dollars seventy-five hundred for the initial of the operation, I made the decision that it was not the best time to proceed with such investment. And I made the option to a letter sent to Mr. Argomaniz in July of 1996 to withdraw my application and to return the corresponding check that I had given -- that I was given to him. After four months and many phone calls, we received the money via wire transfer from a bank in Miami to my personal account in the United States. We are of the belief that your company should give us an explanation about the delay and the way or the manner of the evolution of the return of the money. Being that you are such a -- such a company with so much incidents in the insurance and investments market in a world level and to be a business where the service to the client should be the first.
>
> Sincerely,
> [R.P.]
>
> cc: Carlos Musibay, General Manager

complaint and that he was being placed on suspension pending the outcome of the investigation. (Tr. 41-42, 162-63.) Argomaniz declined to comment and left the meeting without mentioning Mr. Lopez's involvement in taking the funds. (Tr. 163.)

During the investigation, Argomaniz twice met with a compliance officer from Equitable. (Tr. 164-65.) At the first meeting, Argomaniz explained his and Mr. Lopez's respective roles in cashing the refund check. The compliance officer indicated that he would look into Argomaniz's allegations. At the second meeting, Argomaniz told the compliance officer that he wanted to resign. The compliance officer agreed, and they met in the Equitable parking lot a couple of days later on February 14, 1997. Argomaniz tendered his resignation letter, and the compliance officer gave Argomaniz a termination letter. (Tr. 166.) Equitable later filed a Uniform Termination Notice For Securities Industry Registration (Form U-5) with the NASD stating that Argomaniz was terminated for "commingling of client funds." (Ex. A-2, at 2.)

Once Equitable completed its internal investigation, it paid R.P. $270 in interest for the period Argomaniz had R.P.'s money. (Ex. C-10.) Equitable, in turn, recovered this payment from unpaid annualized commissions that came due Argomaniz after he left Equitable.[4] (Tr. 207.)

In an effort to mitigate his misconduct, Argomaniz implicated his immediate supervisor, Mr. Lopez. Implicitly, Argomaniz suggests that Mr. Lopez is more to blame. Argomaniz testified that it was Mr. Lopez, not himself, who came up with the scheme to cash R.P.'s refund check. Argomaniz contended that Mr. Lopez suggested cashing the check because he wanted Argomaniz to continue selling in the Dominican Republic and because Mr. Lopez needed $2000 for personal

[4] The Hearing Panel bases its conclusion on the facts that Enforcement did not ask for restitution and that Equitable dropped the lawsuit it had filed against Argomaniz to recover excess payments.

expenses. Mr. Lopez denied these allegations. He contended that he had no knowledge of what Argomaniz had done until he received the January 17, 1997, letter from R.P. (Tr. 101.)

Argomaniz effectively discredited Mr. Lopez by showing that he had a practice of lending to and borrowing from the agents he supervised, including Argomaniz, and by showing that Mr. Lopez's testimony at the hearing was materially different from his deposition testimony taken just a month earlier in a lawsuit Equitable filed against Argomaniz to recover commission overpayments.

At the hearing, Mr. Lopez said that he loaned Argomaniz money on 12 to 15 occasions in amounts ranging from $300 to $3000 because they were friends. (Tr. 47-48, 99.) This was different from his testimony at his deposition at which he testified that he lent money to Argomaniz six to eight times. (Tr. 94-95.) Mr. Lopez's bank records also reflected that the size of the loans was usually under $1000 and that the largest loan was $1718. (Ex. A-12.) More importantly, the hand-written notations on many of Mr. Lopez's canceled checks indicate, and Mr. Lopez admitted, that he made these as advances against future commissions due Argomaniz. (Tr. 117-19; Ex. A-12.)

On balance, the Hearing Panel finds Argomaniz's testimony more credible than Mr. Lopez's. Mr. Lopez had a well-established practice—albeit against Equitable's policies—of advancing commissions to agents. It is likely that he did this for two reasons: to enable the agents to sell in Latin American countries where most of their policies were being generated and to generate more commissions. Mr. Lopez benefited because he received commissions based on the production of the agents in his district. Further, the Hearing Panel concludes that Mr. Lopez used this practice, and his friendship with the agents under him, to coerce them into loaning him

money. This evidence tends to corroborate Argomaniz's testimony that Mr. Lopez suggested that Argomaniz cash R.P.'s refund check rather than cease selling in the Dominican Republic.

Argomaniz also presented testimony regarding his character from his current supervisor at Allstate, Robert Coffino. He characterized Argomaniz as an honest and valued employee. Mr. Coffino based his opinion on his experience both working with and managing Argomaniz from late 1996 to the present. (Tr. 68, 71.) Mr. Coffino testified further that he knew of no complaints about Argomaniz's business practices. (Tr. 69.) In Mr. Coffino's opinion, Argomaniz was one of the best Life Specialists in the country, and Mr. Coffino did not believe that there was a likelihood that Argomaniz would improperly take money from a customer again. (Tr. 71-72.)

Mr. Coffino also stated that Argomaniz had been very successful at Allstate. He ranks number one in Florida and number 10 nationwide in overall production. (Tr. 70.) Between January 1 and July 7, 1999, Argomaniz earned $110,000 as a Life Specialist at Allstate. (Tr. 83.)

III. Conclusions of Law

A. Jurisdiction

The NASD has jurisdiction over Argomaniz and this proceeding. Argomaniz was registered with the NASD as an Investment Company and Variable Contract Products Representative at the time of the misconduct alleged in the Complaint and at the time Enforcement filed the Complaint in this proceeding.

B. Forgery

Argomaniz admits that, on or about July 1, 1996, he endorsed R.P.'s signature to the refund check issued to R.P. without his authorization. (Stip. ¶¶ 16, 17.) Nevertheless, Argomaniz argues that he cannot be found to have forged the check because the crime of forgery requires an

intent to defraud under Florida state law.[5] Argomaniz steadfastly maintains that he never intended to defraud R.P.; rather, he always intended to return the funds as soon as he was able.

Argomaniz's reliance on Florida state criminal law is misplaced. "An NASD disciplinary action is not a criminal proceeding, and the elements of forgery under . . . state law are not dispositive as to whether the record satisfies the allegations. . ." of forgery in the Complaint.[6] Under NASD Conduct Rule 2110, it is sufficient that the evidence shows that the respondent lacked authority to sign his customer's name. Moreover, the evidence supports a finding that Argomaniz intended to defraud R.P. Argomaniz cashed the refund check so that he could use the money to pay his own expenses, not to benefit R.P. Accordingly, the Hearing Panel finds that Argomaniz violated NASD Conduct Rule 2110, as alleged in Cause One of the Complaint, by forging R.P.'s endorsement to the refund check.

C. Conversion

Argomaniz admits that he improperly cashed the refund check and took the funds for his own use and benefit. Indeed, Argomaniz concedes that he thereby violated NASD Conduct Rule 2110 and that a fine and short suspension are warranted for his misconduct.[7] However, Argomaniz disputes Enforcement's contention that the facts warrant a finding that he is guilty of conversion of funds and a bar is therefore warranted.

Argomaniz asserts that a finding of conversion is precluded by the lack of evidence that he intended to permanently deprive R.P. of the funds, which Argomaniz contends is an element

[5] Respondent's Pre-Hearing Statement at 5.

[6] District Bus. Conduct Comm. for Dist. No. 1 v. Donald Marquis Bickerstaff, Complaint No. C01920017, 1994 NASD Discip. LEXIS 60, at *36 (NBCC June 23, 1994), aff'd 58 SEC 237 (1995).

[7] Respondent's Pre-Hearing Statement at 8.

of conversion. In effect, it is Argomaniz's position that, if the Hearing Panel finds that Argomaniz is only guilty of improper use of R.P.'s funds, a bar would not be an appropriate sanction. The Hearing Panel rejects this argument. Due to the egregious nature of his misconduct, under either theory, a bar is necessary and appropriate. However, because the distinction between improper use and conversion of customer funds is important to the determination of the appropriate sanctions in this proceeding under the NASD Sanction Guidelines, the Hearing Panel will discuss the applicable standards and the Respondent's contention that an element of conversion is the specific intent to permanently deprive the customer of his funds.

The starting point in this analysis is the violation charged in the Complaint. Under the Second Cause, Argomaniz is charged with violating Conduct Rule 2110 by either misusing or converting R.P.'s refund. (Compl. ¶ 9.) Enforcement's theory is that Argomaniz violated Conduct Rule 2110 regardless of how his conduct is characterized. Enforcement did not charge him with a violation that requires Enforcement to prove scienter or specific intent.

Conduct Rule 2110 is a broad ethical provision that is not limited to rules of legal conduct.[8] The Rule provides that a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade. "The crux of a Conduct Rule 2110 violation is the breach of a duty imposed by just and equitable principles of trade."[9] Proof of scienter is not required to establish a violation of this ethical proscription.[10] Accordingly,

[8] Timothy L. Burkes, 51 S.E.C. 356 (1993), aff'd mem., Burkes v. SEC, 29 F.3d 630 (9th Cir. 1994).

[9] See, e.g., District Bus. Conduct Comm. for Dist. No. 5 v. Jeffrey O. Putterman, Complaint No. C05960041, 1997 NASD Discip. LEXIS 52, at *22 (NASD October 10, 1997).

[10] See In re Michael Alan Leeds, 51 S.E.C. 500, 504 (1993) and In re Ernest A. Cipriani, Jr., 51 S.E.C. 1004, 1006 n.8 (1994).

the issue of whether a respondent's conduct is categorized as improper use or conversion is relevant only to the issue of sanctions.

An associated person "improperly uses" customer funds in violation of Conduct Rule 2110 when the associated person fails to apply the customer's funds as the customer directed but did not use the customer's funds for the associated person's own benefit. In other words, a finding of improper use generally falls into the category of negligence as opposed to an intentional taking.[11]

Conversion, on the other hand, involves more than negligence. An associated person "converts" customer funds in violation of Conduct Rule 2110 when the associated person intends to take the funds and use them for the associated person's own benefit. The applicable NASD Sanction Guideline defines conversion as: "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."[12]

Contrary to Argomaniz's position, it is not necessary to find that a respondent intended to "permanently deprive" the owner of his or her property to sustain a finding of conversion. It is sufficient that the evidence show that the respondent misappropriated securities or funds belonging to another for the respondent's use and benefit. For example, in the recent decision In

[11] See, e.g., In re Bernard D. Gorniak, Exchange Act Release No. 35996, 59 S.E.C. Docket 2073, 1995 SEC LEXIS 1820 (July 20, 1995) (associated person retained for an indeterminate period customer funds given to him for the purchase of mutual fund shares); In re Lawrence R. Klein, Exchange Act Release No. 36595, 60 S.E.C. Docket 2373, 1995 SEC LEXIS 3418 (Dec. 14, 1995) (associated person transferred funds from one customer's account to another customer's account); In re Daniel Joseph Alderman, Exchange Act Release No. 35997, 59 S.E.C. Docket 2075, 1995 SEC LEXIS 1823 (July 20, 1995), aff'd 104 F.3d 285 (1997); In re Robert L. Johnson, 51 S.E.C. 828 (1993) (registered principal of broker-dealer failed promptly to register unit trust in customer's name and failed to return funds to customer for almost two years); In re John C. Gebura, 46 S.E.C. 1121 (1977) (registered principal delayed returning funds to customer after intended investment did not materialize).

[12] NASD Sanction Guidelines 34 (2d ed. 1998).

re Eliezer Gurfel, Exchange Act Release No. 41229, 1999 SEC LEXIS 640, at*12 (March 30, 1999), the SEC upheld the NASD's determination that a former registered representative violated Conduct Rule 2110 by "forging or causing to be forged the endorsement of [his firm's] president on the backs of [four] commission checks and converting the proceeds from the checks to his own use."[13] The SEC's finding was not dependent upon the respondent's state of mind in taking the funds. It was sufficient that the respondent had no right to the funds and that he had used them for his own benefit.

Indeed, there are no reported SEC decisions holding that an element of conversion is the respondent's intent to permanently deprive the customer of the customer's funds. There are, however, a few NASD decisions that have cited this as a factor in finding the respondent guilty of conversion as opposed to misuse of customer funds. Argomaniz cites these cases in support of his argument that he should not be found to have converted R.P.'s funds. But, contrary to Argomaniz's argument, these decisions do not alter the standard of proof for establishing conversion under Conduct Rule 2110; in fact, the NASD has recently and expressly rejected this argument in District Bus. Conduct Comm. for Dist. No. 8 v. Herbert L. Davis, Jr., Complaint No. C8A970040, 1998 NASD Discip. LEXIS 45 (Oct. 22, 1998).[14]

[13] See also, e.g., In re Joel Eugene Shaw, 51 S.E.C. 1224 (1994) (registered representative converted customer funds by depositing them into his personal bank account and falsifying records to lull customer); In re Joseph H. O'Brien II, 51 S.E.C. 1112 (1994) (president of broker-dealer converted customer funds by withdrawing them from a customer's account without authorization and failing to repay them); In re Ernest A. Cipriani, 51 S.E.C. 1004 (1994) (registered representative collected cash payments from his customer and converted them to his own use); In re Stanley D. Gardenswartz, Exchange Act Release No. 27194, 44 S.E.C. Docket 725 (Aug. 29, 1989) (registered representative forged customers' signatures on a check, deposited the proceeds in his personal account, and used the funds for approximately one year).

[14] See also District Bus. Conduct Comm. for Dist. No. 3 v. Stuart M. Helffrich, Complaint No. DEN-862, 1990 NASD Discip. LEXIS 99 (NBCC Dec. 24, 1990).

In Davis, the respondent, an employee of Metropolitan Life Insurance Company ("MetLife"), endorsed his client's signature to a death benefit check in the amount of $945.58 and deposited the proceeds in his checking account. Following a hearing, the District Business Conduct Committee for District 8 fined Davis $20,000 and barred him from the industry. On appeal, the National Adjudicatory Council ("NAC") upheld the findings and sanctions of the District Business Conduct Committee and rejected the respondent's contention that "he did not convert the money because he did not intend to permanently deprive [his client] or MetLife of the money."[15] The NAC pointed to the following factors in reaching its conclusion that the respondent deliberately converted his client's funds: (1) the client did not lend the respondent the money; (2) the respondent knew that the money was not his; (3) the respondent endorsed the check over to himself without his client's permission and deposited the proceeds into his own account; (4) and the respondent took the money because he wanted to use it for his own purposes.[16] The NAC further noted that the fact that the respondent "appears to have suffered immediate remorse for his actions and attempted to repay the customer within two weeks does not change the fact that he converted the check."[17]

The identical circumstances are present in this case, and the Hearing Panel concludes that the same result should apply. Argomaniz's argument that he did not intend to keep R.P.'s funds permanently is immaterial to the determination of whether Argomaniz converted the funds to his own use and benefit. Rather, the inquiry regarding a respondent's intended use for the converted

[15] Id. at 1998 NASD Discip. LEXIS at *6.

[16] Id.

[17] Id.

funds, the respondent's later repayment of the funds, if any, and the degree of his remorse are circumstances that are properly weighed in determining sanctions.

Argomaniz relies on the decision in District Bus. Conduct Comm. v. James C. Arnold[18] in support of his argument that the Hearing Panel must find that he intended to permanently deprive R.P. of his funds in order to find him to have converted the funds. But the Hearing Panel concludes that the holding in Arnold is narrower than what Argomaniz suggests.

In Arnold, the respondent, an Investment Company and Variable Contract Products Representative, was charged with nine counts of converting $53,186.26 from nine customers.[19] The respondent appealed the decision of the District Business Conduct Committee after he defaulted by failing to file an answer to the Complaint. Upon appeal, the National Business Conduct Committee ("NBCC") reviewed the case on the basis of the written record. The respondent was denied an appeal hearing because he did not participate in a hearing before the DBCC.

The NBCC upheld the DBCC's finding of conversion for all but one of the causes without making a finding regarding the respondent's state of mind. The NBCC reversed the DBCC on the fourth cause in the Complaint. The undisputed facts under this cause were that the respondent had effected two redemptions from his customers' mutual funds by forging their signatures to the redemption request. The respondent then endorsed his customers' signatures to the redemption checks and deposited them into his own account. On this evidence and the

[18] Complaint No. C05960034, 1997 NASD Discip. LEXIS 79 (NBCC Feb. 25, 1997).

[19] Four of the causes charged the respondent with violations of Article III, Sections 1 and 19(a) of the NASD's Rules of Fair Practice (now Conduct Rules 2110 and 2330). The remaining causes charged him only with violations of Article III, Section 1.

respondent's default, the DBCC found that the respondent had converted $2000 in violation of Article III, Sections 1 and 19(a) of the NASD's Rules of Fair Practice (now Conduct Rules 2110 and 2330).[20]

The NBCC modified the DBCC's holding and concluded that the respondent had only misused his customers' funds. The NBCC stated that it was making the modification because the record showed that the respondent "removed the funds from the customers' accounts, and shortly thereafter returned the funds to the accounts prior to the discovery that the funds had been taken."[21] The NBCC concluded that the evidence did not show that the respondent "intended permanently to deprive the customers of use of the funds."[22]

In a footnote, the NBCC explained that the difference between misuse and conversion was whether the respondent intended to "steal" the funds.[23] In support, the NBCC cited to two SEC decisions: In re Joseph H. O'Brien, II, 51 S.E.C. 1112 (1994) and In re Raymond M. Ramos, 49 S.E.C. 868 (1988).[24] But neither of these decisions states explicitly that intent to permanently deprive the owner of his or her funds is an essential element of conversion.

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[20] Arnold, 1997 NASD Discip. LEXIS 79, at*10.

[21] Id. The decision is silent as to all of the other circumstances surrounding the taking and use of these funds, including the length of time the respondent held the funds before restoring them to his customer's accounts.

[22] Id. at*10 n.8 (citing In re Joseph H. O'Brien, II, 51 S.E.C. 1112 (1994) and In re Raymond M. Ramos, 49 S.E.C. 868 (1988)).

[23] Id. The NBCC's emphasis on whether the respondent intended to "steal" his customers' funds apparently derives, at least in part, from the NASD Sanction Guideline in effect at the time, which instructed adjudicators to consider whether the respondent's conduct "was [e]ssentially 'stealing' versus a mistaken belief of authority to use." NASD Sanction Guidelines 13 (1996).

[24] Cf. District Bus. Conduct Comm. for Dist. No. 3 v. Shannon A. Hayashi, Complaint No. C3A950047, 1996 NASD Discip. LEXIS 54, at *9 (NBCC Oct. 15, 1996) ("By way of background, we note that the [SEC] has held an associated person 'converts' customer funds in violation of Sections 1 and 19(a) when the associated person intends to permanently deprive the customer of the use of his or her funds.") (citing In re Joseph H. O'Brien, II, 51 S.E.C. 1112 (1994), In re Raymond M. Ramos, 49 S.E.C. 868 (1988), and In re Joel E. Shaw, 51 S.E.C. 1224 (1994)).

In O'Brien the respondent withdrew $7050 from his customer's securities account without the customer's authorization to pay a disputed invoice for bookkeeping services the respondent had provided to his customer. The NASD found that the respondent converted the funds, thereby violating Article III, Sections 1 and 19 of the NASD's Rules of Fair Practice.[25] On appeal to the SEC, the respondent contended that the withdrawal from his customer's account had been properly authorized by her attorney and that, in any event, it was common brokerage house practice to charge client accounts without the customer's permission for services rendered. The respondent also claimed that the sanctions imposed by the NASD were excessive. He pointed to his clear disciplinary record and the fact that he did not attempt to conceal his actions as mitigation.

The SEC upheld the NASD's findings without discussion, and it upheld the sanctions stating the following:

> In converting [his customer's] funds, O'Brien abused the trust that is the cornerstone of the relationship between a securities professional and his customer. In isolation, O'Brien's actions in taking money without authorization would be troubling enough, but here he continues to maintain that he was justified in doing so. It is clear that his continued presence in the securities industry threatens the public interest (emphasis added).

Consistent with the more recent NASD decisions in Gurfel and Davis, the SEC apparently focused on the respondent's lack of authority and his intent to use the money for his own benefit in finding that he had converted the funds.

Similarly, in Ramos the SEC upheld the NASD's findings that the respondent had misappropriated his customer's funds based on the SEC's determination that the evidence

[25] O'Brien, 51 S.E.C. at 1113.

showed that he had taken the funds without authorization.[26] As in O'Brien, the respondent defended the charge on the ground that he had authority to take the funds. Here also, the SEC did not draw a distinction between misuse and misappropriation of funds based upon whether the respondent intended to retain them permanently.

Accordingly, the Hearing Panel concludes that the NAC's more recent decisions in Gurfel and Davis, although not expressly overruling Arnold, more accurately reflect the standard to be applied in NASD disciplinary proceedings in determining if a respondent has converted customer funds. This view is consistent with both the definition of conversion in the NASD Sanction Guidelines and with the applicable SEC decisions. For these reasons, the Hearing Panel rejects Argomaniz's argument that under the facts of this case the intent to permanently deprive the owner of his or her property is an element of conversion and finds that Argomaniz converted $7500 belonging to R.P., in violation of Conduct Rule 2110.

IV. Sanctions

The applicable NASD Sanction Guideline indicates that where a respondent has converted funds a bar should be standard, regardless of the amount converted, and that a fine ranging between $10,000 and $100,000 plus five times the amount converted should be imposed.[27]

Argomaniz argues that in assessing sanctions the Hearing Panel need not impose the sanctions recommended in the Guideline and that there are a number of mitigating circumstances in this case that would justify a lesser sanction than a bar. The Hearing Panel notes the presence

[26] Ramos, 49 S.E.C. at 869.

[27] NASD Sanction Guidelines 34 (2d ed. 1998).

of the following mitigating circumstances: (1) Argomaniz's restitution of the funds before the NASD commenced its investigation; (2) Argomaniz's cooperation with the NASD during the investigation; (3) Argomaniz's eventual admission of wrongdoing;[28] (4) and Argomaniz's lack of prior or other similar misconduct. The Hearing Panel has considered also the testimony of Argomaniz's current supervisor that Argomaniz is an honest and valued employee.

Nevertheless, the Hearing Panel considers Argomaniz's conduct egregious and warranting serious sanctions. Argomaniz intentionally cashed the refund check made out to his customer. He knew the funds were not his, and he knew that he did not have authority to endorse his customer's signature to the check. His motive in taking the money was to benefit himself. Argomaniz readily admitted that he wanted to use the money so that he could continue to sell insurance in the Dominican Republic despite the fact that he could have limited his sales activities to the Miami area. There also is no evidence suggesting Argomaniz would have suffered any adverse consequences if he refused to go along with Mr. Lopez's suggestion. In short, he took the money to increase his income. Moreover, Argomaniz testified that when Mr. Lopez suggested the scheme to cash the check and share the money, Argomaniz knew it was wrong and went home to think about it overnight. From this, the Hearing Panel concludes that Argomaniz knowingly and intentionally entered into the scheme to steal the refund proceeds for his personal benefit.

The Hearing Panel also finds Argomaniz's deceit to be an aggravating circumstance. Argomaniz ignored his customer's written instruction to return the policy premium and twice

[28] The Hearing Panel believes that the mitigative effect of this factor is substantially diminished by Argomaniz's failure to accept total responsibility for his misdeeds. The Hearing Panel is troubled by his implicit argument that Mr. Lopez's involvement mitigates in any manner Argomaniz's culpability.

covered up his wrongdoing by lying to his customer's secretary who called to inquire about the status of the refund check. Contrary to Argomaniz's argument, the Hearing Panel does not consider placing his customer's funds at substantial risk and using them for nearly five months to reflect immediate remorse warranting reduced sanctions.

The Hearing Panel also has considered Argomaniz's argument that he does not present a future risk to the public—that this was an isolated incident and there is no likelihood of a recurrence of this or similar misconduct. The Hearing Panel disagrees. The facts show a degree of contrivance undermining his argument. Argomaniz did not act alone; he assisted his supervisor to join in the theft. Furthermore, the Hearing Panel considers the manner in which Argomaniz cashed the check to be an aggravating factor. To conceal detection, Argomaniz cashed the check at a restaurant rather than depositing it in his own account. When asked why he took the check to the restaurant, Argomaniz testified—referring to Mr. Lopez—that "We had cashed checks there before." (Tr. 216.) This admission draws into question Argomaniz's business practices and undercuts his contention that the Hearing Panel should view this violation as an aberrance. Under these circumstances, the Hearing Panel concludes that for the protection of the public and to deter similar misconduct by others, a bar is appropriately remedial.

The Hearing Panel determines that a fine of $62,500 ($25,000 plus five times the amount converted) and a bar should be imposed in this case. In assessing these sanctions, the Hearing Panel has declined to impose separate sanctions for the forgery but, instead, has considered the forgery as an aggravating factor with respect to the conversion. The forgery was integral to the

conversion.[29] However, the Hearing Panel notes that under the circumstances of this case the finding of forgery itself would warrant a fine of $50,000 and a bar.

The Hearing Panel further notes that no lesser sanctions would be appropriate under the facts and circumstances of this case if the Hearing Panel accepted Argomaniz's argument that his conduct should be viewed as intentional misuse of funds and not conversion. The applicable NASD Sanction Guideline provides that in a case involving improper use of funds, the adjudicator should assess a fine of $2,500 to $50,000 and "[c]onsider a bar" but, "[w]here the improper use resulted from respondent's misunderstanding of his or her customer's intended use of the funds . . . or other mitigation exists," it may be appropriate to consider suspending a respondent in any and all capacities for six months to two years and thereafter until the respondent pays restitution. For the reasons discussed above, a bar and a substantial fine also are appropriate under this guideline. The evidence clearly establishes that Argomaniz acted for personal gain, with a complete disregard of his customer's welfare. The mere fact that he later repaid the funds is no justification for the misappropriation.[30]

[29] See, e.g., Market Surveillance Comm. v. James T. Patten, Complaint No. CMS960085, 1998 NASD Discip. LEXIS 20, at *19 (NAC Feb. 3, 1998) (where wash sale transactions were effected in order to mark the close, the NAC declined to impose separate sanctions for the wash sales and instead considered the wash sales to be an aggravating factor with respect to the marking the close violations.) Cf. District Bus. Conduct Comm. for District No. 2 v. Klein, Complaint No. C02940041, 1995 NASD Discip. LEXIS 229 (NBCC June 20, 1995) aff'd, 60 S.E.C. Docket 2373, 1995 SEC LEXIS 3418 (Dec. 14, 1995) (declining to impose additional sanctions for forgery where respondent converted customer funds).

[30] See Cipriani, 51 S.E.C. at 1007.

V. Order

Therefore, having considered all of the evidence, Respondent Alberto E. Argomaniz is fined $62,500 ($25,000 plus five times the amount converted) and barred from associating with any member firm in any capacity.

Alberto E. Argomaniz is further ordered to pay the costs of this proceeding in the amount of $2050, which includes an administrative fee of $750 and hearing transcript costs of $1300.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date this Decision becomes the final disciplinary decision of the NASD.

_____

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Alberto E. Argomaniz (by Airborne Express, next day delivery, and first class mail)
Richard L. Martens, Esq. (by Airborne Express, next day delivery, and first class mail)
William Brice La Hue, Esq. (by first class and electronic mail)
Rory C. Flynn, Esq. (by first class and electronic mail)