FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. KYLE P. HARRINGTON (CRD No. 2282328), and LINDA C. MILBERGER (CRD No. 4939206), Respondents.	Disciplinary Proceeding No. 2015047303901 Hearing Officer–DRS **EXTENDED HEARING PANEL DECISION** **November 12, 2018**

Respondent Kyle P. Harrington is (1) barred from associating with any FINRA member firm for converting customer funds; (2) barred from associating with any FINRA member firm for failing to disclose private securities transactions and for making false statements and providing false documents to his firm employer; and (3) barred from associating with any FINRA member firm for providing false documents and information to FINRA and for trying to obstruct FINRA's investigation into his conversion. Harrington is also ordered to pay disgorgement, restitution, and costs.

Respondent Linda C. Milberger is (1) suspended for one year from associating with any FINRA member firm for falsifying wire request forms and causing her firm employer to have inaccurate books and records; and (2) suspended for one year from associating with any FINRA member firm for providing a false document to FINRA. Milberger's suspensions shall run consecutively. Milberger is also ordered to pay costs.

Appearances

For the Complainant: Brody Weichbrodt, Esq., and John R. Baraniak, Jr., Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondents: Kyle P. Harrington, *pro se*, and Linda C. Milberger, *pro se*.

DECISION

I. Introduction

This case involves a registered representative, Respondent Kyle P. Harrington, who converted nearly $20,000 in funds from one customer and engaged in undisclosed private securities transactions with several other individuals. He then tried to hide his wrongdoing from FINRA and his firm employer by providing them with false information and falsified documents during their investigations. He also tried to persuade the victim of his conversion to help him create a cover story to obstruct FINRA's investigation. Finally, under his direction, his sales assistant, Respondent Linda C. Milberger, facilitated his wrongdoing by altering documents and producing them to FINRA and the firm.

Based on this misconduct, FINRA's Department of Enforcement brought this disciplinary action against Respondents. Respondents denied committing the alleged violations[1] and requested a hearing. A hearing was held before a FINRA Extended Hearing Panel. After considering the evidence, the Panel concludes that Respondents committed the violations, as charged, and imposes appropriately remedial sanctions.

II. Findings of Fact

A. Respondent Kyle P. Harrington

Harrington entered the securities industry in 1992 as a General Securities Representative with a FINRA member firm[2] and became registered as a General Securities Principal in 2009.[3] He was associated with several member firms before joining Matrix Capital Group, Inc. ("Matrix") in December 2009.[4] In June 2009, Harrington filed for bankruptcy.[5] At the time, his liabilities exceeded his assets by approximately $1.6 million;[6] he was overleveraged and owed approximately $2.9 million on a rental property.[7] Matrix permitted Harrington to resign in

[1] Milberger did admit in her Answer that she redacted a bank statement but stated that she did so on Harrington's instructions and denied "trying to violate any FINRA regulations." Milberger Answer ("Milberger Ans.") ¶ 88.

[2] Harrington Answer ("Harrington Ans.") ¶ 8; Joint Stipulations ("Stip.") ¶ 1; *but see* Joint Exhibit ("JX-")1, at 12 (showing that Harrington obtained his General Securities license in August 1993).

[3] Stip. ¶ 1.

[4] Harrington Ans. ¶ 8; Stip. ¶ 1.

[5] JX-11, at 1. He voluntarily dismissed the bankruptcy in January 2015. Hearing Transcript ("Tr.") 78.

[6] JX-12, at 1.

[7] Tr. 73. By the fall 2012, more than three years after he had filed for bankruptcy, Harrington was still experiencing financial difficulties. Tr. 185; *See also* Tr. 192.

November 2011 after discovering that he had failed to timely disclose his bankruptcy filing on his Uniform Application for Securities Industry Registration or Transfer ("Form U4").[8]

On December 28, 2012, FINRA accepted Harrington's Letter of Acceptance, Waiver and Consent ("AWC") in which he consented, without admitting or denying the findings, to a 30-calendar-day suspension from associating with any FINRA member for failing to amend his Form U4 to disclose the existence of that bankruptcy.[9]

After leaving Matrix, Harrington was briefly registered with another member firm before joining National Securities Corporation ("National" or the "Firm") in July 2012.[10] Harrington was registered with National until November 2016, when he was discharged after an internal review revealed "the appearance of conversion of client funds at [a] Broker Dealer affiliate."[11] From December 2016 through at least the time of the hearing in this proceeding, Harrington was registered with Aurora Capital LLC.[12]

Finally, since 2009 and throughout the relevant period, Harrington maintained a registered investment advisor, Harrington Capital Management ("HCM").[13]

B. Respondent Linda C. Milberger

Milberger entered the securities industry in 2005 in a non-registered capacity.[14] Since then, she has been associated with three member firms, including Matrix, from September 2010 until November 2011.[15] In September 2010, Milberger began working with Harrington as a Senior Client Services Associate.[16] She also worked for HCM from 2010 through 2016[17] and reported to Harrington.[18] Milberger followed Harrington to National, where she was associated until November 2016, when the firm discharged Harrington.[19] The next month, she became

[8] Harrington Ans. ¶ 8; Stip. ¶ 1.

[9] JX-10.

[10] Harrington Ans. ¶ 8; Stip. ¶ 1.

[11] Stip. ¶ 1; JX-1, at 4.

[12] Stip. ¶ 1.

[13] Stip. ¶ 1.

[14] Milberger Ans. ¶ 9; Stip. ¶ 2.

[15] Stip. ¶ 2.

[16] Stip. ¶ 2.

[17] Tr. 946.

[18] Tr. 945.

[19] Stip. ¶ 2.

associated with Aurora Capital LLC, where she remained through at least the time of the hearing in this proceeding.[20]

Her job responsibilities at the various firms remained the same: "[a]nything to do with paperwork."[21] For example, she helped open accounts, and dealt with wire transfer and check requests. She was also the first point of contact for client calls.[22]

C. Harrington Has Customer LD Wire Funds into His Account

In late 2008 or early 2009, LD, a psychiatrist,[23] became Harrington's customer and opened several accounts with him.[24] When Harrington later moved to Matrix and then to National, she transferred her accounts to those firms.[25] By July 2012, LD maintained several investment accounts with Harrington, including a trust account and a Simplified Employee Pension IRA ("SEP IRA") custodied at Matrix.[26] Harrington managed these accounts under a HCM Investment Advisory Agreement with LD.[27]

At some point before August 14, 2012, Harrington instructed Milberger to send a wire request form to LD and gave Milberger the information to include on the form.[28] Harrington instructed Milberger to work with LD to complete the paperwork necessary to wire $20,000 from LD's trust account at Matrix to HCM's business checking account.[29]

Communications over the next few days among Milberger, LD, and Matrix resulted in the transfer of those funds. Milberger prepared the $20,000 wire request form and dated it August 14, 2012.[30] The form Milberger prepared identified LD as the named beneficiary of the

[20] Stip. ¶ 2.

[21] Tr. 946.

[22] Tr. 947.

[23] CX-132, at 1, ¶ 1.

[24] CX-132, at 1, ¶ 2.

[25] CX-132, at 1, ¶ 2.

[26] Stip. ¶ 3.

[27] Stip. ¶ 3.

[28] Tr. 990.

[29] Stip. ¶ 4; Tr. 539, 1308–09, 1319–20, 1555–57; CX-82, at 4. Milberger was the only person in the office who handled client wire requests. Tr. 948. When preparing wire instructions, Milberger got information either from the client or from Harrington. Tr. 1353.

[30] Tr. 995–96; CX-84 (wire request form dated August 14, 2012).

transfer.[31] But, at Harrington's direction, the form did not include LD's account number. Instead, it included HCM's account number.[32]

On August 15, Milberger sent the wire request form to LD, and told her to sign it and have it notarized.[33] Upon receiving the form, LD emailed Milberger asking her "to confirm, this is a SEP contribution?"[34] That day, Matrix sent Milberger an account summary showing that LD only had $7,247 in available cash.[35] Because there was insufficient cash to fund the $20,000 wire transfer, on or about August 15, 2012, Harrington sold securities from LD's trust account to generate additional cash[36] by exercising authority granted to him under his investment advisory agreement with LD.[37]

On August 16, 2012, LD returned her signed wire request form and other documentation to Milberger.[38] Milberger then sent the $20,000 wire request form to Matrix,[39] and asked if the cash portion can "leave tomorrow?"[40] Matrix responded that if Milberger wanted the cash wired the next day, she must send two wire request forms: one for the available cash and one upon settlement for the proceeds of the sale of securities.[41]

Matrix clarified on August 17, 2012, that while the available cash ($7,247.18) could be wired that day, wiring $12,707.40 from the sale of LD's securities required a separate wire request form.[42] In other words, the total $20,000 in funds could not be wired using the wire request form LD had already signed and sent to Matrix. Milberger responded to Matrix that day, informing the firm that she had LD "do 2 more [wire request forms] in case I did the first one wrong," and attaching to the email "the 1st wire."[43] That "1st wire"—dated August 14, 2012—was purportedly signed by LD and reflected a wire amount of $7,245.[44]

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[31] CX-89, at 3.

[32] CX-89, at 3; Tr. 554–55.

[33] CX-88.

[34] CX-88, at 1. The record does not reflect whether LD received a response to that question. Tr. 1549.

[35] CX-85; Tr. 1001.

[36] Tr. 1002.

[37] Stip. ¶ 5.

[38] CX-89; Tr. 1014–16, 1558.

[39] Tr. 1016–18; CX-90.

[40] CX-91, at 1.

[41] CX-91, at 1.

[42] CX-92, at 1.

[43] CX-93, at 1.

[44] CX-93, at 3.

But other than the $20,000 wire request form that Milberger dated August 14 and sent to LD on August 15, there was no evidence that Milberger sent any other wire request form to LD for her signature.[45] Nor was there any evidence that LD ever signed the $7,245 wire request form.[46] In fact, Milberger used the signed and notarized $20,000 form to create a new wire request form in the amount of $7,245.[47]

On August 20, 2012, Matrix returned the $7,245 wire request to Milberger because "[t]he bank account title and bank account name did not match."[48] Milberger then prepared[49] and sent to Matrix[50] a third wire request form. This third request, dated August 20, 2012, for $19, 929.58, identified the Beneficiary/Recipient as "Harrington Capital Management LLC," and the font differed from that in the body of the $7,245 wire request.[51] Otherwise, this wire request form was identical to the $7,245 and $20,000 wire request forms. In particular, LD's purported signature and the notary's signature were identical to the signatures on the two previous forms and were obviously copied. This third request, like the previous $7,245 wire request, was never signed by LD and returned to Milberger.[52]

The next day, August 21, 2012, at Harrington's direction Milberger emailed Matrix and falsely represented that she "had [LD] do another wire request."[53] She also asked to be notified when the wire transfer was effected, adding that "[t]oday is the deadline for [LD] to be in the investment Kyle is handling for her."[54] A wire transfer was then effected that day from LD's brokerage account to HCM's bank account in the amount of $19,874.64.[55]

The next month, on September 19, 2012, LD emailed Harrington about, among other things, the wire transfer from her account. "I'm assuming this went to the new company [i.e.,

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[45] Tr. 1553.

[46] CX-94; Tr. 1561–62.

[47] This is apparent on the face of the two wire request forms. LD's signature and the notary's signature on the $20,000 and $7,245 forms are identical. The same typo in the spelling of "San Francisco" (LD's city of residence) also appears on both forms. CX-90, at 2; CX-93, at 3; Tr. 1272.

[48] CX-95; Tr. 1280–82.

[49] Tr. 1283–85.

[50] Tr. 1286–87.

[51] CX-100.

[52] CX-100; Tr. 1564. Indeed, there was no evidence of any email from LD to Milberger between August 16 (when LD sent back the initial $20,000 wire request) and August 20 or 21, 2012. Tr. 1286. Nor was there any evidence that LD ever returned any other signed wire request forms to HCM in August 2012. Tr. 1560; CX-89, at 3. *See also* CX-90, at 2 (identical to CX-89, at 3).

[53] CX-101, at 2.

[54] CX-101, at 1; Tr. 1287–90.

[55] Harrington Ans. ¶ 19; JX-48, at 2. A wire fee was charged to LD's account, which is the reason the amount transferred to Harrington's account was lower than the amount reflected on the wire request form. Tr. 1575–76.

National] for investment but just wanted to double check," she asked.[56] "Yes," Harrington reassured her.[57] But, in fact, there is no evidence that Harrington invested the funds on her behalf. Nor did Harrington ever return to LD the funds wired from her account to HCM's account on August 21, 2012.[58]

D. Harrington, with Milberger's Help, Obstructs Investigations into His Conversion of LD's Funds

Both FINRA and National conducted investigations into the wire transfer. Harrington, with Milberger's assistance, obstructed both investigations.

1. FINRA's Investigation into the Wire Transfer from LD

On November 3, 2016, as part of its investigation,[59] FINRA staff took Harrington's investigative testimony about the wire transfer.[60] During his on-the-record testimony ("OTR"), Harrington testified that he believed the payment from LD was for the rental of one of his Vacation Rental By Owner ("VRBO") properties located in La Jolla, California.[61] He then backtracked and claimed he did not know and needed to go back and check his records.[62] In any event, LD had never rented or stayed at any of Harrington's VRBO properties.[63] And, as discussed below, Harrington later abandoned that explanation for the wire transfer. But in the days immediately following his OTR, Harrington tried frantically to create support for this false explanation.

From November 4 through 6, 2016, Harrington contacted LD via telephone and text messages,[64] trying to persuade her to sign a letter stating that she had paid him to stay at his vacation home in September 2012.[65] According to LD's declaration, which we credit, [66] he

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[56] CX-104.

[57] CX-104.

[58] Tr. 547.

[59] FINRA began its investigation into Harrington's activities because of an unrelated customer arbitration filed by one of his customers, TZ, who was involved in a private securities transaction with Harrington, as discussed below. Tr. 1438–39.

[60] Stip. ¶ 6.

[61] Stip. ¶ 6. Tr. 70, 559, 577–78, Harrington lived there for a period and, at least during 2012, he rented it out to vacationers through VRBO. Tr. 70, 73.

[62] Tr. 1576–78.

[63] Stip. ¶ 8.

[64] Stip. ¶ 7; Tr. 559. Harrington testified that he contacted LD to try and "get clarity from" her and to refresh his memory. Tr. 559.

[65] CX-132, at 4, ¶ 9.

[66] See discussion regarding the credibility of LD's declaration at page 13.

explained that he was going through a divorce and had told his wife's lawyer that LD had rented the vacation property "from him for a lot of money."[67] When she pushed back, telling him that she did not want to lie and risk losing her medical license, he tried to reassure her "that no one would ever follow-up."[68] Though uncomfortable with his request, she told him that she "would think about it."[69]

Afterward, on November 6, he texted her with a growing sense of urgency. "U have my back?" he asked, and sent her an internet link to his vacation home.[70] Later that day, he texted her that he was "[d]esigning [the]letter now." "[T]his is my license on the line," he told her, imploring that "if I can speak with you asap I would appreciate [it] very much."[71] Despite receiving a number of phone calls and texts from him over the next few days, LD chose not to respond.[72]

A few days later, on November 9, 2016, LD emailed FINRA the text messages described above, and recounted to the staff how Harrington had wanted her to sign a letter falsely stating that she had rented his vacation home.[73] That day, pursuant to FINRA Rule 8210, FINRA staff sent Harrington a request asking him to explain the circumstances of the $19,874.64 wire transfer HCM received from LD on August 21, 2012. The request also directed him to provide documentation supporting his explanation.[74]

On November 22, 2016, Harrington, through counsel, responded in writing to the staff's Rule 8210 request.[75] Harrington did not produce a VRBO rental agreement with LD to substantiate his explanation.[76] Moreover, in his response, Harrington no longer claimed that LD had paid him to stay at his rental property. Instead, for the first time, he told the staff that the wire transfer reflected "payment for financial planning & incentive fees owing to [HCM]" for the 2009 through 2012 period.[77] More specifically, he claimed that $12,800 represented a 20 percent

[67] CX-132, at 4, ¶ 9; CX-127, at 1.

[68] CX-132, at 4, ¶ 9.

[69] CX-132, at 4, ¶ 9.

[70] CX-132, at 4, ¶ 10; CX-125, at 2; Tr. 571.

[71] CX-132, at 4, ¶ 10; CX-125, at 2–3.

[72] CX-132, at 4, ¶ 10; *see also* CX-127.

[73] CX-132, at 5, ¶ 11. On November 7, 2016, FINRA staff contacted LD and informed her "for the first time that the money transferred out of [her] account actually went to Harrington Capital Management's bank account." CX-132, at 4–5. According to LD, that is when she realized that there might have been a connection between that transfer and Harrington's call to her. CX-132, at 5.

[74] Stip. ¶ 9; JX-49; Harrington Ans. ¶ 49.

[75] JX-50.

[76] Tr. 559.

[77] Stip. ¶ 9; JX-50, at 1; Harrington Ans. ¶ 55.

incentive based upon the increase in LD's account value of approximately $64,000 between 2009 and 2012[78] and $7,200 represented financial planning fees from 2007 through 2011.[79] The response stated that the "[f]inancial planning fees were based on an hourly charge of $250/hour for 29 hours of work."[80]

2. National's Investigation into the Wire Transfer from LD

On November 10, 2016, the day after LD sent FINRA the above-referenced emails, she complained to National about Harrington.[81] On November 14, 2016, National requested that Harrington provide a written response to LD's complaint and that Milberger provide copies of all correspondence and phone records, including: "A copy of any docs/info that was provided to the client including, but not limited to, all email correspondence between RR(s) and client—(if applicable)."[82]

A few days later, at Harrington's direction, Milberger responded by emailing certain documents to National and copying Harrington on the email.[83] Among the documents that Milberger provided was the $19,929.58 wire request[84] and an incomplete wire request form that omitted certain information, namely, the date, the wire amount, and the name of the beneficiary.[85] Both wire request forms bore LD's signature and a notary's signature. LD's signature was identical on both wire request forms, as was the notary's.[86] Milberger, however, did not produce to National the $20,000 wire request form dated August 14, 2012—the only wire request form that LD had actually signed and sent to her.[87]

E. Harrington's Defense to the Conversion and Cover Up

Harrington denied that he converted LD's funds and claimed the wire transfer represented investment advisory fees that LD owed him. At the hearing, Harrington testified that at his OTR he thought the wire transfer represented payment for a VRBO rental.[88] But, he added, upon reflection he realized that it was, instead, payment of investment advisory fees she owed to

[78] JX-50, at 1.

[79] JX-50, at 1.

[80] JX-50, at 1.

[81] CX-105; Tr. 1291.

[82] CX-105; Harrington Ans. ¶ 51; Milberger Ans. ¶ 51.

[83] CX-106.

[84] CX-106, at 2.

[85] CX-106, at 3.

[86] CX-106, 2–3; Tr. 1294–95.

[87] CX-90, at 2; Tr. 1295–96.

[88] Tr. 558–59.

HCM.[89] As Harrington further explained, because he was transferring from Matrix to National, he used this as an opportunity to take the incentive fee that was provided for in the management fee agreement LD signed.[90] He claimed that LD and HCM had entered into an agreement providing for the payment of management and incentive fees based on a portion of the money he was managing for her;[91] that LD was aware of the terms of the advisory contract, including the provisions relating to incentive fees;[92] that HCM was "more than entitled to" receive those fees from LD;[93] and that he instructed Milberger to transfer the $20,000 to HCM based on a conversation he had with LD in 2012.[94] He went on to say that the transfer of funds from LD's account took place via her "full notarized signature" and "[n]o one signed those forms for her."[95]

We reject Harrington's explanation for several reasons. First, it is uncorroborated. Harrington produced no contemporaneous documentation from August 2012 supporting his assertion that the wire transfer represented the payment of investment advisory fees. He produced no invoices or written communications with LD detailing the hourly fees purportedly incurred by LD or any agreements with her reflecting an hourly fee arrangement. Nor did he provide FINRA with any financial plans he prepared for LD.[96] Also, Harrington did not report on his Form ADV (Uniform Application for Investment Adviser Registration) that he had performed any financial planning services for any clients, including LD, during the period he claimed to have provided such services for her.[97] And, while Harrington testified that he later spoke with LD about the transfer to "correct that record with her" and explain that the wire transfer was for investment advisory fees,[98] he offered no proof that he did so. Tellingly, according to Milberger, in the entire six years she worked for Harrington, she was not aware of any client being charged a financial planning or incentive fee.[99] Milberger added that if such fees

[89] Tr. 547–48.

[90] Tr. 584.

[91] Tr. 43 (Harrington opening).

[92] Tr. 44 (Harrington opening), 813.

[93] Tr. 45 (Harrington opening).

[94] Tr. 44 (Harrington opening).

[95] Tr. 811.

[96] Tr. 589–90, 605–06.

[97] JX-4, at 9 (filed 7/10/2009); JX-5, at 9 (filed 6/8/2010); JX-6, at 16 (filed 11/11/2011); JX-7, at 16 (filed 2/6/2013).

[98] Tr. 551, 555.

[99] Tr. 1298–99.

had been paid, she would have known about it.[100] According to Milberger, this was the only time she can recall wiring funds from a client's account to HCM.[101]

Second, Harrington's argument is inconsistent with LD's advisory agreement with HCM and other credible evidence. Even though that agreement provided for the payment of a management fee plus a 20 percent incentive fee to be determined by investment performance, this only applied to high net worth "qualified clients" (as defined by SEC regulations).[102] There was no evidence that LD met those requirements.[103] In any event, the evidence showed that during the relevant period, LD's Trust and SEP IRA accounts suffered losses, rather than gains, attributable to investment performance.[104] Further, even though the agreement provided that this fee would be assessed "at the end of each calendar year or when the account is closed,"[105] Harrington did not do so.[106]

Harrington's investment advisory agreement with LD did provide for an annual fee, calculated quarterly, that was automatically deducted from her account.[107] In addition, LD's Matrix account statements show that she paid advisory fees in June, July, and August of 2012.[108] That said, the August 21, 2012 wire transfer is not denoted on her account statement as an investment advisory fee. Indeed, LD's Matrix account statement does not indicate the nature of the wire transfer.[109]

Third, Harrington's explanation was contradicted by LD's recollections. Although unavailable to testify at the hearing because of an extended overseas deployment for the United States Department of State,[110] LD provided a declaration addressing the wire transfer and later,

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[100] Tr. 1299.

[101] Tr. 1365.

[102] JX-50, at 7–8.

[103] Tr. 600–02; CX-89, at 4.

[104] Tr. 1595, 1617; CX-123.

[105] JX-50, at 19.

[106] Tr. 604.

[107] JX-50, at 7; Tr. 590–91. In the event of automatic deductions, Harrington was required, under the agreement, to send her quarterly statements showing all disbursements for the custodian account, including the amount of advisory fees. JX-50, at 7; Tr. 592.

[108] JX-47, at 4, 12, 20.

[109] JX-47, at 21.

[110] CX-132, at 1, ¶ 1. Further, at the hearing, Enforcement counsel represented that LD had told him "she didn't want to talk or see Mr. Harrington ever again in her life because she thought he was a sociopath." Tr. 1681. Counsel also represented that LD told him that during the period of her deployment, she would not be able to get approval to testify by phone. Tr. 1681.

related events.[111] She stated in her declaration that based on her understanding of her agreements with Harrington, she could not be charged incentive performance fees for two reasons: she did not qualify as a client who could be charged those fees,[112] and her account never performed well enough to justify such a fee.[113] She also denied that Harrington or anyone who worked for him ever told her that she owed advisory fees beyond the flat three percent annual fee regularly deducted from her accounts, or that Harrington had taken any of her funds for that purported purpose.[114]

As to the purpose of the wire transfer, LD understood it was intended to fund a contribution into her SEP IRA account at National.[115] She maintained that she never authorized the transfer of her funds to HCM's bank account and that she did not know that that had occurred.[116] According to LD, she first learned that her funds had been transferred to HCM's account when, on November 7, 2016, FINRA staff advised her of this during its investigation.[117] Afterward, she contacted National to complain about Harrington's conduct and, in December 2016, she filed, and later settled, an arbitration claim against Harrington and others alleging conversion and other misconduct.[118]

Harrington challenged the declaration. He complained that because LD was not testifying in person, he did not have the opportunity to cross-examine her, and that this was unfair to him; he also launched multiple attacks on her credibility.[119] He noted that LD had been a long-time client and never had any complaints about him or his staff until she filed the complaint against him with National;[120] that during the four years after the alleged conversion, she had seen copies of her account statements and brought no issues to his or National's attention;[121] and that she waited until four years after the alleged conversion to complain.[122] He accused LD of engaging

[111] CX-132. Enforcement drafted the declaration with the participation of a FINRA examiner based on interviews with LD and facts collected by FINRA staff. Tr. 1639, 1641, 1676.

[112] CX-132, at 1–2, ¶ 3.

[113] CX-132, at 5–6, ¶ 13.

[114] CX-132, at 5, ¶ 13.

[115] CX-132, at 2, ¶¶ 4–5.

[116] CX-132, at 3, ¶ 7.

[117] CX-132, at 4–5, ¶ 11.

[118] CX-132, at 5, ¶ 12. Harrington did not contribute to the settlement. CX-132, at 5, ¶ 12.

[119] Tr. 48 (Harrington opening).

[120] Tr. 41–42 (Harrington opening); Tr. 810–11, 1753–54.

[121] Tr. 42 (Harrington opening).

[122] Tr. 42 (Harrington opening); Tr. 810–11, 814.

in erratic behavior, claiming that FINRA incited her complaint.[123] He also attributed her accusations against him to lingering resentment because he had spurned her romantic advances.[124]

Notwithstanding Harrington's attacks on LD's credibility, we find her declaration testimony relevant, reliable, and material; therefore, we give it substantial weight.[125] LD provided the declaration under penalty of perjury. Moreover, it was corroborated by other credible evidence, including contemporaneous email communications, cited above, clearly demonstrating that LD thought the wire transfer was for investment purposes, that she never authorized the wire transfer for any other purpose, and certainly not for Harrington's personal or business use. Harrington failed to demonstrate that bias or ill will fueled LD's accusations. We reject as self-serving and uncorroborated his assertions that she sought to exact revenge because, purportedly, he would not become romantically involved with her.

Finally, Harrington attempted to distance himself from Milberger's credible explanation about the falsification of the wire request forms. He denied having seen the wire request forms relating to LD until Enforcement showed them to him at his OTR.[126] Harrington said he was not involved in the communications between LD and Milberger to get the forms notarized or signed.[127] He denied telling Milberger to doctor the wire transfer paperwork, claiming that he never saw it because "[s]he usually takes care of the documentation with the client on how to proceed…."[128] We find no merit in this line of defense. It is not credible that Milberger would have wired the funds except at Harrington's express direction. While Milberger drafted and

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[123] Tr. 814–15. "Anything could set her off and create a misunderstanding," Harrington claimed, adding that he believed that "that's exactly what happened when she was contacted [by FINRA] and as a result, went down the path that she went down." Tr. 1781–82. *See also* Tr. 48 (Harrington opening).

[124] Tr. 1780–81.

[125] We admitted and then evaluated LD's declaration based on well-established precedent addressing hearsay evidence in FINRA proceedings. FINRA's National Adjudicatory Council ("NAC") recently summarized the applicable principles: "Hearsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact . . . . [H]earsay evidence is admissible in administrative proceedings if it is deemed relevant and material . . . . According to the Commission," the NAC continued, "the following factors must be considered when evaluating hearsay evidence: possible bias of the declarant; the type of hearsay involved; whether the statements are signed and sworn rather than anonymous, oral or unsworn; whether the statements are contradicted by direct testimony; whether the declarant was available to testify; and whether the hearsay is corroborated." *Dep't of Enforcement v. North*, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *13 n.11 (NAC Aug. 3, 2017), *appeal docketed*, No. 3-18150 (SEC Sept. 7, 2017) (internal quotations and citations omitted); *Dep't of Enforcement v. Meyers Assoc. L.P.*, No. 2013035533701, 2017 FINRA Discip. LEXIS 47, at *35–36 (NAC Dec. 22, 2017), *appeal docketed*, No. 3-18350 (SEC Mar. 28, 2018) ("Hearsay should be evaluated for its probative value, reliability, and the fairness of its use.") (citation omitted). *See also Dep't of Enforcement v. Brookstone*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *115–16 (NAC Apr. 16, 2015) (finding that customer declarations were properly admitted because "[t]hey were relevant and material . . . [.]").

[126] Tr. 827.

[127] Tr. 827.

[128] Tr. 47 (Harrington opening).

processed the wire transfers, she did so at his instruction, even if he did not direct every aspect of the process.[129]

F. Milberger's Defense to the Wire Request Form Alterations

Milberger did not dispute that she prepared LD's wire request forms. But she accused Harrington of making her "an unwilling and unknowing participant in harming [LD]."[130] She argued that she did not intentionally violate FINRA rules, but simply followed orders from Harrington—someone she trusted.[131] "[V]ery few administrative assistants do anything on their own but follow the orders or instructions of their boss," Milberger explained. She viewed her role as akin to a soldier in "the military; you follow orders. That is what you were hired for; that is what you're supposed to be doing . . . . Anything I could have done could have harmed his license. I would have never put his license at risk, believing that he was sole supporter of three children."[132]

Defending her actions, Milberger also claimed that she thought LD was fully aware of the wire transfer and that she would never have knowingly or willingly tried to hurt LD.[133] Indeed, Milberger asserted that she did not realize she was doing anything wrong at the time. She testified that when she sent the wire request forms to Matrix, she believed that the funds were for an investment for LD.[134] Further, Milberger added, it was permissible to change the information on the wire transfer after it was signed and notarized because she "knew the relationship" between LD and Harrington, "[s]o I trusted when I was told that she knew everything."[135] According to Milberger, "as long as they're aware of the change and they accept the change and they know about it, I suppose I didn't question it back then."[136] In other words, Milberger said she would have followed Harrington's instruction after believing that he had spoken with the customer.[137]

During her testimony, Milberger became distraught and evinced genuine remorse. "[T]he reason I was so upset is not for me," she told the Panel once regaining her composure, "because I

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[129] Harrington also claimed that he was prescribed medication and "it seems as if there is memory loss associated with some of that" that may inhibit his memory of things that happened several years earlier. Tr. 845. Harrington offered no support for this argument, and we give it no weight.

[130] Tr. 1335.

[131] Tr. 54–55 (Milberger opening).

[132] Tr. 1335–36.

[133] Tr. 55–56 (Milberger opening).

[134] Tr. 1279.

[135] Tr. 1367. Expanding on this, Milberger testified that it was her understanding that they were close friends. Tr. 1370.

[136] Tr. 1367.

[137] Tr. 1357–58.

can get another job, I can build my reputation back, but I can't undo the harm that was caused to [LD]."[138]

* * *

Harrington and Milberger's conduct relating to the conversion and cover-up was troublesome. But it comprises only part of the misconduct forming the basis of this disciplinary proceeding. Harrington also engaged in undisclosed private securities transactions and tried to hide his activities from National and FINRA as well. We turn next to these transactions and the cover-up.

G. Harrington Engages in Undisclosed Private Securities Transactions

1. National's Procedures Governing Private Securities Transactions

Harrington entered into a Registered Representative Independent Contractor Agreement with National when he first became associated with the Firm.[139] That agreement required, among other things, that Harrington comply with the Firm's procedures.[140] The agreement also required that he not participate in any private securities transactions without providing prior notice to the Firm.[141] Further, National's written supervisory procedures ("WSPs") in effect at the time Harrington was associated with the Firm required registered representatives to provide "written notice" to the Firm prior to their "participation in any purchase or sale of any financial instrument not conducted through the broker dealer."[142] The WSPs also reminded representatives that they had to disclose private securities transactions beforehand and in response to periodic questionnaires.[143]

2. Harrington Receives Islet Shares from the Issuer

Sometime between 2010 and the end of 2012, Harrington received 800,000 restricted shares of Islet Sciences, Inc. ("Islet") stock directly from the issuer as compensation for consulting services he agreed to render under one or more contracts with Islet.[144] One of the

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[138] Tr. 1337.

[139] JX-2; Tr. 111–12.

[140] JX-2, at 1.

[141] JX-2, at 4, Section IX; Tr. 111.

[142] Stip. ¶ 11.

[143] Stip. ¶ 11 ("Associated persons are advised through the new applicant paperwork that they have an affirmative duty to notify the firm in advance of engaging in private securities transactions. The firm will make inquiry, no less than annually, of registered representatives about such activities as part of a periodic questionnaire.").

[144] Tr. 92, 123, 132–33; Stip. ¶ 10; JX-17, at 6, no. 3a; JX-17, at 48–51 (dated January 1, 2012); JX-17, at 52–55 (dated May 1, 2012, but signed in September 2012); CX-2, at 11–15.

services he performed was to introduce Islet to potential investors.[145] From these shares, Harrington sold Islet stock to several individuals, as discussed below.

3. Harrington Sells Islet Shares to AB

On Friday, August 17, 2012, Harrington emailed his friend AB[146] asking that the email serve as a contract between them for the sale of 200,000 shares of Islet stock at 50 cents per share for a total purchase price of $100,000; the email further stated that the shares were Harrington's and would be transferred into AB's name.[147] A few hours later, AB emailed Harrington his acceptance of those terms, stating that he would wire the funds to Harrington "as soon as shares are in [Islet's CEO's] hands and he agrees on behalf of Islet to immediately transfer them into my name or my designees."[148] Over the weekend, JS (Islet's CEO), AB, and Harrington exchanged emails relating to the mechanics of the transaction. Harrington emailed JS and AB, representing that he had instructed JS to transfer his shares to AB and that AB should wire the funds on Monday. "[K]yle has shares coming [to him] but he should do it with the existing shares he has issued," JS responded.[149]

On August 21, 2012, Harrington received $100,000 from AB via wire transfer into his personal bank account.[150] Harrington did not disclose the payment from AB to National, where he was registered at the time.[151] And he failed to give prior written notice to the Firm that he was transferring 200,000 of his Islet shares to AB.[152]

4. Harrington's Explanation of the Transaction with AB

Harrington admitted that he transferred 200,000 of his Islet shares to AB, but denied selling the shares to him.[153] Harrington also denied that the $100,000 payment from AB was in connection with a sale of securities to AB[154] or that he gifted the shares to AB.[155] Harrington said he and AB had no contract in place for the sale of 200,000 shares to AB.[156] Harrington

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[145] Tr. 94–95, 97.

[146] Tr. 108.

[147] CX-74, at 2.

[148] CX-74, at 1.

[149] CX-74, at 1.

[150] Stip. ¶ 12; Tr. 455.

[151] Stip. ¶ 12.

[152] Tr. 425–26.

[153] Tr. 136–37.

[154] Tr. 143, 451–52.

[155] Tr. 143.

[156] Tr. 142–43; Tr. 827.

claimed the payment was a business loan[157] and offered a tortured explanation of the circumstances that led to it.

According to Harrington, Islet owed him 375,000 shares and he asked Islet to issue 200,000 of those shares to AB.[158] "[T]here was these discussions with [AB] about selling him shares at a price. There was a -- a contract that was discussed," but, Harrington testified, "[AB] and I both decided not to go through with that contract."[159] Harrington went on to say that AB wanted to compensate him for having introduced AB to Islet, and originally wanted to do so by gifting 200,000 shares to Harrington.[160] But because he did not think it was right for AB to compensate him, Harrington said he returned AB's 200,000 shares to him.[161] Harrington summarized it this way: "An accurate answer is that [AB], for introducing him to Islet Sciences, wanted to give me stock that he had purchased -- a portion of his stock that he purchased. And I did not think that that was warranted, and so," Harrington said, "I had shares that were broken up for me, from him, sent back to [AB]. And I asked the transfer agent to break up my shares and give that portion back to him."[162] As he further explained, "[AB] and I have worked as close friends. He felt like, quite frankly, I made him money in the past…. [Therefore, AB] would provide a business loan to both [Harrington's then-wife] and myself, since she was a part owner. She had discussions with him as well. And," Harrington continued, "he did provide that loan. He has done that in the past, and I can demonstrate that with historic bank statements."[163]

In short, Harrington said that AB originally planned to have Islet give Harrington more shares because Harrington had introduced AB to the company, but ultimately he and AB decided those shares would be returned to AB and AB would, instead, give a capital infusion to HCM.[164]

We do not find Harrington's explanation credible. First, it is uncorroborated. Harrington offered no records showing that AB ever put shares of stock in Harrington's name.[165] Enforcement located no documentary evidence during the investigation substantiating Harrington's claim that AB had ever given him 200,000 shares.[166] Nor was there any written proof that Harrington was retuning shares to AB that AB had given to him.[167] Other than

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[157] Tr. 452–53.

[158] Tr. 142.

[159] Tr. 449.

[160] Tr. 403–04, 920. Harrington testified that he did not report this purported gift to the Firm in writing. Tr. 921.

[161] Tr. 405–07.

[162] Tr. 405–06.

[163] Tr. 452–53; *see also* Tr. 456–57, 468.

[164] Tr. 143, 469–70.

[165] Tr. 143.

[166] Tr. 136–37, 403–04, 1477.

[167] Tr. 879, 881.

Harrington's testimony, there was no evidence that the $100,000 payment was a loan. There was no written loan agreement[168] and Harrington never repaid the purported loan.[169]

Second, the amount of the purported loan was the exact amount that the parties had discussed—and AB agreed to—as the sale price for 200,000 shares. And the 200,000 shares were later transferred to AB. Although Harrington testified that the $100,000 payment and transfer of the Islet stock were unrelated events,[170] the timing is too coincidental for us to credit Harrington's characterization of the payment as a loan.

Most importantly, Harrington and AB described the transfer of the shares as a sale in various email communications both before the transaction occurred, as outlined above, and afterward. When AB failed to receive the Islet shares, he complained to JS in a September 28, 2012 email, and referenced the shares as "my stock I bought from Kyle."[171] The next month, Harrington wrote several communications indicating he viewed the transaction as a sale and that the stock would come from shares he was due to receive. On October 4, 2012, when AB was still experiencing trouble having the 200,000 shares placed in his name, Harrington wrote to AB and RE (Islet's CFO) asking Islet for help, representing that he had "sold [AB] 200,000 shares of my stock …" and wished to place 200,000 of his shares in AB's name.[172] That day, Harrington wrote to the attorney for the transfer agent and asked that the 200,000 shares be transferred to AB, stating that he owed these shares to AB.[173]

Two weeks later, on October 19, 2012, counsel for Islet's transfer agent emailed Harrington that he had received instructions to issue Harrington the 375,000 shares, but needed some additional information from Harrington.[174] On October 22, Harrington informed Milberger and the agent that 175,000 of the 375,000 shares should be allocated to him and "[t]he other 200,000 shares are to be sent to [AB] …."[175] Harrington then followed up on October 25, 2012, with a letter to the transfer agent. The letter instructed the transfer agent to divide Harrington's

[168] Tr. 452–53.

[169] Tr. 480.

[170] Tr. 457.

[171] CX-75, at 1.

[172] CX-76, at 1; CX-2, at 23. That email went on to inform them that they should "keep all email on this personal email" account. CX-2, at 23. None of the email communications concerning this transaction occurred on Harrington's National email account—only on Harrington's personal account. Harrington testified that that was because he and AB were friends, and because AB was not a client. Tr. 448, 463.

[173] CX-2, at 75–76.

[174] CX-78, at 2.

[175] CX-78, at 2.

375,000 shares as follows: "175,000 shares are to remain in my name, Kyle Harrington [and] 200,000 shares are to be placed in the name [of AB]." [176]

Finally, in a December 11, 2012 email, AB's assistant wrote to Harrington in connection with a potential purchase of Islet warrants by AB. In that email, she asked if Harrington had "the agreement that we used last time [AB] purchased shares from you?"[177] Harrington did not deny that he had previously sold shares to AB but simply responded that he did not have the agreement.[178]

* * *

We find that Harrington's explanation of the transaction was convoluted and inconsistent with the credible evidence, and we reject it. Instead, we find that Harrington sold 200,000 shares of Islet stock to AB for $100,000, and that the source of the stock was from the 375,000 shares owed by Islet to Harrington under a consulting agreement.[179]

5. Harrington Sells Islet Shares to TZ

Harrington first met TZ in May 2012, at a meeting with JS to discuss Islet's prospects and a potential investment in the company by TZ.[180] Later that month, TZ purchased 70,000 shares of Islet stock in a private placement offering.[181] In August 2012, TZ opened an account at National,[182] and in October 2012, he deposited the 70,000 shares into that account.[183] At some point in the late fall of 2012—while TZ still held the 70,000 shares at National—TZ and Harrington discussed whether TZ should increase his investment in Islet.[184] Harrington then sold TZ 119,500 shares of his restricted Islet stock for a total of $176,000 in three transactions in

[176] CX-81, at 1.

[177] Tr. 476; CX-78, at 1.

[178] Tr. 477; CX-78, at 1.

[179] The evidentiary record is unclear as to which consulting agreement provided for Harrington to receive the 375,000 shares. Harrington asked Islet to allocate to AB 200,000 of the 375,000 shares owed to Harrington under a consulting agreement dated January 1, 2012. Tr. 143–44; CX-2, at 25, 76. But in response to a FINRA Rule 8210 request, Harrington produced two consulting agreements to FINRA: one dated January 1, 2012 (JX-17, at 48–51), providing for 300,000 shares, and another dated May 1, 2012, providing for 375,000 shares (JX-17, at 52–55).

[180] Tr. 691–93.

[181] Tr. 173–74, 693.

[182] JX-24, at 7; Tr. 178–79.

[183] JX-25, at 4; Tr. 177–79.

[184] Tr. 184. According to TZ, Harrington reached out to him to buy more shares. Tr. 752. Harrington, however, testified that TZ brought up the subject. Tr. 184. Either way, TZ decided to buy more shares.

January and February 2013.[185] TZ's three payments were deposited into the HCM Business Banking account.[186] We describe each of the transactions below.

On January 2, 2013, TZ texted Harrington asking if he could buy 40,000 shares and Harrington responded: "For 80k, u can."[187] And on January 3, 2013, TZ and Harrington entered into a contract of sale for TZ to buy 50,000 shares of Islet for $80,000.[188] On that date, TZ wrote a check to HCM for $80,000 with a notation on the memo line reading: "Islet Shares (50,000)."[189] Later that month, on January 18, 2013, TZ and Harrington entered into an agreement for TZ to buy all of Harrington's interest in 9,500 shares of Islet stock for $16,000.[190] On January 25, 2013, TZ issued a $16,000 check to Harrington Capital Group; the memo line of the check referenced "9,500 shares of Islet."[191] Finally, on February 7, 2013, TZ entered into an agreement with Harrington to buy 60,000 shares of Islet stock for $80,000.[192] On February 15, 2013, TZ issued an $80,000 check to Harrington Capital Group bearing the notation: "60,000 shares of Islet Sciences."[193]

The above transactions are summarized on the following chart:[194]

Transaction Date	Number of Shares	Price Per Share	Purchase Price	Sale Funds Deposit Date	Shares Transfer Date
Jan. 3, 2013	50,000	$1.60	$80,000	Jan. 3, 2013	Apr. 15, 2013
Jan. 18, 2013	9,500	$1.68	$16,000	Jan. 25, 2013	Apr. 15, 2013
Feb. 7, 2013	60,000	$1.33	$80,000	Feb. 15, 2013	Apr. 15, 2013

[185] Tr. 701; Stip. ¶ 13; Harrington Ans. ¶ 26.

[186] CX-32, at 4. TZ testified that he was in Harrington's office and gave him a check for each of the three transactions. Tr. 704–05.

[187] JX-15, at 88; *see also* Tr. 200–01.

[188] JX-17, at 39-40; *see also* Tr. 201. TZ testified that he sent this text message to Harrington after Harrington had called him and said he could buy more shares. Tr. 752–53.

[189] CX-45, at 7; JX-17, at 41; Tr. 208–09.

[190] JX-17, at 42–43; Tr. 210.

[191] JX-17, at 44; CX-45, at 8; Tr. 211–12.

[192] JX-17, at 45; CX-45, at 6; Tr. 220.

[193] CX-45, at 9; JX-17, at 46; Tr. 220–21.

[194] Stip. ¶ 13.

After buying the Islet shares from Harrington, TZ had trouble depositing them at National and contacted Milberger over a dozen times over the period May 2013 to July 2014 to have this accomplished.[195] TZ's efforts to deposit his stock at National continued through at least July 2014.[196] But he was never able to deposit the shares at National[197] or with any other broker-dealer.[198]

On or about September 10, 2015, TZ brought an arbitration proceeding against Harrington and National relating to TZ's January and February 2013 purchases of Islet shares.[199] TZ obtained an award that included $105,000 in compensatory damages, jointly and severally against Harrington and National.[200] National Securities paid the award.[201] As of the time of the hearing, TZ still owned the 119,500 shares of Islet stock he bought in early 2013.[202]

* * *

We find that based on the above, the payments made to Harrington by TZ were to purchase Islet stock, and that Harrington did not disclose those payments to National,[203] or provide National with prior notice of those private securities transactions with TZ.[204]

6. Harrington's Explanation for Not Disclosing His Private Securities Transactions with TZ

At the hearing, Harrington explained why he did not disclose to the Firm until long afterward that he had sold Islet shares to TZ. He attributed his omission to a good faith failure to pay proper attention to detail:

> I think I overlooked it because I had discussions with the CEO [MG] and a lot of folks at National Securities that I had owned these securities. And I didn't fill out the appropriate paperwork, which was my fault, disclosing that I had engaged in a

[195] Tr. 718–19, 956–57; CX-63, at 1–2.

[196] Tr. 718–19; CX-63, at 2.

[197] Tr. 221.

[198] Tr. 726.

[199] JX-15. The claim alleged that under National's supervision, Harrington perpetrated a fraudulent scheme to sell his Islet shares to TZ. JX-15, at 2.

[200] JX-23, at 2.

[201] Tr. 196–97. In closing argument, Harrington stated that he had contributed some amount. Tr. 1871. But he presented no evidence of this, and his Form U4 reflects that he did not contribute toward the $105,000 payment. JX-1, at 42–43.

[202] Tr. 726.

[203] Tr. 219.

[204] Stip. ¶ 14. Tr. 170–71.

private transaction. I then later, after discussions with head legal counsel at National Securities, corrected that for the record.[205]

But Harrington did not correct the record. As late as 2016, he perpetuated his deception.[206] On April 22, 2016, Harrington wrote a letter to the General Counsel for National[207] disclosing that he had engaged in securities transactions with TZ.[208] Even so, he continued to dissemble. Harrington explained in the letter that when originally responding to National's Chief Supervisory Officer ("CSO"), he had been confused about "where the money I received from [TZ] was to be allocated."[209] He wrote that he entered into three private sales of stock to TZ from his personal holdings,[210] and that at the same time, he entered into two rental agreements with TZ and had "erroneously credited the payments made to the rental agreements rather than to the stock purchase agreements."[211] Further, he wrote that when he originally wrote to the CSO, he had "overlooked" the checks written by TZ that "specifically stated that they were in payment for the stock."[212] The letter attached two purported rental agreements with TZ.[213] But as discussed below, these purported agreements were fabrications.

7. Harrington Sells Islet Shares to Additional Persons

In addition to AB and TZ, Harrington received large payments from several other persons to whom he transferred Islet stock. In each instance, Harrington claimed that the payments were not made in connection with stock sales. Instead, he said, they were rental payments relating to his vacation property. As a general matter, Harrington claimed that he "could have paid closer attention" in terms of "dott[ing] my I's and cross[ing] my T's a little better, as there's so many forms that one needs to fill out, and they just seem to be getting longer and longer."[214] He also

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[205] Tr. 219.

[206] Tr. 389.

[207] JX-18.

[208] Tr. 425; *see also* Tr. 828 (Harrington testified, "[W]hen I understood any mistakes that I had made, I engaged my counsel at the time to right the record in writing and make sure that at that time, which was National Securities, they had on file the respective correction to the record."). Harrington's letter was prompted by a request from National after Harrington filed his response to the TZ arbitration. National requested that Harrington explain the discrepancy between the arbitration response about TZ's payments and the explanation Harrington had previously given to the CSO that the payments related to the rental of Harrington's vacation property. Tr. 384–85. In his answer to TZ's arbitration claim, Harrington stated that the January and February sales to TZ were private transactions between the parties and National was unaware of them. JX-17, at 16–17.

[209] JX-18, at 1.

[210] JX-18, at 1.

[211] JX-18, at 2.

[212] JX-18, at 2.

[213] JX-18, at 3–6.

[214] Tr. 1758.

emphasized that there was no contract for the sale of these securities.[215] We address each transfer below.

a. JA

On October 3, 2012, AD and SD ("the Ds") wrote HCM a $20,000 check[216] that was deposited into the HCM account on December 21, 2012.[217] During FINRA's investigation, the Ds' nephew, JA, explained to FINRA the purpose of this payment. According to JA, he had borrowed money from the Ds to purchase Islet stock and had purchased 10,000 shares of Islet for $20,000.[218] In Harrington's April 15, 2013 letter to the transfer agent in which he instructed that his 300,000 shares of Islet stock be allocated among a number of people, Harrington directed that 10,000 shares be apportioned to JA.[219]

Harrington did not directly dispute JA's assertion that he sold the shares to JA. But at his OTR, Harrington said he did not recall knowing the Ds. Even so, according to Harrington, he believed the payment was for a VRBO rental agreement.[220] His characterization of the payment as a rental payment is uncorroborated and he produced no rental agreement for the Ds.[221] By contrast, JA's version is corroborated by the Ds' check in the exact amount JA claimed he paid for the stock.[222] The record provides no basis to doubt JA's version. We therefore find that JA purchased 10,000 shares of Islet stock from Harrington.

b. RF

On November 29, 2012, RF wired $30,000 to HCM's bank account,[223] and on April 15, 2013, Harrington asked the transfer agent to transfer 15,000 of his shares to RF.[224] Harrington never provided notice to National that he had transferred stock to RF.[225] Harrington testified that he gave 15,000 shares of Islet stock to RF as a gift and did not sell the shares to him.[226] Although

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[215] Tr. 827.

[216] JX-31, at 10.

[217] JX-31, at 2; Tr. 1491–92.

[218] Tr. 1495–96.

[219] CX-15, at 1.

[220] Tr. 1493.

[221] Tr. 1493.

[222] Tr. 1496.

[223] JX-29, at 3.

[224] CX-15, at 1. The record is unclear as to the nature of the relationship between RF and Harrington, though, in closing, Harrington described him as a family friend. Tr. 1859.

[225] Tr. 426.

[226] Tr. 329–30, 419.

acknowledging that RF had not entered into a rental agreement,[227] Harrington maintained that RF stayed in the vacation rental property and paid Harrington $30,000 for that purpose.[228]

We reject his explanation. Harrington's bankruptcy filing during the relevant period did not report rental income that correlates to RF's payment.[229] Indeed, Harrington's January 2, 2013 bankruptcy court filing does not reflect the receipt of any rental income from the La Jolla property in November 2012, when RF wired his funds.[230] Nor did Harrington produce a VRBO agreement for RF's purported rental. We find that Harrington's transfer of Islet shares to RF was a sale.

c. PS and SS

On January 30, 2013, HCM's bank account received a $25,000 wire from SS[231]— apparently PS's wife[232]— and on April 15, 2013, Harrington asked that the transfer agent transfer 12,500 shares of his Islet stock to PS.[233] According to Harrington, PS and SS are his family members.[234] Harrington testified that he gifted the stock and they rented his house for $25,000.[235] While there was no VRBO agreement for RF, there was one for PS and SS.[236] The VRBO agreement, purportedly signed on January 29, 2013, was in the amount of $25,000 and identified PS and SS and several other individuals as guests.[237] By April 15, 2015, he had not notified the Firm that he had transferred the Islet stock to PS.[238]

We do not credit Harrington's explanation. Instead, we find that Harrington sold Islet shares to PS and SS. Harrington's bankruptcy filings for the relevant period did not reflect rental income that correlates to PS and SS's payment. Harrington's May 24, 2013 bankruptcy filing contains no reference to rental income in the amount that he claims PS and SS paid him;[239] it

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[227] Tr. 343–44.

[228] Tr. 335.

[229] Harrington testified that while his accounting firm made the bankruptcy filings, he reviewed them first. Tr. 346–48.

[230] JX-30, at 12.

[231] JX-34, at 2.

[232] While it appears that PS and SS are husband and wife, the record is unclear on this point. Tr. 333.

[233] CX-15, at 1–2.

[234] Tr. 280.

[235] Tr. 280–81, 327, 335–36.

[236] Harrington did not provide the agreement to FINRA. National produced it to FINRA after receiving it from NG during National's investigation. Tr. 1480–81, 1484–85.

[237] CX-68, at 3–4.

[238] Tr. 426.

[239] JX-21, at 23.

shows only $9,750 in rental income from the La Jolla property for the month of January 2013, when PS and SS made their payment.[240] We also find it implausibly coincidental that the amount paid under the purported rental agreement equates to $2.00 per share. This is the exact price per share that, we find, Harrington received from RF and the Ds in connection with his sale of shares to RF and JA.

8. Harrington Fails to Disclose His Private Securities Transactions on Compliance Questionnaires

While associated with National, Harrington completed several compliance questionnaires. The questionnaires asked about, among other things, compensation from other sources, gifts, and private securities transactions.[241] Harrington answered a number of these questions falsely:

- On the 2012 Semi Annual Compliance Questionnaire for the first and second quarters filed on September 12, 2012, Harrington answered "no" to the question asking if he had engaged in private securities transactions between January 12, 2012, and the present (i.e., September 12, 2012).[242] This answer was false, as Harrington had sold shares of Islet to AB during this period.[243]

- On the 2012 year-end Semi Annual Compliance Questionnaire, filed March 28, 2013, Harrington answered "yes" to the question about whether, while associated with National, he had accepted compensation from any person or entity other than National without prior written approval of the CSO. He identified HCM as the source of that compensation.[244] That answer was false. The source of his compensation was, in fact, Islet, which had issued shares to him for consulting-related compensation three times in 2012, including on November 1, 2012, after Harrington had joined the Firm.[245] Also on that questionnaire, he answered "no" to the question as to whether he had been involved in any private securities transactions between July 1, 2012, and the present (March 28, 2013).[246] This

[240] JX-21, at 23.

[241] Stip. ¶ 15.

[242] JX-28, at 3, no. 47.

[243] When asked at the hearing if his answer was accurate, he admitted that looking at the answer now, he probably should have answered "yes" and sought out clarity from the CSO. Tr. 407.

[244] JX-28, at 7, no. 8.

[245] Tr. 410; JX-35, at 2; CX-81, at 1.

[246] JX-28, at 8, no. 24.

answer was false because, as Harrington admitted at the hearing,[247] TZ had purchased the Islet stock in private securities transactions.[248]

- On the 2013 Semi Annual Compliance Questionnaire, completed on September 13, 2013, he answered "no" to the question about whether he had engaged in any private securities transactions between January 1 and June 30, 2013.[249] He testified that he answered that question "incorrectly."[250] Also on that questionnaire, Harrington answered "no" to the question asking if he was "involved in any capacity in the purchase or sale of a security not conducted through [the Firm] or an approved outside broker account between January 1 and June 30, 2013."[251] At the hearing, he testified that he also did not answer that question correctly.[252] As discussed above, Harrington had sold shares of Islet to TZ during that period as well as to PS and SS.

- On the 2014 Semi Annual Compliance Questionnaire, completed on August 5, 2014, Harrington answered "no" to the question asking whether, while he was "associated with the Firm," if he "accepted direct compensation from any person or entity other than [the Firm] without the prior written approval of the [CSO] via submission of an Outside Business Interest form."[253] He testified that he did not fill out that answer correctly, and should have answered "yes."[254] Harrington explained that he had received securities as compensation from Islet, which is an entity other than his Firm.[255]

9. Harrington, with Milberger's Help, Obstructs Investigations into His Private Securities Transactions

Both National and FINRA conducted investigations into Harrington's private securities transactions. As discussed below, trying to conceal the true nature of his activities, Harrington,

[247] Tr. 417–18.

[248] Tr. 417–18. In explaining why he answered "no" to the question on the questionnaire about whether he had participated in any private securities transactions between July 1, 2012, and the present (March 28, 2013), JX-28, at 8, no. 24, Harrington pointed to a purported "deal" with TZ for the rental property, adding, "I just think that I was trying to figure out whether it was for the vacation rental or if it was for the stock." Tr. 417. But this explanation is not credible, as discussed above.

[249] JX-28, at 15, no. 24.

[250] JX-28, at 15; Tr. 418–19.

[251] JX-28, at 15, no. 25.

[252] Tr. 419–20.

[253] JX-28, at 29, no. 7.

[254] Tr. 422–23.

[255] Tr. 423.

with Milberger's help, provided false information and falsified documents to National and FINRA. We begin with National's investigation.

10. National Securities Investigation

a. National Securities Requests Information and Documents about Deposits in Harrington's Bank Accounts

In July 2014, National suspected that Harrington might have been involved in certain activities away from the firm.[256] This concern stemmed from certain agreements Harrington had with other entities that were brought to the Firm's attention, including an investment banking engagement agreement.[257] Based on these concerns, the CSO sent Harrington an email on July 16, 2014. In that email, the CSO asked Harrington a number of questions regarding potential outside capital raising/investment banking activities,[258] as well as possible selling away activities.[259]

The next day, the CSO emailed Harrington requesting, among other things, that Harrington produce "all personal and related entity (HCM or otherwise) bank account statements since your hire date in 2012."[260] Harrington agreed to provide those bank statements.[261] On July 18, 2014, under Harrington's direction, one of his assistants, NG, sent copies of bank statements to the CSO.[262] After receiving the statements, the CSO sent follow-up questions to Harrington,[263] including a request that Harrington "explain, with evidence (copies of checks, deposit slips, etc.) all deposits over $1,000 that are not from National Securities" or its affiliate since his hiring.[264]

In response, on July 25, 2014, Harrington's then-wife prepared and sent National, on Harrington's behalf, a spreadsheet purporting to explain various deposits into his bank accounts.[265] Harrington was copied on the email attaching the spreadsheet.[266] While preparing

[256] Tr. 221.

[257] CX-21, at 1–2.

[258] CX-21, at 1.

[259] Tr. 1113.

[260] CX-23, at 3, no. 5.

[261] CX-23, at 1, no. 5; Tr. 234.

[262] CX-29; Tr. 236.

[263] CX-31; Tr. 1121.

[264] Stip. ¶ 16; CX-31.

[265] Stip. ¶ 17; CX-32; Tr. 240–44, 1122–23.

[266] CX-32, at 1.

the spreadsheet, Harrington ordered bank statements from banks, met with his wife to discuss them,[267] and looked at several of the VRBO contracts.[268]

The spreadsheet included several false descriptions. It showed a $19,874.64 deposit into the HCM business banking account on August 21, 2012.[269] The spreadsheet described the deposit as "Vacation Rental/Rental Income + Deposit."[270] In fact, the deposit was from LD's wire transfer. Similarly, the spreadsheet described the following three deposits as "Vacation/ Rental/Income/ +Deposit/Event Fees":[271] (1) January 3, 2013—$80,000; (2) January 28, 2013—$16,000; and (3) February 21, 2013—$80,000. The descriptions for these January and February deposits were false.[272] They were, in fact, payments by TZ for Islet stock.[273] Finally, the spreadsheet reflected a $100,000 deposit into Harrington's personal bank account on August 21, 2012.[274] The spreadsheet describes the $100,000 deposit as "Residual payment under Former Broker Dealer."[275] This description was false, as the source of the payment was not Harrington's former broker dealer;[276] it was AB, and represented payment for his purchase of Islet stock.[277]

After receiving the spreadsheet, the CSO informed Harrington on July 28, 2014, that he needed Harrington to provide the rental agreements and copies of all checks that Harrington claimed were associated with these rental properties.[278] On July 28, 2014, Harrington's assistant, NG,[279] responded to the CSO's request with copies of rental agreements.[280] That production did

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[267] Tr. 245.

[268] Tr. 245–46. Harrington testified that he did not recall if he reviewed the spreadsheet before it was submitted to the CSO, but did discuss each item contained on it with his then-wife. Tr. 322. After providing this testimony, however, he immediately backtracked and denied ever discussing with anyone the two $80,000 entries on the spreadsheet before it was submitted. Tr. 323.

[269] CX-32, at 8.

[270] CX-32, at 8.

[271] CX-32, at 4; Stip. ¶ 17.

[272] Tr. 247–49.

[273] Tr. 247–49.

[274] CX-32, at 7.

[275] CX-32, at 7; Stip. ¶ 17.

[276] Tr. 263.

[277] Tr. 263.

[278] CX-35, at 1; Tr. 1123–26; CX-33.

[279] NG began working for HCM in the fall of 2013. Tr. 1240. At National, she worked for Harrington in various positions, starting in public relations, and her final positon was director of corporate retirement services. Tr. 1210.

[280] CX-36.

not include VRBO rental agreements for TZ or for several others who purportedly paid Harrington for renting his property,[281] including PS and SS, and RF.[282]

This production prompted additional questions by the CSO. On July 29, 2014, the CSO directed Harrington to "explain and reconcile with the receipt"[283] four deposits in the HCM bank account designated as income from the vacation rental: the January 3, January 28, and February 21 deposits totaling $176,000 (from TZ), and a January 30, 2013 $25,000 deposit from PS. [284]

b. Harrington Directs the Fabrication of VRBO Rental Agreements and Provides Them to National[285]

The CSO's July 29, 2014 request caused Harrington to create documentary support for his claim that TZ had paid him to stay at his vacation rental property. The first step was to call TZ and try and enlist his help, as he had done two years earlier with LD. Harrington telephoned TZ and told him that in order to deposit his Islet stock certificates, which TZ was having trouble depositing, he and TZ needed to show that they had "some outside relationship," such as TZ helping Harrington's children with tennis lessons.[286] Harrington went on to suggest that a good way to demonstrate this relationship was to make it look like TZ had rented Harrington's La Jolla, California, vacation property and to provide documentation of the rental.[287] To that end, Harrington asked TZ to sign a rental agreement signature page and, without explaining why, told him not to date it.[288] Later that day, at Harrington's direction,[289] NG sent a rental agreement signature page to TZ and asked that he "print, sign and scan" and return it by email.[290]

The next day, July 30, 2014, TZ signed the signature page and sent it back to NG, informing her in the transmittal email: "[h]ere is the document that Kyle asked me to send you."[291] TZ left the signature page undated and did not indicate who would be occupying the

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[281] Tr. 275.

[282] Tr. 275–76.

[283] The CSO testified that by "reconcile with the receipt," he wanted Harrington to provide the "vacation rental agreements and the deposit slip or canceled check or something that goes along with it." Tr. 1128–29.

[284] CX-39, at 1, no. 1.

[285] TZ testified at the hearing and, as explained in the next section, we find his testimony credible. The findings in this section are based, in part, on his testimony.

[286] Tr. 706, 754–55.

[287] Tr. 706, 767, 769–70.

[288] Tr. 719–20.

[289] Tr. 1246.

[290] Tr. 720–21; CX-64, at 1.

[291] Harrington Ans. ¶¶ 36–37; CX-64, at 2–3. Harrington did not admit or deny asking TZ to sign the signature page. "I don't remember if I asked him to sign it. I know that -- I knew that we were missing it," Harrington explained, "and that we needed his signature. Yes." Tr. 358.

property.[292] That day, NG forwarded to the CSO what purported to be two VRBO contracts signed by TZ: one hand-dated "12/26/12" next to TZ's signature, and the other hand-dated "2/20/13" next to his signature.[293] The dates of stay on the first purported agreement were from February 22, 2013, through May 28, 2013,[294] and the persons occupying the property are described as "GUESTS-TBD."[295] The second contract reflects dates of stay of January 23, 2015, through February 27, 2015,[296] and identifies the persons occupying the property as "TBD."

The signatures on the two signature pages purportedly signed by TZ are plainly identical.[297] These two signatures are also identical to the signature on the undated signed page TZ had sent to NG the previously day. It is obvious that two copies were made of the undated signature page and that each copy was then dated.[298] TZ never entered into a transaction in December 2012[299] or February 2013 [300] to rent the La Jolla property and never stayed at the property.[301]

On July 30, 2014, NG sent another response to the CSO (copying Harrington) that included an attachment further elaborating on TZ's payments. According to the explanation, on January 3, 2013, "we" received TZ's $80,000 check for a "three+ months" VRBO rental of the La Jolla property and a family wedding was held on the site for which an additional $16,000 event fee/security deposit was paid on January 28, 2013. On February 21, 2013, the explanation continued, the TZ family paid the balance of the initial rental plus a $20,000 deposit to reserve the house for January 23 through February 27, 2015, for which a check was received in the amount of $80,000 on February 21, 2013.[302] The response did not include copies of the purported rental payment checks; the CSO never received TZ's checks until later, in connection with the arbitration statement of claim TZ filed a year later, in September 2015.[303] Moreover, as

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[292] CX-64, at 2–3.

[293] CX-67, at 4, 8.

[294] CX-67, at 2.

[295] CX-67, at 4.

[296] CX-67, at 6, 8.

[297] *Compare* CX-73, at 5 *with* CX-73, at 7.

[298] The FINRA examiner testified that she took copies of the two purported agreements, created transparencies of each signature, "overlapped them and they matched." Tr. 1530.

[299] Tr. 707.

[300] Tr. 707.

[301] Tr. 707.

[302] CX-66, at 2. Harrington testified that he was told a wedding took place there, but did not really know if that was the case and, to this day, is unsure but believes TZ did not stay at the property. Tr. 374–79, 382.

[303] Tr. 1131–33; JX-15, at 100–02. In September 2015, TZ filed a FINRA Dispute Resolution arbitration against Harrington and National relating to Harrington's sale of Islet stock to TZ. The arbitration claim did not relate to the initial 70,000 shares of Islet that TZ had purchased earlier in a private placement offering. Tr. 789. Harrington and

discussed above, these checks plainly showed on their face that they represented payment for TZ's purchase of Islet stock from Harrington.

c. We Reject Harrington's Explanation Regarding the Characterization of the TZ Deposits

At the hearing, Harrington admitted that TZ never made any payments to him for the rental of the property[304] and that it was a mistake to characterize the deposits from TZ's payments as rental payments.[305] He blamed his then-wife for this, as he claimed that she was the one who decided to characterize the two $80,000 checks as rental income.[306] Harrington testified that he believed she did so by just assuming it was rental income because other large deposits around that time were for rental income.[307] We find this explanation unlikely, as payments of $80,000 were large compared to other rental payments Harrington received.[308] Further, Harrington, who reviewed the spreadsheet before it was submitted, was certainly aware that he had entered into sales contracts with TZ for the sale of Islet stock. Finally, according to TZ's testimony, which we credit, he paid for the shares by three checks that he brought to Harrington's office and hand-delivered to him.[309]

d. We Reject Harrington's Explanations Regarding the Purported TZ VRBO Agreements

Harrington gave evasive,[310] conflicting, and illogical testimony regarding TZ's purported rental agreements. Harrington testified that during the audit by National in the summer of 2014, he asked TZ to verify that he had signed documents to rent the vacation property.[311] Harrington denied telling TZ to sign the rental agreement because it would help him get his stock deposited.[312] Rather, according to Harrington, TZ had previously signed a vacation rental

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National filed a joint Answer to TZ' s Statement of Claim, admitting to engaging in three private securities transactions with TZ. Stip. ¶ 18.

[304] Tr. 286.

[305] Tr. 276–77. Harrington testified that after Enforcement filed this disciplinary proceeding, he sent a letter to the CSO "outlining the fact that we mischaracterized the rental income." Tr. 323–24. Harrington signed the letter, dated April 22, 2016. JX-18. Harrington and his counsel drafted the letter. Tr. 895.

[306] Tr. 253.

[307] Tr. 253.

[308] Tr. 251–52. The FINRA examiner testified that she looked at all the rental agreements produced to Enforcement and "there were none that even compared in dollar amount." Tr. 1530.

[309] Tr. 704–05.

[310] Tr. 367–70.

[311] Tr. 284–85.

[312] Tr. 842.

contract, but it could not be located.[313] So, Harrington claimed, they gave TZ another contract to sign, and he signed it.[314]

Harrington denied adding the date of December 26, 2012, next to TZ's signature.[315] He also denied that the February 20, 2013 rental agreement was a "fake."[316] Instead, as to this second rental agreement, Harrington claimed that TZ "saw the document, and he intended on renting it, and his signature -- he signed it. And he -- it looks like he dated it. I certainly didn't date it. And I certainly didn't sign it."[317] Harrington specifically denied taking TZ's signed signature page, copying it onto two signature pages, and dating them, thereby creating two false rental agreements.[318] He testified that he believed "they are two separate documents."[319] But he hedged, adding that NG "was the one who obtained these documents, so I'm unsure." Harrington also testified that there was no evidence that he signed or dated any documents for TZ, or that TZ was coerced into signing any documents.[320]

His testimony on this issue was muddled. Harrington said that TZ had originally signed a signature page; then he said that the contracts were signed at different times; then he denied losing both signature pages; and then he said he only had TZ re-sign one document. But when asked directly if TZ was re-signing one contract or two, he replied: "I don't recall. I - - I'm unsure."[321] One of the Hearing Panelists pressed Harrington to explain why TZ would pay $80,000 on February 21, 2013, for an agreement purportedly signed and dated the previous day for a rental two years in the future that required only a $20,000 deposit; Harrington had no answer.[322] All of this confusion undercut Harrington's credibility.

Harrington's testimony also conflicted with TZ's recollections, which we generally credit. TZ denied ever having seen, staying at, or intending to stay at Harrington's rental property.[323] Moreover, he denied entering into agreements in December 2012[324] or February

[313] Tr. 287.

[314] Tr. 287, 365, 388, 895–96.

[315] Tr. 365.

[316] Tr. 367.

[317] Tr. 367.

[318] Tr. 361–62.

[319] Tr. 1533–34.

[320] Tr. 805.

[321] Tr. 922.

[322] Tr. 370–72.

[323] Tr. 707.

[324] Tr. 707.

2013 to rent Harrington's La Jolla property.[325] Other than the signature page he signed,[326] TZ said he has never seen any other document regarding the rental property.[327] Indeed, he claimed that he never even knew that Harrington owned a vacation rental property in La Jolla until July 2014, when Harrington called him.[328] TZ testified that at the time Harrington asked him to sign the signature page, he was "desperate" because he had been trying to get his stock deposited for months.[329]

We found TZ's explanation for why he signed the signature page credible. The evidentiary record shows that TZ was extremely anxious and impatient about his inability to have his Islet shares deposited. In August 2013, one month after he signed the signature page, he and Milberger exchanged emails about trying to get his stock deposited, with TZ asking why he had not been able to get them deposited "when I purchased them 7 months ago."[330] The email traffic between Milberger and TZ in August 2013 reflects TZ's exasperation at being unable to deposit his shares.[331] TZ testified that various persons gave him a number of reasons for why he could not get the shares deposited: Islet was not current on its SEC filings; the price of the stock was under 25 cents; the large number of shares involved; and the need to deposit other customers' smaller amounts.[332]

We find it plausible that TZ would follow Harrington's directive to sign a blank rental agreement for a property he had never rented if he thought it would help him deposit his shares. We also discern no reason why TZ would admit to having signed the blank signature page, yet falsely deny signing two other signature pages, dating them, and filling in who would be staying at the property. Indeed, there is no credible evidence that he ever signed any agreements; only the one, undated, and incomplete signature page that he sent back to NG on July 30.

That said, there is some evidence that TZ may have signed two signature pages. At her OTR, NG testified that she recalled meeting with TZ the day after he faxed the signed, undated

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[325] Tr. 707.

[326] CX-64, at 3.

[327] Tr. 721.

[328] Tr. 706, 719. There is some evidence that TZ may have been aware of the vacation property earlier. NG testified that she was present at a meeting at some point (she did not remember the date) with Harrington and TZ during which TZ and Harrington discussed the rental property; TZ said he had a real estate license; and he said he would like to list the property when Harrington was ready to sell it. At the lunch meeting, according to NG, TZ described the property as "a beautiful, elaborate property, great location." Tr. 1217, 1224–26, 1260–62. We do not give much weight to this testimony, given NG's generally poor recollection of events. And, even if TZ did know about the property earlier, we do not consider this a significant point that undercuts his general credibility.

[329] Tr. 706–07.

[330] CX-49, at 3. Milberger emailed him on August 26, explaining that "National refused to approve any deposits or sales because Islet was not current with their SEC filings." CX-49, at 2.

[331] CX-49.

[332] Tr. 717.

signature page and that he gave her two signed signature pages. But at the hearing, she testified that her memory of these events had "become very unclear about specific dates and times of what occurred when."[333] Further, at the hearing, she repeatedly had difficulty recalling the events at issue relating to her dealings with TZ about the VRBO agreements.[334] In addition to NG's poor recollection, we discount her version because it is unlikely that she met with TZ and obtained two signed documents.[335] There are no documents in the record containing original signatures; moreover, the signatures on the purported agreements are identical. While it is possible that after signing the blank signature page, TZ made two copies of it and gave the copies to NG later that day, there is no credible evidence to support this far-fetched scenario.

Finally, Harrington's attacks on TZ's credibility failed. In his opening, Harrington claimed that TZ had approached him wanting to work for his company, and because Harrington did not hire him, TZ is not trustworthy.[336] During Harrington's testimony, he suggested that TZ was motivated to make false accusations against him because, according to Harrington, TZ wanted Harrington to employ him and permit him to sell Harrington's house and give Harrington's children tennis lessons.[337] And when it became clear to TZ that Harrington was not going to hire him, TZ felt "rejected and angered," Harrington maintained.[338] We discount this self-serving, uncorroborated testimony and argument because, even if true, it seems too weak a motivation for TZ to lie under oath about whether he had signed the rental agreements. In short, the evidence failed to disprove TZ's stated reason for choosing to testify voluntarily at the hearing: "[I]t was the right thing to do," he explained to the Panel, adding: "I don't want what's happening to me to happen to anybody else . . . . I don't think Kyle should be handling other people's money. I mean, if he does what he did to me to other people, he shouldn't be in the industry."[339]

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[333] Tr. 1234.

[334] Tr. 1234–35. In particular, she did not recall receiving two signed and dated signature pages from TZ, only one, Tr. 1234; did not know the circumstances of how the dates and guest notations came to be included on the signature pages she sent to the CSO, CX-67, at 4, 8; Tr. 1252–54; and believed that TZ signed and returned the agreements at some point simply because she submitted a "complete," dated rental agreement. Tr. 1232–33. Also, while acknowledging she testified at her OTR that she met with TZ on the day after he faxed the page back to her and he gave her an envelope with the signed and dated pages, upon reflection, she just could not recall if that is what happened. Tr. 1254–56.

[335] The email communications show that TZ faxed one page, and, later that same day, two signature pages were forwarded to National. According to the examiner, when NG was pressed at her OTR about whether all of this could have taken place on one day, NG "became very confused [and] claimed that she essentially just didn't know how everything took place at that point." Tr. 1537–38.

[336] Tr. 49 (Harrington opening).

[337] Tr. 1782–83.

[338] Tr. 1783.

[339] Tr. 794.

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In conclusion, while the evidence did not establish directly how the two contracts were created from one signature page, or by whom, the circumstantial evidence makes it plain that Harrington either fabricated the contracts himself or instructed someone else to do so. No one else had both the motive and means to engage in this misconduct. He created the fake agreements, or directed their creation, to provide at least partial support[340] for the false descriptions on the spreadsheet relating to the three deposits totaling $176,000.

11. FINRA's Investigation

a. FINRA Requests Documents and Information from Harrington

TZ's arbitration triggered a FINRA investigation.[341] In connection with that investigation, FINRA sent Harrington requests for information and documents and took his OTR. On March 30, 2016, pursuant to FINRA Rule 8210, FINRA staff requested that Harrington disclose, among other things, whether he had sold his Islet stock to anyone other than TZ.[342] On April 18, 2016, in response to that request, Harrington stated there were no "formal" sales of Islet stock to anyone other than TZ.[343]

On June 2, 2016, before Harrington's OTR, FINRA sent him a FINRA Rule 8210 request directing him to produce bank statements for the period July 1, 2012, through the date of the request.[344] Harrington failed to respond to the request. Therefore, on June 21, 2016, pursuant to FINRA Rule 8210, FINRA staff sent a follow-up request asking Harrington to provide copies of bank statements for all accounts in which he had a financial interest, including bank statements for his personal account with HSBC, for the period July 1, 2012, through the most recent statement.[345] Harrington informed Milberger of FINRA's June 21, 2016 Rule 8210 request and enlisted her assistance in gathering responsive documents and information.[346]

On July 15, 2016, Harrington responded to the request through counsel.[347] The response purportedly included the bank accounts over which Harrington had an interest,[348] including an

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[340] The payments due under the two agreements do not total $176,000. The payments due under the "12/26/12" agreement total $121,000. CX-67, at 2. The payments due under the "2/20/13" agreement are partially specified and amount to $28,000, while the taxes and event fees are listed as "TBD." CX-67, at 6.

[341] Tr. 1439.

[342] Stip. ¶ 19.

[343] JX-17, at 7, no. 4.

[344] Tr. 438–39; JX-39, at 7, no. 2.

[345] Stip. ¶ 20; JX-39, at 6–7; Tr. 441; Harrington Ans. ¶ 42.

[346] Stip. ¶ 21; Milberger Ans. ¶ 43; Harrington Ans. ¶ 43.

[347] JX-40; Tr. 442.

[348] JX-40, at 1.

HSBC account.[349] That was the account into which Harrington had received a $100,000 wire transfer from AB in August 2012.[350] Harrington's response, however, did not include certain responsive bank statements, including an August 2012 bank statement for his personal bank account.[351] FINRA staff noticed that the production was incomplete, and on July 26, 2016, sent Harrington a follow-up Rule 8210 request.[352] Harrington then asked Milberger to gather information in connection with the response.[353] But he did more than that: he ordered her to alter a bank statement to remove key information, as we discuss below.[354]

b. Harrington Directs Milberger to Alter a Bank Statement That Is Then Produced to FINRA

In connection with the response, Milberger gathered documents in electronic form,[355] including bank statements,[356] from the previous production made to National in the summer of 2014.[357] At Harrington's instruction, she then sent the documents to Harrington's attorney at the time,[358] knowing they would be produced to FINRA.[359] One of the bank statements sent to the lawyer and produced to FINRA was Harrington's HSBC bank statement for August 2012.[360] Before sending the bank statement to Harrington's lawyer, Milberger, at Harrington's direction, removed AB's name from the description of his August 21, 2012 wire transfer appearing on the statement.[361] When Milberger asked Harrington whether it was appropriate to remove AB's

[349] JX-40, at 2.

[350] Tr. 443.

[351] Stip. ¶ 22.

[352] Stip. ¶ 23; JX-39, at 1. The July 26, 2016 Rule 8210 request attached two prior Rule 8210 requests, namely, June 2 and June 21, 2016. JX-39, at 6–9. According to the examiner, FINRA sent multiple requests because Harrington did not respond to the first request and, in response to the second request, he made only a partial response that included only some of the requested bank statements. Tr. 1497.

[353] Tr. 961–62.

[354] The factual findings regarding the circumstances relating to the alteration rest, in part, on Milberger's testimony, which we credit, as discussed at page 42.

[355] Tr. 963.

[356] Tr. 964.

[357] Tr. 966–67.

[358] Tr. 965.

[359] Tr. 965–66.

[360] Tr. 967.

[361] Tr. 967–69; JX-41, at 78; Milberger Ans. ¶ 6; *see also* Milberger Ans. ¶ 47.

name, he reassured her: "[I]t will be fine,"[362] he said; it was "no big deal";[363] and she should not "worry about it"[364] because they were testing to see if a redaction could be done to protect people's confidentiality. Based on that explanation, Milberger was comfortable removing AB's name.[365] After doing so, she sent the altered bank statement to Harrington's lawyer,[366] knowing it would be sent to FINRA.[367] Milberger did not inform the lawyer about the alteration.[368] And it was not readily apparent from the face of the account statement that it had been altered. AB's name was not simply obscured or blacked out; it was removed from the document in a way that caused the merger of the words on both sides of where his name had appeared, leaving no outward trace that anything had been changed.

On August 3, 2016, Harrington, through counsel, provided a supplemental document response to FINRA.[369] Among the documents produced was the HSBC bank statement for the period August 16 through September 18, 2012.[370] The bank statement produced to FINRA reflected a deposit or other addition of $100,000 on August 21, 2012.[371] The entry for the deposit/addition read:

> 33RECD CHIP JPMORGAN CHASE BANK*ORG:NEW YORK NY 10065 - 8840*BNF : KYLE P HARRINGTON, HASTINGS HDS N*STCHIPSEQ:0238125*TIME:1134*YRREF:OS1 OF 12/08/21*MMB REF:234402285

After receiving the bank statement, the FINRA examiner compared it to the records National had produced to FINRA from its internal investigation.[372] The entry regarding the August 21, 2012 wire transfer, as it appeared on the bank statement produced by National, was

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[362] Tr. 969. Removing AB's name was not easy: while Milberger said she bought her own software for use on her computer to help her fill out paperwork, i.e., to type in information, she had not purchased a redacting program; therefore, it took her three or four hours to figure out how to accomplish the alteration. Tr. 970, 1316–18, 1320.

[363] Tr. 1362.

[364] Tr. 1362.

[365] Tr. 1362–63.

[366] Tr. 971.

[367] Tr. 971.

[368] Tr. 1363.

[369] JX-41; Tr. 1500.

[370] JX-41, at 78–80; Tr. 1503.

[371] JX-41, at 78.

[372] On July 18, 2014, Harrington's assistant, NG, produced August/Sept 2012 bank statements to the CSO. CX-30. It reflected that the originator of the August 21, 2012 wire transfer was AB. CX-30, at 2.

different from the description on the bank statement Harrington had produced to FINRA. The bank statement produced by National included the originator of the wire transfer, namely, AB:

> 33RECD CHIP JPMORGAN CHASE BANK*ORG:**[AB],**NEW YORK NY 10065 - 8840*BNF : KYLE P HARRINGTON, HASTINGS HDS N*STCHIPSEQ:0238125*TIME:1134*YRREF:OS1 OF 12/08/21*MMB REF:234402285.[373]

Upon comparing the bank statement she received from Harrington's lawyer with the bank statement produced earlier by National, the examiner noticed this difference.[374] The examiner also saw that "the remaining text had been essentially kind of merged together, so the transaction details were completely different."[375] When Harrington's counsel produced the bank statement to FINRA, no one informed FINRA of the alteration.[376] According to the FINRA examiner, had she not been able to compare it to the account statement received from National, she may not have noticed the changes made to the bank statement.[377]

c. Harrington and Milberger Concoct a False Explanation about the Bank Statement Alteration

Three months later, in November 2016, Harrington contacted Milberger and told her that his lawyer wanted to know why the bank statement had been redacted.[378] On or about November 4, 2016, Milberger and Harrington drafted a written explanation[379] to the effect that Milberger had tested out a redacting tool on the bank statement in the event that she had to redact the names from VRBO contracts for privacy reasons. And, the explanation continued, in her rush to provide the documents to Harrington's attorney, she inadvertently sent the redacted version to him, rather than the original, unredacted bank statement.[380]

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[373] CX-30, at 2 (bolding added).

[374] Tr. 481–83, 488, 1504.

[375] Tr. 1504–05. After receiving the altered bank statement, FINRA requested the bank statements directly from HSBC. Tr. 1511; JX-44. HSBC then provided the August 16, 2012, through September 18, 2012 bank statement that reflected the August 21, 2012 $100,000 wire transfer. AB's name appears in the wire transfer description, JX-45, at 1, as it did on the copy provided to FINRA by National.

[376] Tr. 1509–10.

[377] Tr. 1505.

[378] Tr. 972.

[379] Tr. 972–74, 1339–40, 1517; CX-70, at 2–3.

[380] CX-70, at 2.

On January 11, 2017, Enforcement took Milberger's OTR,[381] during which she testified consistently with the written explanation.[382] She testified that: she had drafted the statement while on the phone with Harrington; he expressed concerns about the confidentiality of the VRBO contracts; she tried to test some redaction software; she randomly selected an account statement to redact as a test;[383] and Harrington was unaware that AB's name had been deleted from the bank statement.[384] Almost a year later, however, Milberger would disavow this version of events.

d. Milberger Recants Her Earlier Explanation of the Altered Bank Statement

On June 23, 2017, Enforcement instituted these disciplinary proceedings against Harrington and Milberger.[385] Milberger filed her answer to the charges on August 14, 2017.[386] Several months later, Enforcement contacted Milberger to discuss whether she could access certain documents that Enforcement had sent her.[387] This conversation led to FINRA conducting a voluntary interview with Milberger on December 13, 2017.[388] During that discussion, Milberger recanted her earlier OTR testimony in which she had said that Harrington had not been involved in the removal of AB's name from the bank statement.[389] She went on to tell Enforcement that, in fact, Harrington had directed her to remove AB's name from the bank statement.[390]

At the hearing, she reiterated what she told Enforcement in December 2017, namely, that her OTR testimony was untruthful[391] and that Harrington had instructed her to remove AB's name from the account statement.[392] Milberger said that she made the deletion because Harrington asked her to do so and she trusted him.[393] She explained that she had been untruthful during the OTR because she still trusted him; thought he was being wrongly accused; and

[381] Tr. 1312–13, 1517–18.

[382] Tr. 975.

[383] Tr. 1518.

[384] Tr. 1518–19.

[385] Tr. 1312.

[386] Tr. 1312.

[387] Tr. 1379–80.

[388] Tr. 1312–13.

[389] Tr. 1330–32.

[390] Tr. 1524.

[391] Tr. 976, 1309.

[392] Tr. 1314, 1361–62.

[393] Tr. 974.

wanted to protect his children because she believed he was their sole means of support and feared that if he lost his job, the children would suffer.[394]

Milberger also explained the factors influencing her decision to recant and the timing of her decision. She claimed that after her OTR, she began to question Harrington's version—but only after she was charged by FINRA, at which point she had access to information that made her realize she had not been protecting an innocent person.[395] Eventually, she recanted because she "gave Mr. Harrington enough time to tell the truth, and he did not. So I needed to do so."[396] Another factor in the timing of her decision was his children, according to Milberger. She testified that when she learned (in January or February 2017) that Harrington's ex-wife had been working for over a year,[397] she felt more comfortable that the children had someone besides Harrington to rely on for financial support.[398] In other words, Milberger claimed she ultimately rectified her false testimony because she came to see that the children would be fine financially and because it became clear to her that Harrington was not going to tell the truth about the bank account alteration.[399]

e. The Panel Rejects Harrington's Explanation of the Altered Bank Statement

Harrington disputed Milberger's version of the bank account alteration. At the hearing, Harrington denied instructing anybody to redact anything,[400] including AB's name.[401] "Milberger, on her own merit, tried out the redaction of one particular document,"[402] Harrington said. He then explained how the alteration might have occurred. While in the process of providing documents to FINRA, Harrington said, he and his lawyer informed Enforcement that the VRBO agreements for his rental property contained confidential information, including banking information about the renters, and Harrington was concerned about divulging that information.[403] According to Harrington, he and his lawyer discussed with FINRA redacting some of the personal confidential information relating to renters in order to protect their privacy.[404] He testified that he also had a telephone conversation with the staff at HCM,

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[394] Tr. 1315, 1338–39.

[395] Tr. 56 (Milberger opening).

[396] Tr. 975.

[397] Tr. 1372–73.

[398] Tr. 1372.

[399] Tr. 1377.

[400] Tr. 846.

[401] Tr. 485–86, 491, 1755.

[402] Tr. 819–20.

[403] Tr. 816–18.

[404] Tr. 482. Later during his testimony, Harrington was less sure, explaining that it was a "possibility" that Milberger altered the bank account statement because "there were discussions about the sensitivity of those names, whether

including Milberger, about protecting client information, during which he made it clear that he wanted to avoid problems stemming from disclosing confidential information.[405] This conversation, he said, related to both bank statements and rental agreements.[406]

Against this claimed backdrop of privacy concerns, Harrington testified about Milberger's possession of redaction software. He began by noting that he had no redaction software, but that Milberger did.[407] Several months earlier, he continued, Milberger had bought redaction software for a different reason, but it had the functionality to redact bank statements.[408] She tested out the software on the bank statement containing the entry relating to the wire transfer and, whether it was inadvertent or not, she deleted AB's name, he claimed.[409] Harrington further testified that he thought the removal of AB's name may have been inadvertent because he recalled having a conversation with Milberger in which he learned "she inadvertently sent the wrong documentation,"[410] apparently referring to the altered bank statement.

Harrington also attacked Milberger's credibility. He pointed out that her hearing testimony was inconsistent with her under-oath OTR testimony. [411] He also emphasized—although it is not clear why—that when she recanted in December, she was no longer working for his firm,[412] and this, he claimed, undercut her credibility.[413] Harrington also said he believed that FINRA coerced Milberger into changing her testimony in exchange for leniency so that FINRA could continue "their crusade of allegations" against him.[414] Harrington admitted, however, that Milberger had not told him that FINRA granted her leniency to change her testimony,[415] but she did tell him that FINRA was bullying her,[416] and that the allegations

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they were in bank statements or in VRBO contracts, being redacted for privacy purposes." He denied, however, that Milberger ever told him that she altered the bank statement for that reason. Tr. 1769.

[405] Tr. 880.

[406] Tr. 880–81, 1755–56.

[407] Tr. 846.

[408] Tr. 482.

[409] Tr. 482, 879–80, 1756.

[410] Tr. 847.

[411] Tr. 855, 490, 1901.

[412] Milberger left HCM at the end of July 2017. Tr. 1314–16.

[413] Tr. 1757.

[414] Tr. 822, 850–81.

[415] Tr. 851.

[416] Tr. 852–53.

regarding the bank account alteration were ridiculous, and that she felt that FINRA was taking it out of context.[417]

After considering the evidence, we credit Milberger's hearing testimony about the bank account alteration. Her earlier OTR testimony regarding the alteration was not credible. The altered bank statement was produced on August 3, 2016.[418] FINRA, however, did not request the VRBO agreements until later that month, on August 22, 2016.[419] And it was that request that generated a response the next day from Harrington's attorney asking FINRA to explain why it needed the names of Harrington's renters.[420] The next month, on September 19, 2016, Harrington's lawyer raised additional questions, given privacy concerns, about the need to reveal tenants' financial information.[421] According to Enforcement's examiner, this was the first time Harrington raised a privacy issue about his VRBO clients. In other words, privacy concerns could not have been the impetus for the deletion, as they did not become an issue until after the deletion had occurred.

Further, it was implausible that of all the entries on the bank statements, Milberger ended up removing the name of a person whose identity, if revealed, could lead FINRA to discover that Harrington had engaged in an undisclosed private securities transaction. Tellingly, the FINRA examiner reviewed the hundreds of pages of bank statements produced by Harrington and found no other examples of alterations or information removal.[422] Nor is it plausible that Milberger would have altered the information on her own initiative in connection with testing out redaction software. It is far more likely that she acted at the direction of her supervisor, Harrington, who had an obvious motive to remove AB's name from the account statement.

f. Harrington, with Milberger's Assistance, Produces Fabricated VRBO Agreements to FINRA

The production of the altered bank statement was not the only time Harrington and Milberger produced falsified documents to FINRA during the investigation. On August 22, 2016, FINRA requested under FINRA Rule 8210 that Harrington produce VRBO agreements for his

[417] Tr. 853.

[418] JX-41, at 1, 78.

[419] JX-42; Tr. 1520–21.

[420] CX-72, at 1.

[421] CX-72, at 5.

[422] Tr. 1519–20.

rental property.[423] In response to this request, Harrington, through counsel, provided various rental agreements,[424] including TZ's two purported rental agreements.[425]

Milberger was involved in transmitting the VRBO contracts to FINRA.[426] According to Milberger, whose account we credit, the VRBO contracts were sent to her.[427] When she finished assembling them, Harrington called and told her to include TZ's VRBO contracts.[428] While placing TZ's contracts into a folder, she noticed that the dates of TZ's rental overlapped with other VRBO contracts.[429] When she brought this to Harrington's attention, he told her to remove the overlapping contracts but still to include TZ's contracts.[430] Perplexed, she asked Harrington why there were overlapping contracts; Harrington responded that TZ, but not the other individuals, had stayed at the property.[431]

Milberger then sent the VRBO agreements to Harrington's lawyer and knew they might be sent to FINRA.[432] She did not tell the lawyer that she was aware of other, overlapping contracts.[433] When the two purported rental agreements for TZ were produced to FINRA by Harrington's counsel, there was no representation made to FINRA that they were not authentic.[434]

g. Harrington Provides False Testimony to FINRA about the Private Securities Transactions and the Altered Bank Statement

Harrington's obstruction of FINRA's investigation into the private securities transactions was not limited to providing false documents. At his OTR, Harrington testified falsely in a

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[423] JX-42; Tr. 1520–21.

[424] CX-73; Tr. 1527–28.

[425] CX-73, at 4–7; Tr. 1528.

[426] Tr. 976.

[427] Tr. 978–79; CX-69.

[428] Tr. 978.

[429] Tr. 978–81; CX-69 (overlapping contracts).

[430] Tr. 978, 1345–46.

[431] Tr. 981–82.

[432] Tr. 977.

[433] Tr. 1363. The overlapping contracts were not produced to FINRA as part of Harrington's document production in response to the Rule 8210 request. Tr. 1346, 1543–44. On December 13, 2017, after the Complaint in this disciplinary proceeding was filed, Milberger sent the overlapping rental contracts to FINRA because while she had "trusted Mr. Harrington[,] I realize that he wasn't telling the truth so I decided to." Tr. 983; CX-69, at 1.

[434] Tr. 1528. Milberger said that in sending the VRBO contracts to the lawyer, she was "just following [Harrington's] instructions." She also stated that she trusted Harrington when it came to following his instructions about what to send to the attorney, adding, "So if he's telling me to send something to his attorney, why would I argue with that?" Tr. 1363–64.

number of respects about these transactions. He testified that the purported rental agreements with TZ represented authentic rental transactions and claimed TZ still owed him money for the rentals.[435] Harrington also testified that he did not sell his Islet stock to any other person,[436] but had instead gifted shares to a number of investors.[437] This testimony was false because, as we found above, he fabricated TZ's purported rental agreements and sold Islet shares to several individuals.

Additionally, Harrington testified at his OTR that he was not aware that the bank statement reflecting AB's wire transfer had been altered.[438] He specifically denied requesting that anyone alter the bank statement[439] and having any knowledge that anyone did so.[440] According to the FINRA examiner,

> he remembered during the National Securities internal audit that he was in -- that he may have been in the New York area at the time, that he had gone into a New York branch to collect the statements and that he had collected the statements from a California branch during our review, and so he claimed that he would not be surprised if the bank records were different depending on where -- which geographic branch he had visited to collect the records.[441]

This testimony was false. Harrington directed Milberger to alter the bank statement before it was produced to FINRA.

III. Conclusions of Law

A. Harrington Violated FINRA Rule 2010 by Converting Customer Funds (First Cause of Action)

The Complaint charged Harrington with violating FINRA Rule 2010 by converting $19,874.64 of LD's funds. FINRA Rule 2010 provides that "[a] member in the conduct of its business shall observe high standards of commercial honor and just and equitable principles of trade." The Rule also applies to persons associated with a member. Under FINRA Rule 0140(a), "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules." FINRA Rule 2010 "encompasses a wide variety of conduct that may operate as

[435] Tr. 1531–32.

[436] Tr. 433.

[437] Tr. 1477–78.

[438] Tr. 1510.

[439] Tr. 484.

[440] Tr. 484.

[441] Tr. 1510–11.

an injustice to investors or other participants in the securities markets."[442] The Rule "applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money."[443]

"Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[444] Conversion has long been recognized as a violation of FINRA Rule 2010 (and its predecessor) because it is a fundamentally dishonest act that reflects negatively on a person's ability to comply with regulatory requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets.[445] It also reflects "a failure to observe the high standards of commercial honor required of registered persons."[446]

Harrington intentionally caused LD to wire $19,874.64 of LD's funds into his account. He took these funds for his own use, without LD's authorization, and never returned them. Accordingly, Harrington engaged in conversion and violated FINRA Rule 2010.

B. Harrington Violated FINRA Rule 2010 by Attempting to Conceal His Conversion of LD's Funds (Seventh Cause of Action)

Harrington is charged with violating FINRA Rule 2010 by attempting to obstruct FINRA's investigation into his conversion by contacting LD and asking her to sign a false document stating that she had stayed at his vacation rental property. Attempting to create false evidence to deceive FINRA in connection with its investigation violates Rule 2010's requirement that an associated person's conduct conform to high standards of commercial honor and just and equitable principles of trade.[447] While under FINRA investigation, Harrington contacted LD and

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[442] *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *19 (NAC Jan. 13, 2017) (internal quotation marks omitted) (quoting *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013)).

[443] *Casas*, 2017 FINRA Discip. LEXIS 1, at *20 (internal quotation marks omitted) (quoting *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002)).

[444] FINRA Sanction Guidelines at 36 n.2 (2018), http://www.finra.org/industry/sanction-guidelines; *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *11–12 (Mar. 29, 2016).

[445] *Dep't of Enforcement v. Grivas*, No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *14 (NAC July 16, 2015), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008).

[446] *Grivas*, 2016 SEC LEXIS 1173, at *2–3; *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *24 (June 2, 2016).

[447] *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (affirming finding that respondent's intentional attempts to deceive NASD and obstruct its examination through, among other things, offering bribes to customers to get them to sign false and backdated forms, violated NASD Rule 2110, the predecessor to Rule 2010); *John J. Fiero*, 53 S.E.C. 434, 438 n.12 (1998) ("Fiero impeded an investigation into his business activities. That conduct must be viewed as a violation of his obligation to conduct those activities in accordance with ethical standards."); *Stratton Oakmont, Inc.*,

urged her to sign a letter making a false statement—that she had rented his vacation property. Harrington's purpose was to obstruct the investigation by concealing his conversion. This conduct violated FINRA Rule 2010.

C. Milberger Violated FINRA Rules 2010 and 4511 by Falsifying Wire Request Forms and Providing Them to the Firm (Second and Fifth Causes of Action)

Enforcement alleged that Milberger violated FINRA Rule 2010 by twice falsifying a wire request form she had received from LD and then, in order to complete the wire transfer, submitting the falsified forms to LD's broker-dealer as if they were authentic. It is well established that providing false information to a member firm violates FINRA Rule 2010.[448] Falsifying documents violates the Rule because it "is a prime example of misconduct that adversely reflects on a person's ability to comply with regulatory requirements and has been held to be a practice inconsistent with just and equitable principles of trade."[449] And, specifically, falsifying a wire request has been held to violate just and equitable principles of trade.[450]

Additionally, according to Enforcement, by providing these forms to National as part of its investigation, the wire requests became Firm records, thereby making National's books and records inaccurate. As a result, the Complaint alleged, Milberger violated FINRA Rules 4511 and 2010.

FINRA Rule 4511(a) requires FINRA members to "make and preserve books and records as required under the FINRA rules, the Exchange Act, and the applicable Exchange Act

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52 S.E.C. 1170, 1173 (1997) (finding that attempts to impede NASD investigation violated the predecessor to FINRA Rule 2010).

[448] *See, e.g.*, *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (NAC Apr. 23, 2010) (holding that registered representative's submission of false and misleading forms to his member firm violated predecessor to FINRA Rule 2010); *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *58 (NAC Oct. 1, 2013) (finding a violation of predecessor to FINRA Rule 2010 when respondent submitted false information on variable annuity applications).

[449] *Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22–23 (NAC Feb. 27, 2007); s*ee also Dep't of Enforcement v. Cuozzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, *22–23 (NAC Feb. 27, 2007) (holding that falsification of documents and entering inaccurate dates on required records are "inconsistent with the high ethical requirements of Conduct Rule 2110."). *Cf. Dep't of Enforcement v. Mizenko*, No. C8B030012, 2004 NASD Discip. LEXIS 20, at *17–18 (NAC Dec. 21, 2004) (affirming finding that forging firm officer's signature on a corporate resolution used to guarantee payments to an automobile dealership in association with a program to attract would-be professional athletes as clients violated predecessor to Rule 2110.), *aff'd*, 58 S.E.C. 846 (2005).

[450] *Ramiro Jose Sugranes*, 52 S.E.C. 156, 157 (1995) (falsifying letter representing that CD was backed by letter of credit and falsifying bank wires is inconsistent with just and equitable principles of trade); *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 45, at *9–13 (NAC Dec. 31, 2013) (affirming that respondent violated FINRA Rule 2010 by falsifying a wire transfer form to give the impression that he was a manager in order to facilitate the transfer).

rules."[451] Those applicable rules include Section 17(a) of the Securities Exchange Act of 1934, which requires broker-dealers to make and preserve certain books and records and SEC Rule 17a-4(b)(4), promulgated thereunder, requires that a firm preserve records relating to communications concerning the broker-dealer's business. In short, customer correspondence and other documents related to customer transactions are among the records that firms must maintain pursuant to FINRA Rule 4511.[452] As noted above, FINRA Rule 0140(a) provides that FINRA Rules apply to member firms and associated persons. Accordingly, as an associated person, Milberger was obligated to comply with Rule 4511.

A violation of FINRA Rule 4511 constitutes a violation of FINRA Rule 2010's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.[453] Thus, an individual is liable under FINRA Rules 4511 and 2010 for causing a violation of FINRA Rule 4511 through falsification of documents.[454] Also, violating FINRA Rule 4511 is, itself, a separate violation of FINRA Rule 2010.[455]

Milberger falsified two wire request forms and facilitated Harrington's conversion of LD's funds. Based on that misconduct, we conclude that she violated FINRA Rule 2010. We also conclude that because her misconduct rendered National's books and records inaccurate, Milberger violated FINRA Rules 4511 and 2010.[456]

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[451] FINRA Rule 4511(a). *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *48–49 (May 27, 2015) (stating that FINRA's recordkeeping rules include the requirement that the records be accurate, which applies "regardless of whether the information itself is mandated").

[452] Exchange Act Rules 17a-3 and 17a-4 specify the minimum requirements with respect to records that broker-dealers must make and keep, including originals of all communications received and copies of all communications sent by the broker-dealer relating to its "business as such."

[453] *See, e.g.*, *Fox & Co. Invs., Inc.*, 58 S.E.C. 873, 891–94 (2005); *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *35 & n.36 (Aug. 12, 2016) (stating that a violation of FINRA's recordkeeping rules is also a violation of FINRA Rule 2010), *petition for review denied*, 719 F. App'x 724 (9th Cir. 2018).

[454] *Dep't of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *4–7 (NAC Aug. 7, 2009) (affirming the hearing panel's findings that respondent's misrepresentations caused her firm to maintain inaccurate books and records, in violation of the predecessor rule to FINRA Rule 4511 and that her conduct failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of the predecessor to FINRA Rule 2010).

[455] *Dep't of Enforcement v. Correro*, No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *15 (NAC Aug. 12, 2008) (finding that a violation of the predecessor to Rule 4511 also violated the predecessor to FINRA Rule 2010 because "[i]t is a long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110.") (internal quotations omitted) (quoting *Stephen Gluckman*, 54 S.E.C. 175, 185 (1999)).

[456] There is no indication that Milberger sought to benefit herself (or Harrington) when she falsified the wire request forms or that she knew she was facilitating a conversion. She also credibly claimed to be acting consistently with her understanding of LD's intentions. Still, falsifying a record, even to try and benefit the customer and not enrich the

D. Harrington Violated NASD Rule 3040 and FINRA Rule 2010 by Failing to Disclose Private Securities Transactions (Third Cause of Action)

The Complaint charged Harrington with violating NASD Rule 3040 and FINRA Rule 2010 by engaging in private securities transactions with AB and TZ involving Islet stock without giving prior notice to National. It also alleged that during 2012, Harrington transferred Islet stock to other individuals, including RF and PS, but failed to disclose those transfers to National or seek its prior approval for them.

Under NASD Rule 3040(a), "[n]o person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule."[457] Subsection (b) of the Rule requires associated persons to provide written notice to their member firm employer "[p]rior to participating in any private securities transaction." The notice must describe "in detail the proposed transaction and the person's proposed role therein and" must also state "whether he has received or may receive selling compensation in connection with the transaction …." Rule 3040(c) provides that if the associated person has received or may receive compensation for participating in a private securities transaction, the member firm must advise the associated person, in writing, whether it approves the person's participation. Under the Rule, "any securities transaction outside the regular course or scope of an associated person's employment with a member" is deemed a private securities transaction.[458]

Harrington sold Islet shares to AB and TZ, as well as to JA, RF, and PS and SS. It was undisputed that these transactions were outside the regular scope or course of Harrington's employment: he did not sell the securities through National and National did not supervise the sales.[459] Further, Harrington was compensated for the sales. Yet, Harrington neither gave prior written notice to nor received prior written approval from the Firm before selling his Islet shares in these transactions. Therefore, Harrington did not comply with the requirements of Rule 3040 when he engaged in these sales.[460]

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falsifier, is unethical and violates FINRA Rules 2010 and 4511. *Correro*, 2008 FINRA Discip. LEXIS 29, at *16 (citing the predecessors to FINRA Rules 4511 and 2010).

[457] NASD Rule 3040 was superseded by FINRA Rule 3280, which became effective on September 21, 2015. Exchange Act Release No. 75757, 2015 SEC LEXIS 3471 (Aug. 25, 2015). The misconduct at issue in this case occurred prior to September 2015, so NASD Rule 3040 applies.

[458] NASD Rule 3040(e)(1).

[459] *See Dep't of Enforcement v. Vastano*, No. C3A020013, 2003 NASD Discip. LEXIS 41, at *14–15 (NAC Dec. 5, 2003) (affirming finding that sales of investments were outside the regular course and scope of employment where respondent did not sell the investment through the firm; the product was not on the firm's approved product list; the investments were not supervised by the firm or recorded on its books and records), *aff'd*, 57 S.E.C 803 (2004).

[460] The Rule contains an exemption for transactions among immediate family members (as defined in NASD Rule 2790) if the associated person is not receiving any selling compensation. NASD Rule 3040(e)(1). While Harrington testified that PS and SS were part of his family, his testimony was uncorroborated; he did not specify the nature of

Harrington testified he was not aware that he had to provide written notice to the Firm before engaging in a private securities transaction. While his testimony on this point is a bit unclear, he appeared to then say he thought oral notice was sufficient (although he may have been referring to outside business activities and not private securities transactions).[461]

This argument fails for several reasons. First, Harrington did not demonstrate that he gave oral notice to the Firm. And it is unlikely he did so, given that he answered "no" on the compliance questionnaires about whether he had engaged in private securities transactions. Second, even if he had provided oral notice, it would have been insufficient because detailed written notice is required to satisfy Rule 3040.[462] Third, "[t]here is no requirement of scienter to establish a violation of NASD Rule 3040."[463] Fourth, "[i]gnorance of [FINRA] requirements . . . is no excuse for violative behavior."[464] Finally, in light of Harrington's lengthy experience in the securities industry, we do not find it credible that he believed oral notice was sufficient.

Accordingly, we conclude that Harrington violated NASD Rule 3040. And because a violation of NASD Rule 3040 also constitutes a violation of FINRA Rule 2010,[465] we further conclude that Harrington violated Rule 2010.[466]

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the family relationship; and he was paid for selling them his Islet shares. Therefore, the exemption did not apply to this sale.

[461] Tr. 164–65.

[462] *Dep't of Enforcement v. Hartley*, No. C01010009, 2003 NASD Discip. LEXIS 49, at *24 (NAC Dec. 3, 2003) ("Rule 3040 requires the representative to give the detailed written notice before he or she participates in the transactions"), *aff'd*, 57 S.E.C. 767 (2004). *See Vastano*, 57 S.E.C. at 811 (holding that oral notice is insufficient to satisfy requirements of Rule 3040).

[463] *Dep't of Enforcement v. Mathieson*, No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *12 (NAC Mar. 19, 2018).

[464] *Dep't of Enforcement v. Fox & Co. Invs., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at *45 (Feb. 24, 2005), *aff'd*, 58 S.E.C 873 (2005) (citing *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995)); *see also Carter v. SEC*, 726 F.2d 472, 473–74 (9th Cir. 1983) (rejecting representatives' defense that they were unaware of NASD rules regarding private sales of securities, stating that "as employees, [the representatives] are assumed as a matter of law to have read and have knowledge of these rules and requirements").

[465] *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *12.

[466] These conclusions of law rest on the sales to AB and TZ only. While the Complaint alleged that Harrington transferred Islet shares to JA, RF, and PS and SS without giving the Firm prior notice, Enforcement did not charge Harrington with violating Rules 3040 and 2010 by virtue of these sales. *See* Compl.¶¶ 29, 69. Thus, while these sales "do not form the basis of our findings of misconduct, they are relevant to our sanctions analysis." *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 & n.33 (July 1, 2008) (holding that uncharged misconduct may be considered when imposing sanctions); *Dep't of Enforcement v. Ortiz*, No. 2014041319201, 2017 FINRA Discip. LEXIS 5, at *10 & n.8 (NAC Jan. 4, 2017) (citing *Sears*).

E. Harrington Violated FINRA Rule 2010 by Making Misstatements and Providing False Documents to His Firm Employer (Fourth Cause of Action)

Enforcement alleged that Harrington violated FINRA Rule 2010 by making misstatements and providing false documents to National in connection with its investigation into whether he had engaged in outside business activities. Making false statements to a firm violates FINRA Rule 2010. "[T]he SEC has consistently construed [the predecessor to Rule 2010] broadly to apply to all business-related misconduct, including misrepresentations made to a member firm by a registered representative."[467] The principal consideration of "FINRA Rule 2010 is whether the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business."[468] Misrepresentations to a member firm employer calls into question the person's ability to comply with regulatory requirements and is inconsistent with the high standards of commercial honor required of registered persons and violates FINRA Rule 2010.[469]

We found that on or about July 25, 2014, Harrington intentionally misrepresented to the Firm the nature of payments he received and deposited into his bank accounts from AB and TZ. He described three payments from TZ as VRBO rental income and characterized the $100,000 payment from AB as a payment from his former broker dealer. In fact, TZ and AB's payments were for the purchase of Harrington's Islet stock. The Panel also found that Harrington knowingly caused at least two falsified VRBO rental contracts to be sent to National—the purported TZ rental agreements—in order to conceal the true purpose of funds he had received in private securities transactions with TZ. These misrepresentations to National call into question Harrington's ability to comply with regulatory requirements and are inconsistent with the high standards of commercial honor required of registered persons. As a result, we conclude that Harrington violated FINRA Rule 2010.

F. Harrington and Milberger Violated FINRA Rules 8210 and 2010 by Providing False and Misleading Documents and Information to FINRA (Sixth Cause of Action)

Respondents are charged with violating FINRA Rules 8210 and 2010 by providing false documents and information to FINRA in connection with its investigation of the private securities transactions and the conversion. FINRA Rule 8210(a)(1) authorizes FINRA, in the

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[467] *See Dep't of Enforcement v. Hardin*, No. E072004072501, 2007 NASD Discip. LEXIS 24, at *10–11 (NAC July 27, 2007) (citing *James A. Goetz*, 53 S.E.C. 472, 477–78 (1998)).

[468] *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *69–70 (NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 17, 2017), *petition for review denied*, 733 F. App'x 571 (2d Cir. 2018) (quoting *Manoff*, 55 S.E.C. at 1162 (internal quotation marks omitted)).

[469] *Ortiz*, 2008 SEC LEXIS 2401, at *22–23; *Dep't of Enforcement v. Braff*, No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *21 (NAC May 13, 2011), *aff'd*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620 (Feb. 24, 2012); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8–10 (NAC May 7, 2003).

course of an investigation, to require persons subject to its jurisdiction to "provide information orally [or] in writing . . . with respect to any matter involved in the investigation." FINRA Rule 8210(c) requires those persons to provide such information when requested by FINRA. "FINRA Rule 8210 requires a registered person to respond fully, completely, and truthfully to a request for information from FINRA, and providing false documents and testimony violates the rule."[470] Also, the SEC has "frequently held that providing false information in response to a FINRA request during an investigation or examination is inconsistent with just and equitable principles of trade."[471]

In response to a request for documents and information issued by FINRA staff under FINRA Rule 8210, Respondents produced a bank statement to FINRA that Milberger, under Harrington's direction, altered to remove AB's name as the originator of a $100,000 wire transfer. The wire transfer related to Harrington's undisclosed private securities transaction with AB. As the person to whom FINRA directed its requests, Harrington is ultimately responsible for his false regulatory responses to FINRA.[472]

Milberger is also responsible for the false response to FINRA because she was aware that the falsified document that she altered was being produced to FINRA pursuant to a Rule 8210 request.[473] Although Milberger engaged in this misconduct at Harrington's direction and claims to have trusted him, these are not defenses. "[S]cienter is not an element of a FINRA Rule 8210 violation,"[474] and Milberger cannot shift her responsibility for complying with rules to someone else,[475] including her supervisor.[476]

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[470] *Dep't of Enforcement v. Taboada*, No.2012034719701, 2017 FINRA Discip. LEXIS 29, at *42–43 (NAC July 24, 2017), *application for review dismissed*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018).

[471] *David Adam Elgart*, Exchange Act Release No. 81779, 2017 SEC LEXIS 3097, at *25 (Sept. 29, 2017), *petition for review denied*, 2018 U.S. App. Lexis 26677 (Sept. 12, 2018); *Fillet*, 2015 SEC LEXIS 2142, at *51 (finding respondent violated predecessor to Rule 2010 in providing backdated records to NASD during an examination).

[472] *See Dep't of Enforcement v. Merrimac Corp. Sec., Inc.*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *15–16 (NAC May 26, 2017), *appeal docketed*, No. 3-18045 (SEC June 26, 2017) (citations omitted).

[473] *See Dep't of Mkt. Regulation v. Naby*, No. 20120320803-01, 2017 FINRA Discip. LEXIS 27, at *17–19 (NAC July 24, 2017) (citations omitted); *Dep't of Enforcement v. Palmeri*, No. 2007010580702, 2013 FINRA Discip. LEXIS 2, at *11 n.6 (NAC Feb. 15, 2013) ("In those instances when FINRA staff does not direct a request for information to a specific associated person, an individual may nevertheless violate NASD Rule 8210 when he is aware that the false information is being provided by the member firm to FINRA in response to a request for information issued pursuant to NASD Rule 8210.").

[474] *Taboada*, 2017 FINRA Discip. LEXIS 29, at *43 (citing *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *20 (July 27, 2015)).

[475] *Dep't of Enforcement v. Zaragoza*, No. E8A2002109804, 2008 FINRA Discip. LEXIS 28, at *28 (NAC Aug. 20, 2008) (a respondent may not shift responsibility for complying with rules to a third party) (citing *Michael David Borth*, 51 S.E.C. 178, 181 (1992)).

[476] *See, e.g.*, *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *22 (Nov. 8, 2006); *see also Dep't of Enforcement v. Merhi*, No. E072004044201, 2007 NASD Discip. LEXIS 9, at *27–28 (NAC Feb.

We conclude that by providing an altered bank statement to FINRA in response to a FINRA Rule 8210 request, Harrington and Milberger each violated Rule 8210 and also violated FINRA Rule 2010, both independently and by virtue of their Rule 8210 violations.[477]

In November 2016, Harrington submitted to FINRA a written response to a FINRA Rule 8210 request in which he falsely represented he was entitled to the approximately $20,000 he directed LD to wire to him in August 2012. He falsely claimed that this payment was for investment advisory fees rendered to LD from 2009 through 2012. Finally, during his OTR, Harrington falsely testified that the two purported rental agreements with TZ were authentic and represented legitimate rental transactions. By providing false information to FINRA staff during his investigative testimony regarding the purported TZ VRBO agreements and in response to FINRA's Rule 8210 request regarding the money he stole from LD, Harrington violated FINRA Rule 8210. And, by virtue of that violation, he violated FINRA Rule 2010. His misconduct also independently violated FINRA Rule 2010.

IV. Sanctions

A. Overview

In considering the appropriate sanctions to impose on Respondents, the Panel looked to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines contain: (1) General Principles Applicable to All Sanction Determinations ("General Principles") "that should be considered in connection with the imposition of sanctions in all cases"; (2) a list of Principal Considerations in Determining Sanctions ("Principal Considerations"), "which enumerates generic factors for consideration in all cases"; and (3) guidelines applicable to specific violations. A number of those guidelines "identify potential principal considerations that are specific to the described violation." ("Specific Considerations").[478]

The General Principles explain that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct." Adjudicators are therefore instructed to "design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct." Further, sanctions should "reflect the seriousness of the

16, 2007); *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *24 & n.21 (NAC July 18, 2014) (quoting *Gluckman*, 54 S.E.C. at 184 n.29), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015).

[477] It is well established that a violation of any other FINRA Rule constitutes a violation of FINRA Rule 2010. *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16 (NAC Mar. 9, 2015). In particular, a violation of FINRA Rule 8210 constitutes a violation of Rule 2010. *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *22 & n.9 (NAC Feb. 25, 2014).

[478] Guidelines (2018) at 1 (Overview), http://www.finra.org/industry/sanction-guidelines.

misconduct at issue,"[479] and should be "tailored to address the misconduct involved in each particular case."[480]

The sanctions we impose are appropriate, proportionally measured to address Respondents' misconduct, and designed to protect and further the interests of the investing public, the industry, and the regulatory system.

B. Aggravating Factors Applicable to All of Harrington's Violations

As a threshold matter, we considered several aggravating factors relating to Harrington that applied to all of his violations. Harrington's misconduct was intentional[481] and he has a disciplinary history.[482] Further, Harrington showed either a complete lack of remorse for certain misconduct (e.g., his conversion of LD's funds and his undisclosed private securities transactions involving AB, JA, RF, and PS and SS) or minimized his wrongdoing (e.g., his private securities transactions with TZ), viewing it merely as an inattentiveness to paperwork. Meanwhile, he tried to shift responsibility to his ex-wife or his assistants for these so-called paperwork errors.[483] Harrington's refusal to take full responsibility for his misconduct "and his continued finger-pointing heightens our concern that he may engage in future wrong doing"[484] and is an aggravating factor.[485]

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[479] *Id.* at 2 (General Principle No. 1).

[480] *Id.* at 3 (General Principle No. 3).

[481] *Id.* at 8 (Principal Consideration No. 13). We took Harrington's lengthy experience into account when finding that he acted intentionally or with a high degree of recklessness. *See Dep't of Enforcement v. Scholander*, No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *65–66 (NAC Dec. 29, 2014) (holding that an individual's significant industry experience bolsters a finding of recklessness), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016), *petition for review denied sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir 2017).

[482] Guidelines at 2–3 (General Principle No. 2) and 7 (Principal Consideration No. 1). In May 2018, FINRA revised the Guidelines by amending General Principle No. 2 to instruct adjudicators in disciplinary proceedings to consider customer-initiated arbitrations that result in adverse arbitration awards or settlements when assessing sanctions. These revisions apply only to complaints filed in FINRA's disciplinary system beginning June 1, 2018. *See* FINRA Regulatory Notice 18-17 (May 2, 2018), http://www.finra.org/industry/notices/18-17. Accordingly, the Panel did not consider LD and TZ's arbitrations in determining sanctions.

[483] *See, e.g.*, Tr. 613 ("there are certain clerical errors that I could have—I could have paid attention more to the documents that—some of them that you highlighted. I tend to not be as disciplined as I should, and I put a lot of reliance on my assistants. So there are definitely things that I could have done better."); Tr. 1751 ("[O]ne of the things that I may have been better at is sort of dotting I's and crossing T's and handling paperwork maybe a little bit more proactively."); Tr. 828 ("I . . . think there's paperwork that could have been handled better. We're all subject to that. But for any allegation that there's nefarious or illegal or falsification of documents, it's simply not true.").

[484] *Casas*, 2017 FINRA Discip. LEXIS 1, at *45; *Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 SEC LEXIS 3773, at *18 n.16 (Sept. 301, 2016) ("[Respondent's] refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future.").

[485] Guidelines at 7 (Principal Consideration No. 2); *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *98–99 (NAC Dec. 20, 2007) ("Epstein's failure to accept responsibility for his own actions

Finally, Harrington engaged in troubling conduct at the hearing. In the early afternoon on the second day of the hearing, Tuesday, June 12, 2018, right after the lunch break, Harrington announced he had just been notified that he was required to attend a proceeding in court in San Diego the next day relating to a child custody dispute with his ex-wife. As a result, Harrington said, he could not appear the next morning in Los Angeles at the ongoing disciplinary proceeding. Harrington added, however, that he hoped once his court hearing ended, he could return to Los Angeles in time to appear at the disciplinary proceeding in the afternoon.[486] The Hearing Officer continued the hearing until the afternoon of the next day, Wednesday.[487] But the court proceeding stretched into the afternoon on Wednesday,[488] and, as a result, Harrington did not appear at the disciplinary proceeding that day.[489] The Hearing Officer adjourned the proceedings again, this time scheduling it to recommence on Thursday, June 14, 2018.[490]

When the hearing resumed on Thursday, Harrington admitted that, in fact, he had known about his court proceeding earlier than he had originally told the Hearing Panel. He went on to say that he could not remember when he first learned of the proceeding; that he had hoped and believed it would be taken off the calendar;[491] and, that, therefore, he never told the parties or the Hearing Officer about it.[492]

The next day, Harrington's attorney in the court case testified by telephone in the disciplinary proceeding. His testimony revealed that Harrington had not been forthright with the Panel. The attorney told the Panel that the court order compelling Harrington's appearance had been issued almost two months earlier, on April 24, 2018. He went on to say that four days after receiving the order, he notified Harrington that the court had compelled Harrington's appearance, in person, on June 13, 2018, at 9 a.m., for what was not merely a custody dispute hearing, but a contempt trial.[493] According to the attorney, Harrington did not tell him about the existence of

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and his continued blame of others for the circumstances that have occurred are aggravating factors that we have considered in reaching our conclusion that a bar is an appropriate sanction in this case."). *See also Taboada*, 2017 FINRA Discip LEXIS 29, at *48–49 & n.34 (citing Guidelines at 7 (Principal Consideration No. 2)).

[486] Tr. 514–16, 519.

[487] *See* Hearing Officer Email Order (June 12, 2018, at 11:03 PM). For a summary of the circumstances leading to the adjournment, *see* Tr. 644–50.

[488] Tr. 651–52.

[489] Tr. 644.

[490] *See* Hearing Officer Email Order (June 13, 2018, at 6:30 PM).

[491] Tr. 884–87.

[492] Tr. 929–30.

[493] Tr. 1078–79, 1083–84, 1086–87.

the FINRA proceeding until the morning of the contempt proceeding,[494] at which time the attorney belatedly sought a continuance from the judge,[495] but it was denied.[496]

Harrington's failure to appear at the disciplinary proceeding on Wednesday, compounded by related delays (e.g., to receive testimony from his attorney in the court case), prevented the hearing from concluding within the time originally scheduled. It had to be resumed and completed three weeks later.

In sum, Harrington failed to timely apprise the parties and the Hearing Officer of a court-ordered appearance that conflicted with the long-scheduled disciplinary hearing; failed to inform his attorney in that proceeding about the scheduling conflict so he could timely seek a postponement of the court proceeding; and initially attempted to leave the Panel with the misimpression that he had just learned that the court had ordered him to appear at a custody proceeding. He also failed to produce the court order, even though the Hearing Officer directed him to do so on several occasions.[497] In its totality, this conduct demonstrated a lack of regard for the disciplinary process and a lack of candor toward the tribunal that reflected negatively on his ability to comply with regulatory requirements.[498]

Next, we turn to our sanctions analysis relating to each violation.

C. Harrington Is Barred for Converting LD's Funds and Ordered to Pay Disgorgement

"[C]onversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money."[499] The Guidelines for conversion recommend a bar, regardless of the amount converted.[500] This recommended sanction "reflects the reasonable judgment that, in the absence of mitigating factors warranting a different

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[494] Tr. 1084–85.

[495] Tr. 1088.

[496] Tr. 1085.

[497] *See, e.g.*, Hearing Officer Email Order (June 13, 2018, at 12:28 PM); Tr. 528, 891–93, 934–35, 937–39, 1064–65, 1745–46.

[498] *Cf. Dep't of Enforcement v. McCrudden*, No. 2007008358101, 2010 FINRA Discip. LEXIS 25, at *32 (NAC Oct. 15, 2010) (finding that respondent's obstructive conduct during the disciplinary proceeding was an aggravating factor in imposing sanctions); *Thomas S. Foti*, Exchange Act Release No. 31646, 1992 SEC LEXIS 3329, at *13 (Dec. 23, 1992) (citing lack of candor at a hearing is an aggravating factor).

[499] *Butler*, 2016 SEC LEXIS 1989, at *29 (internal quotation marks and footnotes omitted); *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 at *9 (Sept. 3, 2015) (internal quotation marks and footnotes omitted). *See also Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *33–34 (Jan. 9, 2015), *aff'd*, 641 F. App'x 27 (2d Cir. 2016) ("Misappropriation or misuse of customer funds constitutes a serious violation of the securities laws, involving a betrayal of the most basic and fundamental trust owed to a customer.").

[500] Guidelines at 36.

conclusion, the risk to investors and the markets posed by those who commit such violations justifies barring them from the securities industry."[501]

Because the Guidelines do not include Specific Considerations for us to consider, we reviewed the relevant Principal Considerations and General Principles.[502] We found aggravating factors present here. Harrington directly injured a customer[503] while obtaining a fairly substantial monetary benefit (nearly $20,000).[504] His conduct was especially disturbing because he created a relationship of trust and confidence with LD when she granted him discretionary authority over her account,[505] and then exercised that authority to sell securities from her account to generate funds that he converted. Harrington also tried to conceal his misconduct from FINRA and National during their investigations,[506] and even went so far as to beseech his victim to sign a false letter (which she refused to do).

The only mitigation present here is that Harrington was terminated by National because of concerns that he had converted customer funds. But we give this little mitigative weight. Under the Guidelines, it was Harrington's burden to prove that his termination "has materially reduced the likelihood of misconduct in the future."[507] He failed to meet that burden. Moreover, we find that Harrington's termination "is no guarantee of changed behavior, and it is not enough to overcome our concern that [he] poses a continuing danger to investors and other securities industry participants (including would-be employers) for the reasons discussed above."[508]

Finally, in determining the appropriate sanction here, we are mindful of the NAC's observations on the central role integrity plays in the securities industry and the need for FINRA to take forceful action when a respondent acts dishonestly. Quoting the SEC, the NAC wrote, "The securities industry 'presents a great many opportunities for abuse and overreaching, and depends heavily on the integrity of its participants.'"[509] "In light of our duty to protect the investing public and ensure the integrity of the market," the NAC continued, "we find we must

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[501] *Grivas*, 2015 FINRA Discip. LEXIS 16, at *25 (internal quotations omitted).

[502] *See Dep't of Enforcement v. Doni*, No. 2011027007901, 2017 FINRA Discip. LEXIS 46 at *__ n.26 (NAC Dec. 21, 2017).

[503] Guidelines at 7 (Principal Consideration No. 11).

[504] *Id.* at 8 (Principal Consideration Nos. 16, 17).

[505] *See Dep't of Enforcement v. The Dratel Group*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *60 (NAC May 2, 2014) *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1038 (Mar. 17, 2016).

[506] Guidelines at 7 (Principal Consideration No. 10), 8 (Principal Consideration No. 12).

[507] *Id.* at 5 (General Principle No. 7).

[508] *Olson*, 2015 SEC LEXIS 3629, at *18–19 (referencing former Principal Consideration No. 14 of the Guidelines); *see also Dep't of Enforcement v. Iida*, No. 2012033351801, 2016 FINRA Discip. LEXIS 32, at *19–20 (NAC May 18, 2016). *See also* Guidelines at 5 (General Principle No. 7).

[509] *Dep't of Enforcement v. Grafenauer*, No. C8A030068, 2005 NASD Discip. LEXIS 29, at *17 (NAC May 17, 2005) (quoting *Bernard D. Gorniak*, 52 S.E.C. 371, 373 (1995)).

act decisively in cases, like this one, in which the evidence proves the dishonesty and lack of veracity of a person associated with a member firm."[510] Accordingly, we bar Harrington.

We also determine that disgorgement is appropriate in this case. The Guidelines recommend that adjudicators consider a respondent's ill-gotten gains when determining an appropriate remedy. Disgorgement may be appropriate where "the record demonstrates that the respondent obtained a financial benefit from his or her misconduct."[511] Its purpose is "to prevent a respondent's unjust enrichment, and it is an appropriate remedy where, as here, a respondent has converted investor funds."[512] Harrington converted $19,974.64 in customer funds for his own benefit and should not be permitted to retain these ill-gotten gains. Accordingly, we order Harrington to pay that amount to FINRA,[513] plus interest running from August 21, 2012 (the date he obtained the funds), until paid.[514]

D. Harrington Is Barred for Failing to Disclose Private Securities Transactions, Making Misstatements, and Providing False Documents to National, and Ordered to Pay Restitution and Disgorgement (Third and Fourth Causes of Action)

"SEC case law and [FINRA] practice strongly suggest that sanctions be assessed per cause."[515] But "where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve [FINRA's] remedial

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[510] *Id*. (quoting *Dep't of Enforcement v. Brinton*, No. C049990005, 1999 NASD Discip. LEXIS 36, at *9 (NAC Dec. 14, 1999).

[511] Guidelines at 5 (General Principle No. 6).

[512] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *51 (NAC Dec. 29, 2015).

[513] The Guidelines provide that "Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct," adding that restitution orders should be calculated "based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence . . . . When a member firm has compensated a customer or other party for losses caused by an individual respondent's misconduct, Adjudicators may order that the individual respondent pay restitution to the firm." Guidelines at 4 (General Principle No. 5). While LD settled her arbitration, and Harrington did not contribute to it, the record does not reflect who paid the settlement, the amount of the settlement, and what part of the settlement was attributable to the conversion. *See* CX-132, at 5, ¶ 12. Therefore, we do not order restitution.

[514] The NAC explained that "[b]y ordering prejudgment interest on a disgorgement amount, an adjudicator achieves the proper deterrence for the misconduct because disgorgement alone does not reflect the time value of ill-gotten gains, and in effect, provides the respondent with an interest free loan until the disgorgement order is final." *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *51 n.35 (internal quotation marks omitted). The pre-judgment interest rate for disgorgement is the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *43–44 (NAC Apr. 26, 2013) (citing Guidelines at 11).

[515] *Dep't of Enforcement v. CMG Inst'l Trading*, No. 2006006890801, 2010 FINRA Discip. LEXIS 7, at *30 (NAC May 3, 2010).

goals."[516] We conclude that Harrington's failure to disclose his private securities transactions and his attempts to conceal them from National derive from the same underlying problem—his failure to disclose private securities transactions—and therefore we will impose a single, unitary sanction for this misconduct. [517]

The Panel began its assessment of the appropriate sanction by considering the purpose of NASD Rule 3040 and the seriousness of the violation. "The purpose of NASD Conduct Rule 3040 is to protect 'investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment.'"[518] A violation of this Rule "deprives investors of a member firm's oversight and due diligence, protections they have a right to expect."[519]

We also considered the Guidelines applicable to undisclosed private securities violations. For private securities violations, the Guidelines recommend a fine of between $5,000 and $73,000 and a suspension or bar, depending on the results of a two-step evaluation. The first step of this evaluation consists of assessing the extent of the selling away, taking into account "the dollar amount of sales, the number of customers, and the length of time over which the selling away occurred."[520] The violative transactions that serve as the basis for this charge totaled $276,000 in sales to two purchasers: AB in August 2012, and TZ in January and February 2013.

As part of this assessment, we are to consider a "range of sanctions based on the dollar amount of sales." When the dollar amount of sales is between $100,000 to $500,000, as here, the Guidelines recommend, for this first step, that we consider a suspension of three to six months.[521]

After making this initial assessment, the Guidelines require us to "consider other factors as described in the Principal Considerations for this Guideline and the General Principles applicable to all Guidelines. The presence of one or more mitigating or aggravating factors," the

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[516] *Id*. at *30–31; *see also Mielke*, 2015 SEC LEXIS 3927, at *59 (affirming FINRA's imposition of a single sanction for violations that are based on the same facts); Guidelines at 4 (General Principle No. 4).

[517] *See Braff*, 2011 FINRA Discip. LEXIS 15, at *24 (imposing a unitary sanction for failing to disclose outside brokerage accounts and making false statements to the firm about the absence of such accounts, explaining that the misconduct stemmed "from a single source, which is his failure to disclosure the existence of his outside brokerage accounts").

[518] *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *46 & n.47 (Oct. 6, 2008) (quoting *Hartley*, 57 S.E.C. at 775 n.17).

[519] *Dep't of Enforcement v. Calandro*, No. C05050015, 2007 FINRA Discip. LEXIS 17, at *28 (NAC Dec. 14, 2007) (quoting *Keyes*, 2006 SEC LEXIS 2631, at *15).

[520] Guidelines at 14.

[521] *Id*.

Guidelines advise, "may either raise or lower the above described sanctions." The Guidelines also direct adjudicators to consider disgorgement. [522]

There are no Guidelines directly applicable to Harrington's misrepresentations and falsifications. Therefore, we looked for guidance to the Guidelines for the most analogous violation.[523] We conclude that the Guidelines for forgery and/or falsification of records under FINRA Rule 2010 are the most analogous, and we utilized them to assist our formulation of sanctions.[524] Where a respondent affixes a signature to or falsifies a document without authorization, in the absence of other violations or customer harm, the Guidelines recommend a fine of $5,000 to $146,000. If a respondent affixes a signature to or falsifies a document without authorization or ratification, then, in the absence of other violations or customer harm, the adjudicators should consider suspending the respondent for two months to two years. But where, as here, a respondent affixes a signature to or falsifies a document without authorization, in furtherance of another violation, resulting in customer harm or accompanied by significant aggravating factors, a bar is standard.[525]

Next, we considered the Principal Considerations and Specific Considerations. We found numerous aggravating factors present here. The dollar volume of sales was substantial, totaling $276,000;[526] Harrington sold the Islet shares to at least five purchasers over a period of several months;[527] he had a consulting relationship with Islet (although the record is unclear as to whether, and to what extent, he disclosed that to purchasers);[528] National customer TZ was injured by not being able to deposit his shares of Islet;[529] Harrington did not provide even verbal notice to National of the details of the proposed transactions;[530] he directly participated in the

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[522] *Id.*

[523] *Id.* at 1 ("For violations that are not addressed specifically, Adjudicators are encouraged to look to the guidelines for analogous violations.").

[524] *See Braff*, 2011 FINRA Discip. LEXIS 15, at *26 & n.16 (stating that respondent's false statements about the existence of his outside business accounts on this firm's disclosure forms caused the firms' records to contain false information concerning those accounts and therefore found that the Guidelines for forgery and/or falsification of records were "helpful and the most analogous under the facts presented.") (citing *Dep't of Enforcement v. Duma*, No. C8A030099, 2005 NASD Discip. LEXIS 46, at *27 & n.15 (NAC Oct. 27, 2005)) (applying Guidelines for falsification of records in the context of false statements under NASD Rule 3050(c)). Here, Harrington's misstatements and falsifications caused National to have false information in its records concerning the nature of the payments he had received.

[525] Guidelines at 37.

[526] *Id*. at 14 (Specific Consideration No. 1).

[527] *Id.* at 7 (Principal Consideration No. 8) and 14 (Specific Consideration Nos. 2, 3).

[528] *Id.* at 14 (Specific Consideration No. 5).

[529] *Id.* at 15 (Specific Consideration Nos. 7, 8).

[530] *Id.* (Specific Consideration No. 9).

transactions as seller of the securities;[531] and he concealed his wrongdoing by numerous means.[532] Finally, the nature of the misstatements and falsified documents related directly to National's investigation into possible outside business activities/private securities transactions.[533]

In light of the numerous aggravating factors, and the absence of any mitigating factors, Harrington has demonstrated that he is fundamentally unfit to continue as an associated person of a FINRA member. Serious sanctions are appropriate to remedy his violations, protect investors, and deter others from engaging in similar misconduct. Therefore, we find that Harrington should be barred from association with any FINRA member firm.

We also order disgorgement, as directed by the Guidelines,[534] so that Harrington does not retain the financial benefit of his wrongful conduct. Harrington shall disgorge to FINRA the sales proceeds relating to the private securities transaction with AB, namely, $100,000, plus interest running from August 21, 2012, until paid.[535]

Further, Harrington shall pay restitution and disgorgement relating to the sales to TZ. Harrington received $176,000 from TZ for those sales. But because National paid TZ $105,000 to resolve his arbitration claim, Harrington shall pay restitution to National in that amount, plus interest, running from February 15, 2013 (the date of the last sale of Islet stock to TZ), until paid. The remaining $71,000, plus interest running from February 15, 2013, until paid, shall be paid to FINRA as disgorgement. In light of the bar and disgorgement, we do not also impose a fine.[536]

E. Milberger Is Suspended for One Year for Falsifying Wire Request Forms and Providing Them to the Firm (Second and Fifth Causes of Action)

Because Milberger's falsification and recordkeeping violations are based on the same facts and course of conduct, we impose a unitary sanction.[537] In arriving at the unitary sanction, we considered the applicable Guidelines—forgery and/or falsification of records and recordkeeping—as well as the General Principles and pertinent Principal and Specific Considerations.

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[531] *Id.* (Specific Consideration No. 11).

[532] *Id.* at 7 (Principal Consideration No. 10), 8 (Principal Consideration No. 12), and 15 (Specific Consideration No. 13). Harrington also enlisted the participation of someone who trusted him—Milberger—in the bank statement alteration and lied to her about its propriety. This is troublesome, although, as we discuss below, this does not excuse Milberger's misconduct.

[533] Guidelines at 37 (Specific Consideration No. 1).

[534] *Id.* at 5 (General Principle No. 6) and 14 n.1.

[535] The evidence did not establish that AB was injured as a result of the private securities violations.

[536] Guidelines at 10.

[537] *Cf. Fillet*, 2015 SEC LEXIS 2142, at *53–55 (sustaining unitary sanction imposed for falsifying by backdating firm documents, thereby causing the firm's records to be inaccurate, and for providing those documents to FINRA).

We discussed above, the Guidelines for forgery and/or falsification of records, which are applicable to Milberger's falsification of the wire request forms.[538] Turning next to Milberger's recordkeeping misconduct, we begin with the seriousness of the violation. "[T]he Commission has stressed the importance of the records that broker-dealers are required to maintain pursuant to the Exchange Act, describing them as the keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies."[539] Under the Guidelines for recordkeeping violations, adjudicators are directed to consider a fine of $1,000 to $15,000 and a suspension in any or all capacities for a period of 10 business days to three months. When aggravating factors predominate, however, we should consider a fine of $10,000 to $146,000, or a higher fine where significant aggravating factors predominate. When aggravating factors predominate, we should also consider a suspension of up to two years or a bar.[540]

Here, there are both aggravating and mitigating factors present. On the one hand, the falsified documents were wire request forms—the key documents that facilitated Harrington's conversion of customer funds and helped his wrongdoing escape detection;[541] LD did not see the wire request forms—other than the first one—before her signature was affixed to them;[542] nor did LD re-sign the forms or ratify her copied signature;[543] and she never authorized the transfer of funds into Harrington's account for his own use.[544]

On the other hand, there was no evidence that Milberger knew she was facilitating a conversion of LD's funds. Rather, she had a good faith, but mistaken, belief that LD had authorized the transfer of funds; that the funds were being transferred for a legitimate purpose; and that Harrington had first discussed the full circumstances relating to the transfer with LD.[545] Further, Milberger did not benefit financially from her wrongdoing.[546] And, while she did not express remorse before the Complaint was filed, or even in her Answer, we found, based on her hearing testimony, that she truly regretted having falsified the wire request forms. Thus, we viewed her remorse as somewhat mitigative.[547]

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[538] Guidelines at 37.

[539] *Dep't of Enforcement v. Trevisan*, No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *35 (NAC Apr. 30, 2008) (quoting *Edward J. Mawood & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979)).

[540] Guidelines at 29.

[541] *Id.* (Specific Consideration Nos. 1, 5) and 37 (Specific Consideration No. 1).

[542] *Id.* at 37 (Specific Consideration No. 3).

[543] *Id.* (Specific Consideration No. 5).

[544] *Id.* (Specific Consideration No. 4).

[545] *Id.* (Specific Consideration No. 2).

[546] *Id.* at 8 (Principal Consideration No. 16).

[547] *See id*. at 6 (Principal Consideration No. 2); *Dep't of Enforcement v. Kelly*, No. E9A2004048801, 2008 FINRA Discip. LEXIS 48, at *32 & n.34 (NAC Dec. 16, 2008) (holding that, while accepting responsibility before intervention has "the greatest mitigative weight," later admission of wrongdoing has some mitigative weight); *Dep't*

Balancing the aggravating and mitigating factors, we find that a one-year suspension is an appropriately remedial sanction for Milberger's wrongdoing. In light of this lengthy suspension, we exercise our discretion and do not also impose a fine, as we find that it would not serve a remedial purpose in this instance.[548]

F. Harrington Is Barred for Providing False Documents and Information to FINRA and for Trying to Conceal from FINRA His Conversion of LD's Funds (Sixth and Seventh Causes of Action) and Milberger Is Suspended for One Year for Providing a False Document to FINRA (Sixth Cause of Action)

1. Harrington

Harrington's FINRA Rule 8210 violations for providing false documents and information to FINRA and his FINRA Rule 2010 violations based on his attempt to have LD sign a false statement derive from the same underlying wrong: Harrington's obstruction of FINRA's investigation. Therefore, we impose a unitary sanction for these violations.

"Providing false and misleading information to FINRA staff during an investigation mislead[s] [FINRA] and can conceal wrongdoing and thereby subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest."[549] Because this violation is so serious—posing a risk of harm to both investors and the market—the SEC has concluded that a violator is rendered "presumptively unfit for employment in the securities industry."[550]

The Guidelines reflect the seriousness of this violation. "The failure to respond truthfully to a FINRA Rule 8210 request is as serious and harmful as a complete failure to respond, and comparable sanctions are appropriate."[551] For failing to respond or to respond truthfully, the Guidelines recommend a fine of $25,000 to $73,000 and state that a bar is the standard sanction. However, where mitigation exists, we are directed to consider suspending the individual for up to two years. In determining the appropriate sanction for a FINRA Rule 8210 violation, the Guidelines identify the importance of the information requested from FINRA's perspective as a

of Enforcement v. Golonka, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *37 (NAC Mar. 4, 2013) ("[W]e assign only limited mitigative weight to Golonka's remorse because he did not express it until after his Firm had detected some of his violations."). *But see Mizenko*, 2004 NASD Discip. LEXIS 20, at *18 (admission of misconduct was not mitigating because it came after respondent's firm detected the forgery and confronted respondent with evidence).

[548] Guidelines at 10.

[549] *Taboada*, 2017 FINRA Discip. LEXIS 29, at *42 (internal quotation marks omitted) (quoting *Ortiz*, 2008 SEC LEXIS 2401, at *32).

[550] *Ortiz*, 2008 SEC LEXIS 2401, at *32.

[551] *Harari*, 2015 FINRA Discip. LEXIS 2, at *31.

Specific Consideration.[552] The false information and documents Harrington provided were important as they directly related to the subjects of the investigation.

We also considered the numerous aggravating factors present here. Harrington's violations evidenced a pattern of wrongdoing that took several forms and related to two separate subject matters under investigation: conversion of funds and potential private securities transactions.[553] He intentionally provided false OTR testimony and false documents to FINRA relating to both subjects. Further, Harrington's attempt to obstruct the investigation by importuning LD— the victim of his conversion and someone who trusted him—to make a false statement supporting his untruthful OTR testimony is especially troublesome; it demonstrates a blatant and callous disregard of both his customer's best interests and his regulatory obligations. In a similar vein, Harrington directed Milberger to alter a bank statement that was then produced to FINRA, thereby betraying her trust and leading her to commit a violation of FINRA Rule 8210.

Because there are numerous aggravating circumstances, no factors mitigating the risk of future harm, and a presumption of unfitness based on the violations, we find that Harrington's "lack of veracity both in his document production and testimony warrants a bar."[554]

2. Milberger

In determining the appropriate sanction for Milberger, we find that the falsified document—a bank statement—was important to the investigation. The altered entry on that bank statement related to a payment from a purchaser in a private securities transaction. This directly related to the subject of the investigation. The alteration was intentional,[555] and Milberger also falsely testified at her OTR about the circumstances of the alteration. These circumstances are aggravating.

There are, however, a number of mitigating factors. At the time of her wrongdoing, Milberger, an associated, non-registered person, was acting under the direction of Harrington, her supervisor, who not only directed her to alter the document but also reassured her that it was permissible. While she did not accept full responsibility before the Complaint was filed, she did admit to the alteration in her Answer. And even though she did not recant her false OTR testimony and show genuine remorse until months after FINRA brought this disciplinary proceeding, her remorse was genuine—at the hearing, she appeared chastened and contrite; therefore, we gave it some limited weight. Most importantly, we find it unlikely that she would

[552] Guidelines at 33.

[553] *Id*. at 7 (Principal Consideration No. 8).

[554] *Taboada*, 2017 FINRA Discip. LEXIS 29, at *52 ("Taboada's lack of veracity both in his document production and testimony warrants a bar.").

[555] Guidelines at 8 (Principal Consideration No. 13).

commit a similar violation in the future. These factors contributed to our conclusion that it is not necessary to bar Milberger in order to protect the investing public.[556]

Accordingly, we find that a suspension of one year from associating with a member firm is a sufficiently remedial sanction. In light of the lengthy suspension, we do not find that a remedial purpose would be served by also imposing a fine, and therefore, we decline to do so.

V. Order

Respondent Kyle P. Harrington is:

1. Barred from associating with any FINRA member firm for violating FINRA Rule 2010 by converting customer funds. He is also ordered to pay $19,974.64 in disgorgement to FINRA, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from August 21, 2012, until paid.

2. Barred from associating with any FINRA member firm for violating NASD Rule 3040 and FINRA Rule 2010 by failing to disclose private securities transactions and making misstatements and providing false documents to his member firm employer. He is also ordered to pay:

    a. $100,000 in disgorgement to FINRA, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from August 21, 2012, until paid;

    b. $105,000 in restitution to National, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from February 15, 2013, until paid;[557] and

    c. $71,000 in disgorgement to FINRA, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from February 15, 2013, until paid.

[556] *Doni*, 2017 FINRA Discip. LEXIS 46, at *__ ("To validate barring Doni as a remedial sanction, our foremost consideration must be whether doing so protects the public from further harm . . . . Under these particular facts and circumstances, we find that a bar does not serve the public interest.").

[557] Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to the staff of FINRA's Department of Enforcement, District 2, no later than 90 days after the date when this decision becomes final.

3. Barred from associating with any FINRA member firm for violating FINRA Rules 8210 and 2010 for providing false documents and information to FINRA and for trying to conceal his conversion of customer funds from FINRA.

4. If this decision becomes FINRA's final disciplinary action, Harrington's bars will take immediate effect.

Respondent Linda C. Milberger is:

1. Suspended for one year in all capacities from associating with any FINRA member firm for violating FINRA Rules 2010 and 4511 by falsifying wire request forms and providing them to her member firm employer.

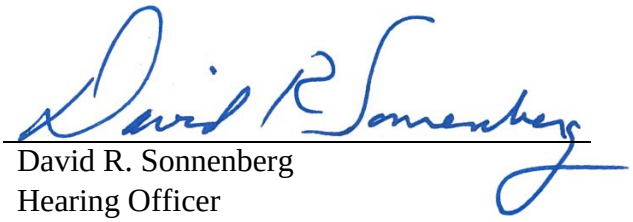
2. Suspended for one year in all capacities from associating with any FINRA member firm for violating FINRA Rules 8210 and 2010 by providing a false document to FINRA.

3. The suspensions imposed herein shall be served consecutively. If this decision becomes FINRA's final disciplinary action, the first suspension shall become effective with the opening of business on January 7, 2019. The second suspension shall become effective immediately upon the end of the first suspension.

Respondents are ordered to pay the costs of the hearing in the amount of $15,679.82, which includes a $750.00 administrative fee and a $14,929.82 fee for the cost of the hearing transcript. Their responsibility to pay these costs is apportioned as follows: Harrington shall pay two thirds, i.e., $10,453.21, and Milberger shall pay one third, i.e., $5,226.61.[558]

[558] Unless "equity otherwise dictates," responsibility for costs is generally imposed jointly and severally on multiple parties found liable for misconduct. *Dep't of Enforcement v. Newport Coast Sec. Inc.*, No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *223 (NAC May 23, 2018), *appeal docketed*, No. 3-18555 (SEC June 22, 2018) (citing *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497 (8th Cir. 2002)). There is precedent in this forum for apportioning costs between respondents. *See, e.g.*, *Dep't of Enforcement v. Scholander*, No. 2009019108901, 2013 FINRA Discip. LEXIS 37, at *85 & n.158 (OHO Aug. 16, 2013) (requiring two respondents to each pay one half of the costs), *aff'd*, 2014 FINRA Discip. LEXIS 33 (NAC Dec. 29, 2014), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016); *Dist. Bus. Conduct Comm. v. Equity One Corp.*, No. DEN-659, 1988 NASD Discip. LEXIS 30, at *114–15 (Bd. of Governors Aug. 29, 1988) (imposing costs on a per capita basis because "respondents … had differing degrees of involvement in the facts underlying the allegations of the complaint," their hearing presentations "varied considerably in length and complexity," and it was not "appropriate to burden any one of these respondents with the entire cost of the … proceeding in order to remain in the securities business."). We find that equity dictates the imposition of costs on the apportioned basis set forth herein given the differing degree of responsibility between Harrington and Milberger for the misconduct alleged in the Complaint and because Harrington prolonged the hearing, unduly increasing its costs, as discussed above at pages 54–55. Also, if costs are imposed jointly and severally, and Harrington fails to pay them, it would be unfair to impose all the costs on Milberger in order for her to re-associate with a member firm.

The restitution (including interest), disgorgement (including interest), and costs shall be payable on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this matter.[559]



David R. Sonnenberg
Hearing Officer
for the Extended Hearing Panel

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