FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DENNIS A. MEHRINGER, JR. (CRD No. 722569), Respondent.	Disciplinary Proceeding No. 2014041868001 Hearing Officer—MJD **EXTENDED HEARING PANEL DECISION** April 30, 2018

Respondent recommended unsuitable mutual fund Class A shares to a customer and exercised discretion in the customer's accounts without written authorization. He breached his fiduciary duties to a charitable trust and gave his employer firm false information about his use of the charity's funds. He also settled a customer's complaint without notifying his firm and later falsely told the firm he had not received or settled any customer complaints. Respondent is barred from associating with any FINRA member firm in any capacity, fined $50,000, and ordered to disgorge $108,131.21, plus interest. Respondent is ordered to pay costs.

Appearances

For the Complainant: Jonathan Golomb, Esq., and Lane Thurgood, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Sylvia Scott, Esq., and C. G. Gordon Martin, Esq.

DECISION

I. Introduction

FINRA's Department of Enforcement filed a Complaint against Respondent Dennis A. Mehringer, Jr. ("Respondent" or "Mehringer") alleging six causes of action. The most serious allegation, contained in cause one, is that Mehringer made unsuitable recommendations to customer ES that resulted in costly short-term trading in mutual fund Class A shares, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010. Cause two alleges that Mehringer exercised discretion in ES's accounts without written authorization, in violation of NASD Rule 2510 and FINRA Rule 2010.

Causes three through six charge Mehringer with violations of FINRA Rule 2010, which obligates associated persons to observe high standards of commercial honor and just and equitable principles of trade. Cause three alleges that Mehringer breached his fiduciary duties to a charitable trust that was also his customer, primarily by failing to ensure that its funds were used for charitable purposes. Cause four charges Mehringer with giving his firm false information about his use of the charity's assets.

Cause five alleges that Mehringer settled a customer complaint for nearly $48,000 without disclosing the existence of the complaint or the settlement to his firm. Cause six alleges that within five months of settling the customer complaint Mehringer submitted an annual firm compliance questionnaire in which he falsely stated that he had reported all written or oral customer complaints and had not settled any customer complaint.

The Extended Hearing Panel finds that Mehringer committed each of the violations alleged in the Complaint.[1] For the unsuitable recommendations to customer ES alleged in cause one, the Panel bars Mehringer from associating with any FINRA member firm in any capacity, imposes a $50,000 fine, and orders him to disgorge $108,131.21, together with prejudgment interest.

In light of the bar for the unsuitable recommendations of Class A shares, the Panel assesses but does not impose additional sanctions for Mehringer's misconduct alleged in causes two through six.

II. Respondent and Jurisdiction

Mehringer was first associated with a FINRA member firm in 1981.[2] Since March 2009, he has been registered with Western International Securities, Inc. ("Western International" or the "firm"), as a General Securities Representative, General Securities Principal, Municipal Fund Securities Principal, Direct Participation Programs Representative, and Investment Company and Variable Contracts Products Representative.[3]

FINRA has jurisdiction over Mehringer under Article V of FINRA's By-Laws because he is currently registered with FINRA through a member firm and the alleged misconduct occurred while he was registered with FINRA.

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[1] The hearing of this matter took place September 11-14, 2017. In addition to Mehringer, Enforcement called three witnesses to testify at the hearing: customer ES, an Enforcement investigator, and the chief compliance officer at Mehringer's firm, Western International Securities, Inc. Mehringer testified in his case and he called a forensics investigator to testify about trading activity in ES's account. The parties filed post-hearing briefs and reply briefs.

[2] Complaint ("Compl.") ¶ 4; Answer ("Ans.") ¶ 4; Complainant's Exhibit ("CX-_") 1, at 11.

[3] CX-1, at 4-6. This matter originated from a customer complaint ES filed with FINRA in June 2014 against Mehringer, alleging excessive and unauthorized trading in his accounts, and from an annual cycle examination of Western International. Hearing Transcript ("Tr.") 145-46; CX-1, at 20-23; CX-2.

III. Mehringer Made Unsuitable Recommendations to ES to Purchase Mutual Fund Class A Shares

A. Findings of Fact

1. Customer ES's Background and Accounts

Since 1993, ES has owned a company that provides post-production audio and sound recording services for the television and movie industry in Los Angeles. ES's accountant introduced him to Mehringer. ES was married and 45 years old when he opened his first brokerage accounts with Mehringer in mid-2010. Mehringer handled ES's company's trust and employee non-brokerage accounts before ES opened securities accounts with him.[4]

Between July 2010 and May 2011, ES opened five brokerage accounts at Western International, including a company voluntary employees' beneficiary association account ("company employee account").[5] He transferred cash and securities from accounts he held at another broker-dealer.[6] ES had between $3.3 million and $5 million in assets in the accounts he held with Mehringer.[7]

According to new account forms, ES's annual income in 2010 and 2011 was $500,000 and his net worth was $6 million, $4 million of which was held in liquid investments. The new account forms stated that ES had 20 years of experience investing in stocks, bonds, and mutual funds, and no experience trading options and commodities.[8] ES had brokerage accounts at another broker-dealer before opening accounts at Western International, but he denied that he had between 15 and 20 years of investment experience when he moved his accounts to Mehringer.[9] Years earlier, ES had also opened an online personal account that he used to make

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[4] Tr. 39, 73; Respondent's Exhibit ("RX-_") 21, at 65-72.

[5] The five accounts were (i) ES's defined benefit pension plan ("pension account," opened July 2010); (ii) a joint account between ES and his wife ("joint account," opened November 2010), (iii) ES's 401(k) profit sharing plan ("401(k) account," opened May 2011), and (iv) ES's personal account ("personal account," opened July 2011). ES's accountant was the trustee and signatory for the fifth account, the company employee account (opened November 2010). Tr. 32-41; Joint Exhibit ("JX-_") 4; JX-5; JX-6; JX-7; JX-8.

[6] Tr. 147-48. During the relevant period, ES transferred over $1.2 million in cash and $3.8 million in securities into his five brokerage accounts. RX-1, at 1.

[7] Tr. 611.

[8] JX-4; JX-5; JX-6; JX-7. Mehringer testified that he—Mehringer—wrote on the new account application that ES had 20 years of investment experience because "he had been in the market for a number of years" and he "knew the difference between common stocks, bonds, mutual funds, … and he didn't know anything about equity participation, CDs, though I had to spend a couple of hours' time with him to explain how they worked." Tr. 418. Mehringer also testified that he knew ES had at least 10 years' experience but asked ES whether "20 years sound[ed] about right," and that ES agreed. Tr. 425-26.

[9] Tr. 60-61.

one investment in a security.[10] ES testified that he had "[e]xtremely little [investment] experience."[11]

With the exception of the company employee account, ES's investment objective for each of his accounts was "Growth." ES testified that he selected "Growth" as his investment objective because "it was at the time in my life that I felt I was earning money from my business, and I didn't need an income. I just wanted the long-term outlook [sic] to grow the fund … for the future."[12] ES selected "Moderate" as his "risk profile"[13] because his "mindset was just kind of middle ground … not aggressive because I don't want to lose what I've painstakingly amassed … and not too conservative because I wouldn't be building any growth."[14] His investment time horizon for each account was in the middle of the three ranges available on the new account forms—five to 10 years.[15] ES testified that he did not intend to engage in short-term trading, because his "MO [*modus operandi*] was to look at the long term and to kind of approach things in a moderate way. The short-term trading was too risky."[16]

ES proposed only two specific investment ideas, both of which his brother had suggested to him: Netflix, Inc., and Walt Disney Company. Mehringer advised against investing in Disney, and ES agreed.[17] Mehringer recommended and solicited all of ES's accounts to invest in mutual fund Class A shares.[18]

2. Origin of the Investigation: ES Receives a Tip

Sometime in the summer of 2013, a former broker at Western International who worked for and was supervised by Mehringer contacted ES.[19] ES testified that the person told him he

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[10] Tr. 61-62.

[11] Tr. 31.

[12] Tr. 34. According to his testimony, ES did not select one of the more aggressive options available on the form—"Trading" or "Speculation"—as an investment objective "because I wanted to play it rather conservatively, minimal amount of risk, and I feel that those two ["Trading" or "Speculation"] would be too much risk up and down involved." Tr. 34.

[13] The application form for the company employee account indicated that the "return objective" was "Income and Growth," the risk profile was "Moderate," and the investment time horizon was "Long (>10 years)." The company employee account's annual income was $58,000, according to the form, and the net worth or the assets held by the account totaled over $1.5 million. JX-8.

[14] Tr. 34-35.

[15] JX-4; JX-5; JX-6; JX-7. The other two options for investment time horizon were "Short (0-5 years)" and "Long (>10 years)."

[16] Tr. 56.

[17] Tr. 56-57, 79, 90-91; RX-13, at 2-3; RX-14, at 2.

[18] Mehringer did not dispute that all of the transactions in Class A shares in ES's accounts were solicited. The trade confirmations for Class A shares transactions were marked "solicited." RX-46; RX-47; RX-44; RX-49; RX-50.

[19] Tr. 45-46.

should look at his account statements to "see what Mr. Mehringer was doing" because "there [were] things going on with my accounts that weren't on the up-and-up, and I was losing money."[20] ES met with the person two or three times to discuss activity in his accounts. The former broker told ES that Mehringer was excessively trading his accounts and charging him unfairly high commissions.[21] On September 4, 2013, ES emailed Mehringer instructing him to cease all trading in his accounts. It was also at around this time that ES last spoke with Mehringer.[22] ES retained an attorney, and in June 2014 filed an arbitration claim against Mehringer and Western International with FINRA Dispute Resolution.[23]

3. Overview: Mehringer's Trading in Class A Shares in ES's Accounts

a. Mehringer's "Trading Strategy"

According to Mehringer, when he met with ES before opening his accounts, they discussed his general investment strategy. Mehringer explained that he would place ES's assets in three different "buckets," as he called them—CDs, equities, and mutual funds, which were primarily Class A shares.[24] Mehringer testified that ES went along with the proposed general investment strategy, and agreed to place 40 percent of his account funds in CDs, 30 percent in equities, and 30 percent in mutual funds.[25]

Mehringer had about 350 customers in 2010. ES became one of his top 20 customers in terms of commissions generated and was the source of about 10 percent of the commissions Mehringer earned from 2010 to 2013, the period that ES had accounts with Mehringer.[26]

b. Commissions Charged

Approximately 36 percent of the purchase and sale transactions in all of ES's accounts were in Class A shares.[27] Mehringer testified that he traded Class A shares in ES's accounts to

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[20] Tr. 45-46.

[21] Tr. 47, 123. Aside from the former broker, no one in a supervisory or compliance capacity ever contacted ES about the trading activity in his accounts. Tr. 139.

[22] Tr. 53-54, 619; CX-33.

[23] Tr. 49-51, 464-65; CX-1, at 20-24; CX-2, at 7. In the customer complaint filed with FINRA, ES alleged that Mehringer bought and then sold front-end loaded mutual funds after a short holding period for the purpose of generating commissions and fees and engaged in the transactions without ES's authorization. CX-2, at 7. ES, Mehringer, and Western International settled the claim in June 2016, which Enforcement says made ES whole. CX-1, at 21.

[24] Tr. 419, 475-77.

[25] Tr. 419-20.

[26] Tr. 607-09.

[27] Tr. 157-58, 645; RX-1, at 26. This includes investments in three Rydex Class A funds. Tr. 645; RX-1, at 23-25. CDs made up 5 percent of all transactions and equities were nearly 60 percent. Tr. 646; RX-1, at 26. In three years,

compensate for the lower commissions he charged on equity and other trades. According to Mehringer, ES had agreed to this because Mehringer was charging "a really, really low amount … for the common stock trades."[28] The higher commissions on Class A shares "equal[ed] out" his overall compensation because he was charging less for stock and CD transactions.[29] Mehringer testified that he told ES he would pay commissions on CD purchases, a $50 or $100 commission on each equity trade, and between 3 and 5 percent on mutual fund purchases. Mehringer assured ES that this would be less overall than what ES was paying his prior broker in commissions.[30] Mehringer estimated that ES was paying his prior broker an average of about 3 percent, after factoring in all the fees, but claimed ES paid commission rates that averaged 2 percent per year at Western International.[31]

Actually, Mehringer often charged ES considerably more than $50 or $100 for equity trades. For example, on February 3, 2011, Mehringer recommended that ES invest in multiple equities in his pension account.[32] The next day, he sold positions totaling over $788,000 in eight different mutual fund Class A shares, and used the proceeds to buy over $569,000 of common stock of 14 different companies.[33] On the 18 buy executions, Mehringer charged ES commissions that were more than 1.4 percent, most of which exceeded $600, and one was $718.[34] On June 3, 2011, also in the pension account, Mehringer charged ES commissions between 2.36 and 2.8 percent for three solicited equity purchases.[35]

ES testified that Mehringer told him he was paying no more than a 1 percent commission on all securities trades.[36] ES testified that although he sometimes read trade confirmations, he did

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Mehringer engaged in 907 securities transactions in Class A Shares (including the Rydex Class A share funds), CDs, and equities in ES's five accounts. Tr. 646; RX-1 at 26.

[28] Tr. 424.

[29] Tr. 589.

[30] Tr. 477.

[31] Tr. 476-78.

[32] RX-11, at 2.

[33] Tr. 87, 118-19; RX-2, at 3; RX-47, at 72-77.

[34] RX-47, at 72-75. Mehringer charged ES more than $10,000 in commissions for all the equity investments made on February 4, 2011. One commission, for $228, on a $4,808 purchase of 1,000 shares of Citigroup, Inc., amounted to 4.7 percent.

[35] RX-47, at 47. As another example, on May 23, 2011, Mehringer charged ES a commission of $296 for a solicited purchase of more than $12,000 in shares of Microsoft Corporation for his pension account, which amounted to a 2.4 percent commission.

In the joint account, on April 21, May 18, and June 14, 2011, Mehringer charged commissions between 2 and 3 percent for eight purchases of equities that he solicited. RX-49, at 20, 22, 26. In another investment in the joint account, on April 18, 2011, Mehringer charged a commission of $318, or 4.4 percent, on a solicited purchase of 1,600 shares of Citigroup, Inc., totaling $7,152. RX-49, at 26.

[36] Tr. 122-26. ES testified that in an exchange of emails Mehringer told him that 1 percent would be the highest commission and some trades would have no commission. Tr. 126.

not notice or understand that the confirmations for the A share purchase transactions disclosed sales charges, or commissions. He testified that had he understood he was being charged commissions as high as 5 percent, he would have "asked questions."[37]

In contrast, Mehringer testified that when he met with ES, they reviewed trade confirmations together, and Mehringer identified the commission and trade amounts in Class A shares.[38] The Panel does not find this credible. ES had no incentive to mislead the Panel as he had already been made whole as a result of his arbitration. It is apparent to the Panel that even though he was a successful businessman, ES did not pay attention to and did not understand the activity in his accounts. Mehringer capitalized on ES's inattention and inexperience. No reasonable investor would have countenanced the frequent and costly in-and-out trading in Class A shares that Mehringer executed in ES's accounts. The Panel finds ES credible, and that Mehringer told him that he would charge a commission of no more than 1 percent on all securities trades. We also conclude that ES did not review all confirmations or understand those he did review.

c. Mehringer's Preference for Trading Class A Shares

The Complaint alleges that from 2010 to 2013 Mehringer engaged in 82 short-term sets of transactions in Class A shares.[39] Most of the sets of violative transactions took place in two accounts: ES's pension account and the company employee account. These two accounts were by far the largest of ES's five accounts.[40] The 82 sets of transactions include 14 intra-day switches of Class A mutual funds (identified in Addendum A attached to this Decision). He invested in 45 different mutual fund Class A shares. Mehringer testified that he did his own research to help him decide which mutual funds to invest in and did not rely on third-party services that evaluated mutual fund performance.[41] In each of the 82 groups of transactions,[42] the

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[37] Tr. 139-40. *See also* Tr. 128-38. The confirmations for purchases of Class A shares identified the front-end loads as a percentage figure and described them as "sales charge paid." The confirmations did not provide ES with a specific dollar amount charged. *See* RX-47; RX-48; RX-49; RX-50; RX-51.

[38] Tr. 585. Mehringer said that in "every instance" he pointed out the commission amount to ES, and that he does this "with every client." Tr. 585.

[39] The Complaint alleges that there were 84 sets of unsuitable A share trades in ES's accounts. Compl. ¶¶ 10-13, Attachment A. Before the hearing, however, Enforcement removed two sets of purchases and sales because they were in fact offsetting cancelled trades. These include a $25,000 purchase and sale of Pimco Real Estate Return Strategy on April 5, 2013, and a $49,353 purchase and sale of Putnam Equity Spectrum Fund on March 25, 2013. These two cancelled purchase and sale pairs were removed from CX-28, which lists the 82 sets of violative transactions in Class A shares. Tr. 161; Enforcement's Pre-Hearing Br., at 3-4 n.4; CX-28.

[40] *See* RX-42; RX-43; RX-44; RX-45; RX-46.

[41] Tr. 568-69.

[42] Mehringer frequently made more than one purchase in a mutual fund A share before selling the entire position in a single sell transaction. For example, he made five purchases of Invesco Global Health Care A shares from September 25, to December 6, 2012, totaling $99,150, before selling them on April 3, 2013. CX-28, at 2. In another set of transactions, he made seven purchases of Putnam Equity Spectrum between August 7, and October 8, 2012, totaling $97,101, before selling all of the shares on November 6, 2012. CX-28, at 4. The 82 groups of transactions

investment in Class A Shares was held for less than one year, and usually for considerably less than one year. Of the 82 investments, 66 positions were held for less than 90 days, 58 positions for between three and six months, and only 25 for were held for more than six months.[43]

Mehringer characterized himself as a trader and not a "buy-and-hold" kind of broker.[44] He described the investment strategy he employed on behalf of ES as one that he had developed into a "habit" acquired over a 40-year career.[45] His trading in ES's accounts, which also included numerous equity transactions, demonstrates this.

Mehringer understood that Class A shares were considered long-term investment vehicles. However, to him, six months was long-term.[46] He claimed not to have known at the time of these trades that FINRA and the Securities and Exchange Commission ("SEC") considered holding Class A shares for less than a year to be short-term.[47] Mehringer testified at both his investigative interview and the hearing that he never told ES that Class A shares were intended as long-term investments.[48] ES credibly testified that he did not understand the distinction between Class A shares and Class C shares and even did not know that he had made investments in Class C shares at his prior brokerage firm before he transferred his accounts to Western International.[49]

Mehringer testified that in evaluating whether his trading in Class A shares was successful he did not "isolate" trades to see if they were profitable for the client in relation to trading in other securities. He explained, "If you take the A shares out of the equation, … then the whole structure of how I do the client[']s accounts has to change."[50] Mehringer did not separately verify if his trading in Class A shares in ES's accounts was working. Instead, he calculated that losses in Class A shares were "more than made up in the common stocks" that he bought using the proceeds of sales of Class A shares. "I didn't isolate the mutual fund trades. It

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involved 146 separate purchase transactions and 91 separate sales transactions. The 146 purchases of Class A shares totaled $5,007,373. *See* CX-28. The allegations exclude Mehringer's trading in three Rydex funds in ES's accounts because the issuer designed the Class A shares for short-term trading. Tr. 158, 178-79.

[43] Tr. 151-52; CX-28; CX-30. The violative transactions in Class A shares identified in the Complaint do not include A share investments ES held at the time he closed his accounts in late 2013, which he then transferred (along with equity and CD investments) to another broker-dealer. The Complaint charges only transactions in A shares that were purchased and sold before ES closed his accounts. *See* Tr. 693-94; RX-2, at 13; RX-3, at 7.

[44] Tr. 363.

[45] Tr. 374-75, 560.

[46] Tr. 363-64. At the hearing, Mehringer agreed that his trading in A shares for ES did not constitute long-term trading. Tr. 364-65.

[47] Tr. 364.

[48] Tr. 365-67; CX-4, at 44-45.

[49] Tr. 55-57.

[50] Tr. 565.

was the overall performance of the account that I was looking at, not how the mutual fund trad[ing] was doing, you know, separately; okay?"[51]

Mehringer generally did not consider buying Class C shares for ES.[52] He testified that he did not check whether the issuer also offered C shares each time that he purchased A shares for ES.[53] He also testified that Class C shares were frequently not offered by issuers and "generally speaking" they were not available on the trading platform he subscribed to.[54] However, of the eight most frequently traded Class A shares in ES's accounts, Enforcement demonstrated that seven of the issuers also offered Class C shares.[55]

One of Mehringer's first recommendations to ES was to sell his Class C shares. When ES opened his pension account at Western International in July 2010 he transferred existing investments in 18 mutual fund C shares from his prior broker-dealer. Within two days, Mehringer sold 16 of the 18 Class C share investments, and used the proceeds to purchase nine different Class A shares, at $100,000 each.[56] ES paid front-end loads totaling $22,130 on the purchases of the nine Class A shares on July 29, 2010, a few days after he opened his pension account.[57]

ES lost $54,581.43 from Mehringer's trading in Class A shares. In addition, he paid substantial front-end loads—$182,299.07 on the 82 sets of A shares transactions identified in the Complaint. Western International paid Mehringer 90 percent of this amount, or $164,069.16. Trading in Class A shares generated 55 percent of all the commissions Mehringer earned from trading ES's accounts.[58] Still, ES made money in his accounts. Taking together trading in all securities—Class A shares, equities, and CDs—in all five accounts, ES earned $529,574 during the three years he had accounts at Western International.[59]

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[51] Tr. 566.

[52] Tr. 375. Class A shares have higher short-term costs than Class C shares. Class A shares have a front-end sales load that investors pay at the time of purchase. Class C shares generally have a contingent deferred sales load (a fee investors pay only when they redeem fund shares that typically decreases to zero if the investor holds the shares long enough). The contingent deferred sales load in Class C shares is typically lower than the Class A shares' front-end sales load. *See* https://www.sec.gov/fast-answers/answersmfclasshtm.html (Mutual Fund Classes).

[53] Tr. 560.

[54] Tr. 707-08.

[55] Tr. 703-06.

[56] Tr. 148-51; CX-31; CX-32, at 1-14; RX-2, at 1

[57] CX-28, at 1-3; CX-31; RX-2, at 1.

[58] Tr. 153, 158, 166; CX-28, at 8.

[59] Tr. 478; RX-1, at 1. Approximately $447,000 of the profits were from trading the common stock of Apple Inc. and Netflix. Tr. 571-75; RX-2, at 14, 24; RX-3, at 8, 14; RX-4, at 6, 11; RX-5, at 7; RX-6, at 2.

The average loads or commissions on each set of ES's Class A purchases ranged from 2.75 percent to 5 percent.[60] Mehringer structured his purchases of Class A shares to maximize his commissions, and to deprive ES of the benefit of customary breakpoint discounts.[61] For example, of the 146 separate purchase transactions he made in ES's accounts, 29 were between $48,000 and $49,999, just below a typical $50,000 breakpoint discount.

d. Mehringer's Multiple Purchases

Although he was aware of the existence of breakpoints and knew what they were, Mehringer testified that he did not always look for them when he recommended Class A shares. He also claimed that he did not know why he made purchases of $49,000.[62] Mehringer affirmed in his 2012 and 2013 annual compliance questionnaires that he informed clients of mutual fund breakpoints and maintained documentation that he had done so.[63] The Panel finds that Mehringer did not address the significance of mutual fund breakpoints with ES.

In many instances, instead of making a single large purchase of Class A shares, Mehringer made multiple smaller purchases that served to increase his commissions. For example, on October 8-10, 2012, Mehringer made eight separate purchases in different mutual fund Class A shares of between $48,000 and $49,500.[64] He made two purchases of the same mutual fund Class A shares (Invesco Global Health Care) on the same day (October 8) in the same account, of $28,000 and $48,000.[65] In another set of transactions, also involving Invesco Global Health Care, Mehringer made two purchases of $49,000 each, on July 15 and July 23, 2013. In between making the two purchases (on July 17), he bought $34,000 of the same Class A shares.

In another group of transactions, in Pimco Real Estate Real Return Strategic, Mehringer made two purchases of $49,000 on April 3 and 25, 2013. On April 4, one day after the first

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[60] CX-28. Seven of the 82 sets of transactions had average loads below 2.75 percent. CX-28, at 1-4. One purchase of Class A shares had no front-end load or commission. CX-28, at 2.

[61] Breakpoint discounts are volume discounts to the front-end sales load charged to investors who buy Class A mutual fund shares. *See* http://www.finra.org/industry/mutual-funds.

[62] Tr. 378-79.

[63] RX-26, at 13, 17.

[64] CX-28, at 1-2, 4, 8; RX-2, at 9-10. In ES's pension account, Mehringer sold more than $650,000 in Apple common stock on October 8, 2012, to purchase Invesco A shares, as well as A shares in about ten other funds. Tr. 656; RX-2, at 9-10. Mehringer engaged in similar trading the same day—October 8, 2012—in the company employee account: he sold over $291,000 in Apple common stock shares and used some of the proceeds to purchase $171,000 in Class A shares in three different funds, and other equities and a CD. Tr. 663; RX-3, at 4.

On February 28, 2013, Mehringer made four separate purchases of $49,000 each in four different funds in ES's accounts. CX-28, at 5-7.

[65] CX-28, at 2.

purchase, Mehringer bought $1,585 of the same fund. ES paid average commissions of 4.19 percent on these purchases, which totaled $4,800.[66]

On yet another occasion, in two successive days—July 23 and 24, 2013—he purchased $46,400 and $53,500, respectively (totaling $99,900), in Alliance Bernstein High Income Class A shares. ES paid a 4 percent load, or $3,996, and lost $2,189, even after accounting for interest and dividends paid while he held the investment.[67]

e. Mehringer's Circular Trading in Class A Funds

Some of the transactions in Class A shares exhibited a circular pattern. Mehringer would buy Class A shares in a mutual fund, shortly thereafter sell them, and then buy back into the same mutual fund that he sold in the first place. Each round of purchases caused ES to incur front-end loads while generating commissions for Mehringer. An examination of Mehringer's trading in Class A shares in two specific funds further illustrates the unsuitability of his recommendations and the costly consequences to ES.

The transactions in Transamerica Capital Growth Class A shares are an example of such a pattern. On April 19, April 20, and May 10, 2012, Mehringer purchased $16,943, $75,000, and $17,500, respectively (totaling $109,443), in Transamerica Capital Growth in ES's pension account. On May 21, 2012, just 11 days after his last purchase, he sold all of the shares for $98,673, generating a loss of $10,769 because the unit price of the shares dropped. ES paid $4,286 in front-end loads on the investment, an average of 3.92 percent.[68]

Less than a month later, Mehringer started buying more Transamerica Capital Growth Class A shares, also in ES's pension account. On June 14, July 12, and July 13, 2012, Mehringer purchased $13,300, $5,200, and $15,000, respectively, in the account. Two months later, on September 20, 2012, Mehringer sold all the Class A shares for $34,187, generating a profit of $687. But ES paid $1,591 in front-end loads, an average of 4.75 percent.[69]

Three weeks later, on October 8, 2012, Mehringer purchased $50,000 in Transamerica Capital Growth Class A shares, again in ES's pension account. He sold them five months later, on March 4, 2013, at a slight loss, but ES made $584 in profit after accounting for $1,094 in

[66] CX-28, at 3. Mehringer also bought $15,000 of the Pimco Real Estate Real Return Strategic Class A shares on May 14, 2013. CX-28, at 3.

[67] CX-28, at 4.

[68] Tr. 163-65; CX-28, at 2; CX-29, at 8; RX-2, at 8. Western International paid Mehringer 90 percent of the load, or commission, on each transaction in A shares, resulting in commissions totaling $3,857 in this series of transactions in Transamerica Capital Growth. CX-28, at 2.

[69] Tr. 164-65; CX-28, at 2; CX-29, at 8; RX-2, at 8-9.

interest or dividends paid during the period he held the investment. ES paid $2,000 in front-end loads on the $50,000 investment.[70]

Mehringer also engaged in significant trading in Transamerica Capital Growth in ES's personal account and the company employee account. In ES's personal account, Mehringer engaged in three sets of purchases and sales of Transamerica Capital Growth Class A shares. On May 17, 2012, he bought $49,000 of the Class A shares, then sold them just four days later at a loss of $2,538. ES paid a commission of $2,327. On October 10, 2012, Mehringer again purchased $49,000 in the Class A shares in ES's personal account, and then sold the position on January 28, 2013, at a slight gain. A week later, on February 4, 2013, Mehringer made another purchase in Transamerica Capital Growth, for $1,930, and sold the shares eight days later at a loss. On the transactions in Transamerica Capital Growth in his personal account, ES paid commissions totaling $4,746 and he lost $1,343, even after accounting for $1,087 in interest and dividends paid.[71]

Another fund that Mehringer frequently traded was American Beacon SiM High Yield Opportunities Fund Class A shares. He bought and sold these shares in three of ES's accounts. In ES's pension account, Mehringer made three purchases from March 2012 to November 2012, totaling $59,800. He sold all of the shares on January 24, 2013. Beginning two weeks later, on February 7, 2013, and continuing until April 12, 2013, he made an additional five purchases, totaling $77,652, in American Beacon Class A shares, and then sold all of the shares in July 2013. After accounting for interest and dividends paid, ES lost $2,138 on the transactions in American Beacon Class A shares in his pension account.[72]

Mehringer also purchased American Beacon Class A shares in ES's joint account and the company employee account. Taking together all of Mehringer's trading in American Beacon SiM High Yield, ES lost $596 (even after accounting for interest and dividends paid), while Mehringer earned commissions of $8,772.[73]

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[70] Tr. 165; CX-28, at 2; CX-29, at 8; RX-2, at 9, 11. In calculating losses incurred by ES on each of the Class A shares investments, Enforcement accounted for interest, dividends, and distributions paid by the issuers during the period ES held the investments. Tr. 166.

[71] CX-28, at 7-8; CX-29, at 9; RX-5, at 2-3. Mehringer also engaged in four groups of transactions in Transamerica Capital Growth A shares in the company employee account, which included five purchases totaling $127,800. The company employee account paid front-end loads totaling $5,010. CX-28, at 5; CX-29, at 8; RX-3, at 3-4, 6-7.

In some cases, Mehringer's trading in a given mutual fund also generated profits. For example, in four of ES's accounts, from September 2012 to October 2013, he made 21 purchases and sales in Invesco Global Health Care Fund A that generated a $25,313 profit (after including $25,579 in dividends paid to ES). ES also paid loads or commissions of $15,775, of which Mehringer was paid 90 percent. Tr. 161; CX-29, at 2.

[72] Tr. 159-60; CX-29, at 1.

[73] CX-29, at 1.

f. Mehringer Also Engaged in Intra-Day Switching in Class A Shares on 14 Occasions

Mehringer made 14 same-day Class A shares switches in three of ES's accounts: ES's personal account, his pension account, and the company employee account.[74] ES paid a total of $25,038 in front-end loads on the purchases associated with the 14 intra-day fund switches.[75] Mehringer did not obtain switch letters justifying the reasons for the changes in mutual fund investments.[76] He testified that he did not know if his customers agreed to mutual fund switches by signing off on switch letters.[77]

In each instance, Mehringer sold one Class A fund and used the proceeds to purchase one or more other Class A funds the same day.[78] For example, on November 6, 2012, in the company employee account, he sold $36,540 in Putnam Equity Spectrum and the same day purchased $36,500 in Transamerica Capital Growth.[79] On January 30, 2013, in ES's pension account, Mehringer sold $48,433 in Transamerica High Yield Bond and the same day purchased $48,000 in PNC Mutual Fund Small Cap.[80]

In some instances, Mehringer used the proceeds from one sale of Class A shares to make new investments in more than one new Class A fund. For example, on April 3, 2013, he sold $100,277 in Invesco Global Health Care and used the proceeds to purchase $49,000 in Pimco Real Estate Real Return and $49,000 in Prudential Financial Services Fund.[81]

Some intra-day switching involved selling Class A shares that ES had held for a very short time. For example, on July 18, 2013, Mehringer sold $80,325 of Growth Fund America Class A shares in the company employee account, and used the proceeds to buy interests in three other funds the same day. He had made the most recent purchase, $30,000, in Class A shares in Growth Fund America, only three days earlier, on July 15, 2013.[82]

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[74] The 14 switches are identified in Addendum A to this Decision.

[75] Addendum A; CX-28. Mehringer received 90 percent of the commissions ES paid, or $22,383.

[76] Tr. 389, 567-68. Mehringer testified that he was obligated to get switch letters only for registered representatives whom he supervised, not for mutual fund switches he recommended for his own customers. Tr. 389. However, Mehringer represented on his 2012 and 2013 annual compliance questionnaires that he obtained switch letters from customers when he switched an investment from one mutual fund to another. RX-26, at 13, 17.

[77] Tr. 568.

[78] *See* Addendum A to this Decision.

[79] Addendum A; Tr. 685-86; CX-28, at 5-6; RX-3, at 4.

[80] Addendum A; CX-28, at 2-3; RX-2, at 10.

[81] Addendum A; Tr. 682-83; CX-28, at 2-3; RX-2, at 11. One day later, on April 4, 2013, Mehringer used the proceeds from the sale of Invesco Global Health Care to purchase another $1,585 in Pimco Real Estate Real Return Class A shares. CX-28, at 3; RX-2, at 11.

[82] On April 26, 2013, Mehringer had purchased of Growth Fund America. Addendum A; CX-28, at 5; RX-3, at 6.

In another switch, on July 24, 2013, Mehringer sold $97,432 in Legg Mason Opportunity Fund in the company employee account, and the same day used the proceeds towards the purchase of four other funds. Less than three months earlier, on April 26, 2013, and again just six days before the sale, on July 18, 2013, Mehringer had bought $49,000 and $48,000, respectively, in Legg Mason Opportunity Class A shares.[83]

Another switch involved selling Class A shares that ES had held for less than a month. On November 6, 2012, Mehringer sold all the Class A shares in Putnam Equity Fund in ES's personal account for $47,566 (at a loss). He used over half of the proceeds to buy another fund the same day. He had purchased the Putnam Equity Fund Class A shares for $49,000 on October 10, 2012.[84]

g. Mehringer's Explanations for Trading Class A Shares in ES's Accounts

Mehringer testified that there were two principal reasons for selling Class A shares: "harvesting profits" and generating cash to purchase stocks.[85] The investments in A shares, however, resulted in net losses to ES, even after including distributions he received. The frequent purchases of Class A shares were costly to ES. Mehringer attempted to show at the hearing that in most instances the proceeds from sales of Class A shares were used to purchase equities,[86] and that in other instances, proceeds from the sales of equities were used to buy Class A shares.[87] However, the heavy short-term, in-and-out trading in A shares, combined with equivalent trading in equities, only serves to emphasize the unsuitability of Mehringer's trading in A shares.

Mehringer argued that some Class A share sales were caused by specific circumstances. He stated that in the case of one fund—Natixis CGM Advisor Targeted Equity Class A—he decided to sell ES's shares because the fund's manager was in poor health and therefore unable to manage it.[88] The Panel does not credit this explanation. Mehringer's trading in Natixis Class A shares was similar to his trading in other Class A shares. He engaged in five sets of violative trades in Natixis that involved 15 buy and sell trades in three of ES's accounts in 2011 and again

[83] Addendum A; CX-28, at 5; RX-3, at 6.

[84] Addendum A; CX-28, at 8; RX-5, at 3. Not only did Mehringer in some instances switch A shares held by ES for a short time, in some cases he quickly re-sold A shares he had purchased in the switches. For example, as part of a switch on July 24, 2013, he bought $25,800 in Franklin Mutual European Class A shares; two days later, on July 26, 2013, he sold them. Addendum A, at 2; CX-28, at 7. In another instance, he bought $53,000 of Transamerica Capital Growth A shares in a switch on August 20, 2013; he sold them less than three weeks later, on September 6, 2013. Addendum A, at 2; CX-28, at 5.

[85] Tr. 446. *See also* RX-14, at 2.

[86] Tr. 647-77; RX-2; RX-3; RX-4; RX-5; RX-6. Mehringer's forensics investigator testified, "[T]his looks to me like the mutual funds are being liquidated and used to buy individual equities." Tr. 651; RX-2, at 3.

[87] *See* Tr. 657-58. Mehringer's investigator testified, "Look, you're seeing liquidations of individual securities with the proceeds being used to fund or purchase mutual funds."

[88] Tr. 446-49. *See* Mehringer's Post-Hearing Br., at 9.

in 2013. ES lost over $23,000, while Mehringer earned commissions of nearly $9,000 from recommending Natixis.[89]

Mehringer also contended that the frequency of sales of Class A shares in ES's accounts was the result of unexpected forced liquidations because ES needed money to pay tax bills and capital calls arising from prior investments.[90] However, in only two instances did such events coincide with the sale of Class A shares. In all the other instances for which ES needed money, Mehringer sold equities or CDs—not Class A shares.[91]

For example, on September 28, 2012, ES emailed Mehringer to say he needed about $60,000 to pay taxes.[92] The only withdrawal from any of ES's accounts was a $65,000 transfer from ES's personal account two weeks later, on October 11, 2012. Mehringer sold over $171,000 in Apple shares three days before the withdrawal; no Class A shares were sold to fund ES's tax payment.[93]

ES was obligated to pay capital calls for partnership investments he made before opening accounts with Mehringer. On December 2, 2011, Mehringer arranged to transfer $38,750 from ES's pension account and $28,389 from his personal account to fund two capital calls. All but $1,000 of the cash transfers were funded by the sale of equities. The same day, he sold $63,870 in General Motors stock in ES's pension account, and on December 8, 2011, transferred out $38,750.[94] On December 2 and 5, 2011, Mehringer sold $27,736 in three stocks and $1,000 in one A share fund. On December 8, 2011, he transferred out $28,389 to satisfy the capital calls.[95]

On another occasion, ES wanted to protect assets that he held in the joint account. To that end, on July 6, 2011, he opened a personal account.[96] To generate the cash to make a transfer from the joint account, the same day, Mehringer sold $323,555 in equities and $27,353 in a Class A share investment. On July 11, 2011, he transferred $350,000 from the joint account to ES's new personal account.[97]

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[89] CX-28, at 3, 6, 8; CX-29, at 3. One Natixis purchase was for $49,000. Mehringer testified that he bought more Natixis Class A shares after its manager returned from his illness. Tr. 448-49.

[90] Tr. 389.

[91] Tr. 390-407.

[92] Tr. 493-94; RX-19.

[93] Tr. 406-07; RX-5, at 3.

[94] Tr. 393-94; RX-2, at 7.

[95] Tr. 405-06; RX-5, at 2.

[96] JX-7.

[97] Tr. 399-400; RX-4, at 4; RX-5, at 1. Mehringer testified that he could not transfer securities from the joint account to ES's personal account without the joint account holder's consent. A cash transfer did not require the other person's consent. Tr. 404.

Aside from the $23,353 in Class A shares sold in the joint account on July 6, 2011, to fund the cash transfer to ES's personal account, only $1,000 in Class A shares was sold to fund ES's unexpected financial needs.[98]

h. Mehringer's Defense that He Is Not Responsible for Transactions in Class A Shares after April 2013 Is Not Credible

On the last day of the presentation of evidence at the hearing, Mehringer for the first time claimed that on April 16, 2013 (less than five months before ES fired him), he had sold ES's accounts and much of his book of business to another broker at Western International.[99] Mehringer said the firm sent customers letters announcing that a new broker was taking over the sold accounts, but Mehringer never disclosed this to ES.[100] Mehringer testified that even after selling ES's accounts, he continued to recommend purchases and sales of Class A shares to ES. However, he insisted that the new broker also made recommendations, although he could not recall who made which recommendations.[101]

This eleventh-hour claim is the basis for Mehringer's argument that the Panel must dismiss all allegations related to Class A transactions in ES's accounts after April 2013. He argues that these trades must be dismissed because Enforcement did not ascertain who was responsible for them. This argument flies in the face of overwhelming evidence that Mehringer made all of the recommendations associated with the Class A share trades.

Mehringer makes this claim after a long period of repeatedly asserting contradictory facts. Throughout the lengthy pre-hearing process, Mehringer never raised this as a possibility. During sworn investigative testimony, he did not dispute recommending Class A transactions to ES in August and September 2013.[102] Then he testified for nearly two days at the hearing before asserting that another broker at Western International was responsible for the recommendations in ES's accounts after April 2013. Yet Mehringer also specifically admitted that in May 2013 he was responsible for placing an order to sell ES's interests in a Japan fund (discussed below in the

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[98] Tr. 405. *See also* Tr. 390-410.

[99] Tr. 609. A few minutes later, Mehringer reversed himself, and testified that he "didn't sell [ES's accounts] off," but that ES had fired him. Tr. 615.

[100] Tr. 619-20; CX-33. Beginning in April 2013, ES's monthly accounts statements identified both Mehringer and the other broker as the registered representatives. Tr. 625-27; RX-42, at 113; RX-43, at 83; RX-44, at 75; RX-45, at 54; RX-46, at 34; RX-52. Mehringer testified that his name continued to appear on ES's accounts after April 2013 so that persons at Western International would recognize them as accounts that used to belong to him, but were now the other broker's accounts. He also contended that he received no commissions from transactions in ES's accounts after April 16, 2013, and that they all went to the other broker. Tr. 627. There is no evidence that the other broker was paid the commissions. The Panel does not find these assertions credible.

[101] Tr. 630-31, 633.

[102] Tr. 635-36; CX-4, at 41.

section addressing cause two). When he cross-examined ES at the hearing, he asked nothing about another broker's recommendations.

Mehringer's Answer to the Complaint did not mention the other broker, and nowhere does he deny responsibility for the Class A share recommendations. Nor did he raise this defense in his pre-hearing brief. Mehringer in fact submitted exhibits demonstrating that he was responsible for the overall profits in all of ES's accounts through the end of 2013 as a result of his investment recommendations. In defending ES's arbitration claim, Mehringer did not name the other broker. When ES fired him via email on September 4, 2013, Mehringer did not tell ES that he was no longer his broker.

The Panel finds that the record contains ample, uncontroverted evidence that Mehringer, not the other broker, was the person responsible for recommending the Class A share transactions in ES's accounts throughout the time ES had accounts at Western International. The Panel therefore rejects Mehringer's last-minute argument, and denies his request to dismiss the allegations related to his Class A recommendations to ES after April 2013.

B. Conclusions of Law

Cause one charges Mehringer with making unsuitable recommendation to ES between 2010 and 2013 that resulted in 82 excessive short-term trades and intra-day switches in mutual fund Class A shares. Mehringer solicited all of the purchase and sale transactions in Class A shares.[103] Enforcement alleges that Mehringer violated NASD Rule 2310 and FINRA Rules 2111[104] and 2010.

FINRA's suitability rules set out broad principles for fair dealing with customers and guidelines for the suitability of securities transactions. NASD Rule 2310(a) provided that, "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

NASD Interpretive Material 2310-2(a)(1) provided that "[i]mplicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing." Interpretive Material 2310-2(b)(3) specifically addressed the suitability of short-term trading in mutual fund shares: "It is clear that normally these

[103] The confirmations associated with the A share transactions were marked "solicited." *See* RX-47; RX-48; RX-49; RX-50; RX-51.

[104] FINRA Rule 2111 replaced NASD Rule 2310 effective July 9, 2012. *See* FINRA Regulatory Notice 11-02 (Jan. 2011), http://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf. Accordingly, Mehringer's unsuitable recommendations to ES before July 9, 2012, violated NASD Rule 2310. Those that occurred beginning on July 9, 2012, violated FINRA Rule 2111.

securities are not proper trading vehicles and such activity on its face may raise the question of [Rule 2310] violation."[105]

FINRA Rule 2111 provides that an associated person "must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for a customer" based on the customer's investment profile. A customer's investment profile includes the customer's age, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the associated person.[106]

Supplementary Material to Rule 2111 describes the suitability rule as "fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct."[107] "Implicit in all member and associated person relationships with customers and others is the fundamental responsibility of fair dealing."[108] Another suitability obligation requires a broker "who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile."[109]

A broker's recommendations of investments and an investment strategy must be suitable. It is well-established that a broker cannot recommend a security to a customer "unless there is an adequate and reasonable basis for such recommendation."[110] A broker cannot conclude that a recommendation is suitable for a given customer unless he has a reasonable basis for believing that the recommendation could be suitable for at least some customers.[111] Here the pattern of trading in Class A shares was not suitable for any customer, not even a wealthy and successful entrepreneur such as ES.

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[105] NASD Interpretive Material 2310-2 was eliminated effective July 9, 2012, but the general type of misconduct it discussed, including short-term trading in mutual fund shares, or prohibited was incorporated in FINRA Rule 2111. *See* FINRA Regulatory Notice 11-02, n.8 (Jan. 2011), http://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf.

[106] FINRA Rule 2111(a). *See also* Supplementary Material 2111.04 (Customer's Investment Profile).

[107] Supplementary Material 2111.01 (General Principles).

[108] Supplementary Material 2111.01 (General Principles).

[109] Supplementary Material 2111.05(c) (Components of Suitability Obligations).

[110] *Hanly v. SEC*, 415 F.2d 589, 597 (1969).

[111] *Dep't of Enforcement v. Cody*, No. 2005003188901, 2010 FINRA Discip. LEXIS 8, at *19 (NAC May 10, 2010) (citing *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *28 (Oct. 6, 2008)), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010); *Dep't of Enforcement v. Brookstone Sec.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *46 n.24 (NAC Apr. 16, 2015) (finding that reasonable basis suitability "requires that a broker have a reasonable basis to believe his recommendation could be suitable for at least some customers by his understanding the potential risks and rewards inherent in that recommendation.").

Mutual funds have long been considered to be suitable only as long-term investments and not for short-term trading. The SEC has consistently held that short-term trading in mutual funds is inappropriate and violates rules on a broker's fair dealing with customers because of the costs associated with front-loaded funds.[112] The SEC has noted that a "pattern of switches from one fund to another … where there is no indication of a change in investment objectives of the customers," as exists here, "and where new sales loads are incurred, is not reconcilable with the concept of suitability."[113]

Mehringer engaged in a pattern of buying and selling that involved many transactions in Class A shares. There were so many transactions in Class A shares that it would have been impossible for ES to keep track of them. Mehringer held the shares for short periods of time before selling them. That he frequently broke up the buy and sell transactions constitutes a pattern demonstrating that his true objective was to maximize commissions. Mehringer acknowledged that he used Class A shares to make up for lower commissions from trading equities. This is not an acceptable reason to trade Class A shares as he did in ES's accounts.[114]

The intra-day switching of Class A shares is also troubling.[115] An occasional switch from one fund to another may have been appropriate but the amount of switching here, combined with Mehringer's pattern of frequent trading of Class A shares, while holding the A share investments for short periods, makes clear to the Panel that Mehringer's trading was unsuitable. Even setting aside the instances of same-day switching, the Panel finds that Mehringer's frequent trading of Class A shares was unsuitable.

Mehringer failed to justify his heavy trading in Class A shares. His explanation that sales of Class A shares were used to fund ES's financial needs is not convincing. He also claimed that in some instances he was "harvesting profits" and getting better returns than CDs offered.[116]

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[112] *See, e.g., Krull v. SEC*, 248 F.3d 907, 912 (9th Cir. 2001). FINRA and the SEC have not defined "short term" in the context of mutual fund trading. The SEC's decisions have focused on periods of less than a year being short-term. *See Winston H. Kinderdick*, 46 S.E.C. 636 (1976) (noting switches taking place within one year but not specifying the holding periods); *Russell L. Irish*, 42 S.E.C. 735 (1965), *aff'd*, 367 F.2d 637 (9th Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (noting that large percentage of violative mutual fund switches had holding periods of less than a year.).

[113] *Kinderdick*, 46 S.E.C. at 639. *See also Terry Wayne White*, 50 S.E.C. 211, 213 (1990) (reiterating that mutual funds are not proper short-term trading vehicles, "particularly when that trading involves the repeated payment of sales commissions … at the expense of the customer.").

[114] *See Wendell D. Belden*, 56 S.E.C. 496, 500 (2003) (rejecting respondent's defense that he recommended Class B shares instead of Class A shares because they paid higher commissions which offset lower commissions from other transactions).

[115] *See Irish*, 42 S.E.C. at 738 (finding that respondent's practice of switching customers from one mutual fund to another was "highly profitable to himself and detrimental" to customers).

[116] Mehringer's Post-Hearing Br., at 21.

The Panel rejects Mehringer's argument that Enforcement's allegations that 14 sets of 82 Class A share transactions constitute switching should be dismissed because they were not identified in the Complaint and he was "not given a fair opportunity to defend himself."[117] In fact, the Complaint alleges that Mehringer recommended the "short-term mutual fund trading and the intra-day mutual fund switching … without reasonable grounds to believe that the recommendations were suitable for ES in light of the frequency and nature of the transactions including the sales loads."[118] An exhibit to the Complaint identified the 82 violative sets of transactions, which included the 14 same-day switches. That Enforcement did not isolate the 14 sets of same-day switches from the 82, as Mehringer argues it should have, is not a basis for claiming that Mehringer was not on notice. Enforcement's allegations merely clarify that a sub-set of the 82 short term transactions also involve same-day switches.[119] Given that Enforcement identified all 82 violative sets of trades, Mehringer can hardly claim he was unfairly taken by surprise.

The Panel also rejects Mehringer's contention that the violative transactions in the company employee account should be excluded because Enforcement did not call ES's accountant (the authorized agent on the account) to testify at the hearing that the Class A share transactions were unsuitable.[120] There is no evidence that Mehringer ever talked to the accountant about trading Class A shares in the company employee account.[121] We find that Mehringer's short-term trading in Class A shares in the company employee account, which involved at least 25 sets of violative trades, followed the same general high-frequency trading pattern as in ES's other accounts and was unsuitable, regardless of whether Mehringer talked to the accountant.[122]

Mehringer argued that, because his overall trading in ES's accounts was profitable, the voluminous trading in Class A shares was suitable. He stated that the trading in Class A shares

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[117] Mehringer's Post-Hearing Reply Br., at 4.

[118] Compl. ¶ 18.

[119] FINRA Rule 9212(a) requires that a Complaint "specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated." To meet this standard, Enforcement need not include evidentiary details in the Complaint. The Complaint's allegations must provide "a respondent sufficient notice to understand the charges and an adequate opportunity to plan a defense." *Dist. Bus. Conduct Comm. v. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *10 (NBCC July 28, 1997). The Panel finds that Enforcement met this standard.

[120] Mehringer's Post-Hearing Br., at 16.

[121] The record evidence suggests that Mehringer discussed the company employee account with ES, not the accountant. For example, in February 2011, he emailed ES about investments he had made in the account, explaining the valuation of $1.3 million in CDs he purchased. Tr. 480-81; RX-9, at 1. In September 2011, he explained in an email why he had purchased Apple stock in the company employee account. RX-14, at 2. In February 2012, he forwarded copies of monthly statements for the company employee account after ES asked to "see what we are doing with that, and take a closer look at them for a change." RX-17, at 2.

[122] *See* RX-3, at 1-7. There is no evidence that the accountant was associated with a member firm. Therefore, FINRA did not have jurisdiction under Rule 8210 to compel him to appear at the hearing to provide testimony.

"played a complementary role in the overall investment strategy."[123] Mehringer also argued that purportedly lower overall commissions that he charged compared to ES's prior broker further justified the pattern of trading in Class A shares.[124] However, the issue is whether the excessive and short-term trading in Class A shares "served a reasonable investment objective,"[125] not whether the customer profited or the broker charged less than other brokers. "Suitability is determined at the time of the recommendation. Profit is not a defense to a suitability violation."[126]

It is apparent to the Panel that Mehringer could have generated profits for ES without the excessive costs in front-end loads of trading the Class A shares in the manner that he did. The Panel also finds that Mehringer's trading in Class A shares was motivated primarily by generating commissions for himself and not looking out for ES's interests. The Panel can conceive of no investor for whom Mehringer's trading in Class A shares would be suitable. No customer could expect a reasonable return from trading A shares considering the frequency of the transactions and the high front-end costs associated with purchasing them.

Accordingly, the Panel finds that Mehringer made unsuitable recommendations to ES to trade mutual fund Class A shares, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010.[127]

IV. Mehringer Exercised Discretion in ES's Accounts Without Authorization

A. Findings of Fact

ES testified that Mehringer did not speak with him before each trade. After ES received the tip that Mehringer may have engaged in excessive trading, ES reviewed his accounts and

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[123] Mehringer's Post-Hearing Br., at 22.

[124] Mehringer's Post-Hearing Br., at 21.

[125] *Krull*, 248 F.3d at 913 (rejecting respondent's justification that his trading in mutual funds was suitable because his customers made a profit overall from his recommendations).

[126] *Dep't of Enforcement v. Escarcega*, No. 2012034936005, 2017 FINRA Discip. LEXIS 32, at *53 (NAC July 20, 2017) (quoting *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *53 n.48 (May 27, 2011). *See also Larry Ira Klein*, 52 S.E.C. 1030, 1034-35 (1996) (rejecting argument that earlier suitable recommendations negate the absence of suitability of later recommendations); *Laurie Jones Canady*, 54 S.E.C. 65, 81 (1999) ("The actual success or failure of [respondent's] purported trading strategy is irrelevant …. Unknown to her customers, [respondent's] 'trading strategy' generated high costs for her customers … and deviated grossly from these customers' stated conservative investment objectives."), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000); *Eugene J. Erdos*, 47 S.E.C. 985, 988 n.10 (1983), *aff'd*, 742 F.2d 507 (9th Cir. 1984) (holding that recommendations are not made suitable because they resulted in profits to the customer).

[127] A violation of FINRA's suitability rule is also a violation of FINRA Rule 2010, which requires a member, in the conduct of his business to "observe high standards of commercial honor and just and equitable principles of trade." *See Dep't of Enforcement v. Evans*, No. 2006005977901, 2011 FINRA Discip. LEXIS 36 (NAC Oct. 3, 2011) (finding that unsuitable recommendations in violation of NASD Rule 2310 also violate NASD Rule 2110, the predecessor to FINRA Rule 2010).

discovered that there "was a lot of trading going on which I had never known about, never authorized."[128] It was at that point that he instructed Mehringer to stop trading his accounts.

At the hearing, ES explained that he was not aware that Mehringer needed to get his authorization before each trade. He trusted Mehringer "to do what was right for the accounts."[129] ES was shown the 82 sets of transactions in Class A shares. ES denied that Mehringer discussed any of the trades beforehand, explaining that "none of these were anything that he brought to my attention. These weren't in any of the discussions."[130] ES added that at the time Mehringer was placing trades in Class A shares, he "wasn't aware" of them.[131]

Mehringer admitted in his investigative testimony and at the hearing that he placed at least one trade for ES without his authorization to avoid losses in a Japan-based fund. This occurred, according to Mehringer, because ES was traveling abroad. He also testified during the investigation that when he could not contact ES to get his authorization he proceeded with transactions that he believed were in ES's interests. He also admitted during the investigation that there may have been transactions besides the Japan fund sale that he entered without first speaking to ES.[132]

In contrast, at the hearing, Mehringer testified that before each trade, he got ES's consent by calling him or sending him an email, or by contacting ES's assistant, who did not have authority to place orders on behalf of ES. Mehringer introduced many emails to demonstrate that ES was aware of Mehringer's trades.[133] The vast majority of the emails, however, concerned scheduling meetings and general account performance. No more than a small handful related to specific securities transactions.[134]

Mehringer continued to trade ES's accounts, making additional purchases and sales of Class A shares, even after ES instructed him, in an email on September 4, 2013, to stop all activity.[135]

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[128] Tr. 52.

[129] Tr. 121.

[130] Tr. 113. *See also* Tr. 76.

[131] Tr. 122, 495.

[132] CX-4, at 25-26; RX-20.

[133] *See* Tr. 77-97.

[134] *See* RX-8; RX-9; RX-11; RX-14; RX-17; RX-18; RX-21; RX-22, at 5-63; RX-23.

[135] RX-2, at 13; RX-3, at 7; RX-6, at 1. The trades in Class A shares after September 4, 2013, occurred in ES's pension account, his 401(k) account, and the company employee account.

B. Conclusions of Law

Cause two charges Mehringer with exercising discretion in ES's accounts without having written authorization, in violation of NASD Rule 2510 and FINRA Rule 2010. Rule 2510(b) provides that registered representatives may not "exercise discretionary power in a customer's account unless such customer has given prior written authorization," and the account has been accepted by the firm as a discretionary account. Compliance with Rule 2510(b) helps member firms supervise sales practices by enabling them to review discretionary accounts to detect and prevent excessive and large trades that may be inconsistent with the financial resources and objectives of a customer's account.[136] Mehringer evaded this supervision by failing to obtain written permission from ES and Western International to exercise discretion before making trades in ES's accounts.

There is no dispute that ES never gave Mehringer written authority to exercise discretion in his accounts. Mehringer acknowledged that at least in one trade—selling a Japan fund—he did not get ES's authorization for the transaction.[137] Based on the evidence presented at the hearing, the Panel concludes that Mehringer routinely traded without first obtaining ES's authorization.

Mehringer argues that he did not violate Rule 2510(b) because he met frequently with ES and obtained oral authorization from him. He also testified that ES agreed to an overall investment strategy that involved trading Class A shares, equities, and CDs. Mehringer argues that ES was not diligent in monitoring his account activity, and he constantly had to remind him to do so. He claims he even opened envelopes containing trade confirmations at ES's office so he could go over the trades with ES.

Even if Mehringer reviewed confirmations with ES, after-the-fact acquiescence in trades does not relieve Mehringer of liability. None of the numerous email exchanges with ES that Mehringer introduced contained an authorization to trade a specific security. Furthermore, despite ES's mistaken belief that Mehringer had the authority to decide what to trade, this does not remove Mehringer's obligation to obtain written authority from ES.[138]

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[136] *Dep't of Enforcement v. King*, No. 2015044444801, 2017 FINRA Discip. LEXIS 31, at *48 (NAC July 20, 2017) (citing NASD Rule 2510(c)); *Dep't of Enforcement v. Wilson*, No. 2007009403801, 2011 FINRA Discip. LEXIS 67, at *30-31 (NAC Dec. 28, 2011) (explaining that compliance with the requirements of NASD Rule 2510(b) is "an additional means of ensuring effective supervision of sales practices at securities firms").

[137] Tr. 354. In the annual compliance questionnaires he submitted during the years that ES was a customer, Mehringer acknowledged that he did not have any discretionary accounts. RX-26, at 8, 13, 17.

[138] *See Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *17-18 (May 7, 2015) (finding that broker violated Rule 2510(b) when he did not have customer written authorization to make trades); *Protective Group Sec. Corp.*, 51 S.E.C. 1233, 1240 (1994) (finding liability for discretionary trading without written authority after broker admitted obtaining customer's ratification after the trades); *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *27-28 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014) (finding that broker violated Rule 2510(b) when customer granted oral authority for discretionary trading, but did not grant written authority).

The Panel accordingly finds that Mehringer violated NASD Rule 2510(b) and FINRA Rule 2010,[139] as alleged in cause two.

V. Mehringer's Statute of Limitations and Laches Defenses to the Suitability and Discretionary Trading Charges

In his Answer to the Complaint, Mehringer asserted that Enforcement's claims are barred by the doctrine of laches.[140] At the hearing, Mehringer limited this defense to the allegations contained in causes one and two alleging unsuitable recommendations and unauthorized trading. These constituted the oldest misconduct alleged in the Complaint,[141] and involved transactions occurring from July 2010 to August 2013.[142] Mehringer argues that "it is inherently unfair" for Enforcement to have brought an action against him for transactions that were more than five years old when the Complaint was filed.[143] He also contends that Enforcement's charges are time-barred by the federal statute of limitations.

A. The Federal Statute of Limitations

Mehringer argues that 23 sets of allegedly unsuitable transactions in Class A shares occurred more than five years before the filing of the Complaint on December 16, 2016. He says these should be barred by the federal five-year statute of limitations in 28 U.S.C § 2462.[144] He argues that because FINRA is a self-regulatory organization authorized by the U.S. Congress to conduct oversight activities and its rules are approved by the SEC, it should be subject to the same federal statute of limitations as the SEC. Therefore, he argues, FINRA should not be allowed to bring an action outside the same limitations period that is imposed on SEC actions.[145]

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[139] *Guang Lu*, 58 S.E.C. 43, 54-55 n.22 (2005) (finding that, by violating NASD Rule 2510(b), respondent also violated the predecessor to FINRA Rule 2010).

[140] Ans., at 8.

[141] Tr. 758 (closing argument referring to Mehringer's recommendations made in 2010); Mehringer's Pre-Hearing Br., at 11; Mehringer's Post-Hearing Br., at 23.

[142] Both parties state that the last unsuitable recommendation occurred in August 2013. *See* Compl. ¶¶ 1, 10, Att. A; Mehringer's Post-Hearing Br., at 23 n.127. The attachment to the Complaint and the evidence presented at the hearing, however, show that additional transactions associated with Mehringer's unsuitable recommendations to ES to purchase and sell Class A shares also took place in September, October, and December 2013. *See* CX-28, at 1-2, 4-5. In analyzing Mehringer's defense that Enforcement's claims are time-barred, this Decision adopts the date the parties used in their arguments, which is also more favorable to Mehringer's argument—August 2013.

[143] Mehringer's Post-Hearing Br., at 23.

[144] 28 U.S.C. § 2462 provides, "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued …."

[145] Mehringer's Post-Hearing Br., at 23 n.128. Mehringer asks that the Complaint be dismissed "at least with regard to transactions that are more than five years old both under the doctrine of laches and pursuant to 28 U.S.C. § 2462." Mehringer's Post-Hearing Br., at 24. Mehringer acknowledges that his position with respect to the statute of limitations is contrary to SEC and FINRA precedent. Mehringer's Post-Hearing Br., at 23 n.128.

There is ample case law holding that FINRA is not subject to the statute of limitations. SEC and FINRA decisions "have established 'the consistently held principle that no statute of limitations applies to disciplinary actions of [self-regulatory organizations such as FINRA].'"[146] The SEC has repeatedly rejected respondents' efforts to create a limitations period for FINRA disciplinary actions, stating that § 2462 "does not apply to FINRA disciplinary proceedings because FINRA is not a governmental entity."[147] The SEC has also held that applying a limitations period to FINRA actions would "impair [FINRA's] statutory obligations and duty to protect the public and discipline its members."[148]

We therefore reject Mehringer's efforts to have the Panel apply the federal statute of limitations and dismiss the action as to the 23 transactions that he says occurred more than five years before the filing of the Complaint, or before December 16, 2011. Even if we were to agree with Mehringer—which we do not—this would still leave 59 sets of unsuitable recommendations in Class A shares that occurred within the limitations period. This is a sufficiently large number of unsuitable recommendations that would not lead us alter our finding that Mehringer violated the rules alleged in causes one and two.

B. The Fairness of the Proceeding

Mehringer argues that it is also unfair for Enforcement to bring this action because the oldest misconduct occurred about six and a half years before the filing of the Complaint. The SEC has held that there are "no bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings."[149] Instead, the fairness of a proceeding is based on the "entirety of the record," and whether respondent has shown that his "ability to mount a defense was harmed by any delay in the filing of a complaint against him."[150]

In determining whether a proceeding was brought unfairly late, the SEC has considered four time periods between the filing of the complaint and: (1) the first incident of misconduct; (2) the last incident of misconduct; (3) notice to the SRO of the misconduct; and (4) the initiating of the SRO's investigation.[151] In this case, the time elapsed between the initial misconduct (July 2010) and the filing of the Complaint (December 2016) was six years and five months. The time between the last misconduct (August 2013) and the filing of the Complaint was three years and

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[146] *Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *88 (NAC July 23, 2015) (citing *Mark H. Love*, 57 S.E.C. 315, 323 (2004)).

[147] *Murphy*, 2013 SEC LEXIS 1933, at *92-93; *Klein*, 52 S.E.C. at 1039 (rejecting respondent's argument that § 2462 applies to FINRA disciplinary proceeding).

[148] *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993).

[149] *Love*, 57 S.E.C. at 323.

[150] *Id.* at 325 (rejecting argument that delay was unfair where respondent failed to show that he was prejudiced).

[151] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *88-89.

four months. The time between when FINRA learned of the misconduct (June 2014)[152] and the filing of the Complaint was two years and six months. The time between the initiation of the investigation (June 2014) and the filing of the Complaint was also two years and six months. However, evaluating the time lags "does not, in itself, resolve the fairness question."[153]

Mehringer relies on two SEC and FINRA cases to support his contention that the proceeding is inherently unfair because of the purported delay in bringing the case: *Jeffrey Ainley Hayden*,[154] and *Department of Enforcement v. Morgan Stanley DW Inc.*[155] In *Hayden*, the SEC dismissed charges brought by the New York Stock Exchange ("NYSE"), finding the delay in filing the case—14 years after the misconduct began and six years after the most recent incident of misconduct—was "inherently unfair" to the respondent.[156] Also, five years had passed since the NYSE learned of the misconduct and three and one-half years had elapsed before it filed the complaint. In *Morgan Stanley*, FINRA dismissed a complaint that was brought eight years after the misconduct began, seven years after it ended, five years and nine months after Enforcement learned of the misconduct, and four years and nine months after Enforcement began the investigation.[157]

Mehringer also relies on a third case, *Johnson v. SEC*, in which the U.S. Court of Appeals for the District of Columbia reversed an SEC administrative order censuring and suspending a supervisor of a broker-dealer because the action was barred by the five-year limitations period in 28 U.S.C. § 2462.[158] Although Mehringer concedes that *Johnson* involves the application of the federal statute of limitations, he argues it is relevant because the SEC in *Hayden* purportedly relied on *Johnson* to dismiss the NYSE's action. However, in *Hayden*, the SEC explicitly declined to rely on *Johnson* because it dismissed *Hayden* on grounds other than the statute of limitations.[159]

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[152] Both parties rely on ES's arbitration filing on June 27, 2014, as the date when FINRA was on notice of the misconduct. Tr. 145-46; Enforcement's Post-Hearing Br., at 31; Mehringer's Post-Hearing Br., at 23 n.127.

[153] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *91 (citing *Love*, 57 S.E.C. at 323).

[154] *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000).

[155] *Dep't of Enforcement v. Morgan Stanley DW Inc.*, No. CAF000045, 2002 NASD Discip. LEXIS 11 (NAC July 29, 2002).

[156] *Hayden*, 54 S.E.C. at 654.

[157] *Morgan Stanley DW*, 2002 NASD Discip. LEXIS 11, at *15-17.

[158] *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996); Mehringer's Pre-Hearing Br., at 11-12; Mehringer's Post-Hearing Br., at 23-24.

[159] *Hayden*, 54 S.E.C. at 652-53 n.2. Mehringer argues the Panel should rely on *Johnson* because in that case the action was commenced six years and two months after respondent's misconduct began, five years and four months after the last incident of misconduct, and five years and four months after the SEC began its investigation. Mehringer's Post-Hearing Br., at 23.

Mehringer claims he "was severely disadvantaged in trying to defend himself given the length of time that had passed."[160] Although applying an analysis of elapsed time periods in other cases does not alone determine whether a proceeding is fair, the Panel finds that, based on the entire record, the periods in this case are not so long that they cause us to conclude that Mehringer was denied a fair hearing. The purported delay in this case was considerably less than in *Hayden* and *Morgan Stanley*. Also, the four time periods here are generally shorter than in other cases in which adjudicators rejected respondents' claims that a delay in bringing a case was unfair to them.[161]

We also find that Mehringer was not harmed by the lag in filing the Complaint. To establish the defense based on the alleged unfairness of the passage of time between the misconduct charged and the filing of a complaint, a respondent must show that the delay caused actual prejudice.[162] Mehringer has not demonstrated any prejudice. He claims that he was harmed because he did not maintain all of his notes of and files relating to his dealings with ES, and his recollection of conversations with ES was "hazy."[163] The Panel finds, however, that Mehringer had no trouble remembering supposedly exculpatory events and conversations, including, for example, his strategy of using three "buckets" of investments with ES, trading Class A shares because it was his "habit," and using them to compensate for low commissions in equity transactions. Mehringer also claimed that he recalled reviewing trade confirmations with ES and going over proposed trades, and he contended that he recalled the amount he charged for commissions on ES's trades in equity securities.

Finally, Mehringer did not dispute that he made the recommendations that resulted in the large volume of trading in Class A shares and ES's holding the investments for short periods. No reasonable investor would have knowingly consented to this costly trading activity, and we do not find that the time required to bring this case to hearing denied Mehringer a fair proceeding.

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[160] Mehringer's Post-Hearing Br., at 24.

[161] *See William D. Hirsh*, 54 S.E.C. 1068, 1077-78 (2000) (delay not unfair where the time between the first act of misconduct and the filing of the complaint was nearly nine years, the time between the last act of misconduct and the filing of the complaint was eight years, the time between discovery of the misconduct and the filing of the complaint was one year and eight months, and the time between the initiation of the investigation and the filing of the complaint was 12 months); *Love*, 57 S.E.C. at 323-25 (delay not unfair where complaint filed seven years after the first act of misconduct, more than six years after the last act of misconduct, four years after discovery of the misconduct, and three years and six months after investigation initiated); *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *40-42 (NAC Feb. 12, 2007) (delay not unfair where the time from the first act of misconduct to the filing of the complaint was six years and two months, from the last act of misconduct to the filing of the complaint was five years and ten months, and from discovery of the misconduct and the initiation of investigation to the filing of the complaint was four years and one month).

[162] *Kaweske*, 2007 NASD Discip. LEXIS 5, at *38 (citing *Dep't of Enforcement v. Apgar*, No. C9B020046, 2004 NASD Discip. LEXIS 9, at *25 (NAC May 18, 2004)); *see also James Gerard O'Callaghan*, Exchange Act Release No. 57840, 2008 SEC LEXIS 1154, at *32 (May 20, 2008).

[163] Mehringer's Post-Hearing Br., at 24.

C. Mehringer's Laches Defense

Mehringer also claims that causes one and two are barred by the doctrine of laches. However, in order to successfully assert the defense of laches, a respondent "must demonstrate a lack of diligence by [FINRA] and that he has been prejudiced."[164] The record shows that Enforcement was diligent in pursuing this case. It commenced its investigation promptly after it learned of Mehringer's potential misconduct in June 2014, when ES filed a complaint with FINRA. As discussed in subsection V.B. above, Mehringer has also failed to show prejudice.

The Panel accordingly rejects Mehringer's statute of limitations, unfairness, and laches defenses to the allegations contained in causes one and two.

VI. Mehringer Breached His Fiduciary Duties to the Charitable Trust

A. Findings of Fact

1. Formation of the Trust

Mehringer testified that he formed the Mehringer Educational Trust ("Trust") because a client wanted to shelter income from being taxed. The client, JB, was a medical doctor with a successful medical practice whom Mehringer described as having "fingers in a lot of pies, and always doing deals on the side."[165] Mehringer said JB had a net worth of $10 million and a "seven-figure" annual income.[166] Two persons with whom JB was doing business owed him a lot of money and he did not want to pay taxes on it. Mehringer understood that the money represented JB's share of profits from business transactions.[167] Mehringer proposed creating a charitable education trust. Because JB did not want to pay a lawyer to establish the charity, he suggested that Mehringer search the Internet for a form to use.[168]

Mehringer created the Trust on March 25, 2013. He found a trust document form on the LegalZoom® website, but the one he selected was not designed for a charitable trust.[169] As a result, the Trust contained no provisions describing its supposed charitable purposes. Mehringer did not look into the legal restrictions on the uses of a charitable trust's funds or for whose benefit the funds could be used.[170] Mehringer made himself the settlor of the Trust and he

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[164] *Robert Tretiak*, 56 S.E.C. 209, 230 (2003).

[165] Tr. 517. Mehringer could not recall his "reasoning" for naming the charity after himself instead of using JB's name. Tr. 579.

[166] Tr. 220.

[167] Tr. 579.

[168] Tr. 517-18.

[169] Tr. 198, 205, 518-19.

[170] Tr. 205-06; JX-2.

appointed himself and JB as co-trustees.[171] Mehringer had not been a trustee of a charitable trust before nor had he ever managed a charitable organization.[172] However, he was familiar with the requirements of operating a lawful charity. He testified that he had reviewed Internal Revenue Service ("IRS") instructions for filing an application for recognition of exemption under Section 501(c)(3) of the Internal Revenue Code "10 or 15 times over the last 20 years."[173]

The same day that he formed the Trust, Mehringer submitted an application to open an account in the name of the Trust at Western International.[174] Mehringer was the registered representative on the account.[175] Shortly thereafter, Mehringer received a check for $1,086,800 from AA dated March 28, 2013, payable to the Trust, which he deposited in the brokerage account.[176] This was a payment of a debt AA owed to JB, and which JB wanted to shelter from taxes.[177] According to Mehringer, AA was not trying to make a charitable donation; he was just paying off a debt he owed to JB.[178]

A year and a half later, in October and November 2014, IR, a dentist, wrote three checks to the Trust for $150,000, $181,028, and $24,000. Mehringer deposited the checks in the Trust's brokerage account at Western International.[179] By paying the money to the Trust, IR received a tax deduction equal to the amount he paid, according to Mehringer, and JB avoided paying taxes on the money IR paid him.[180] In response to an inquiry from the firm's AML officer, Mehringer said that IR donated to the Trust to benefit underprivileged children, one of the Trust's putative purposes.[181]

In late 2014, Western International's clearing firm reviewed the Trust agreement and determined that it needed to be amended to reflect its supposed charitable purposes. In March 2015, Mehringer amended the Trust agreement to include language specifying that the charity's

[171] Tr. 196-98; JX-2.

[172] Tr. 518. Mehringer testified that he did not make any charitable contributions to the Trust. Tr. 609.

[173] Tr. 210; RX-38; RX-39.

[174] Tr. 519-20; JX-1. Mehringer identified himself and JB as the co-owners of the Trust on the application form. On the application, Mehringer stated that the source of funds for the Trust was a "gift." JX-1.

[175] Tr. 212. As the registered representative on the Trust account, Mehringer earned $82,385 in commissions from securities transactions. Tr. 277; CX-7, at 3.

[176] Tr. 199; CX-9, at 1-2.

[177] Tr. 199-200.

[178] Tr. 200.

[179] Tr. 200-01; CX-9, at 3-5.

[180] Tr. 201.

[181] Tr. 202; CX-5, at 1.

purpose was to support underprivileged children.[182] Mehringer testified that the amendment was intended to apply retroactively to cover the two years since the Trust's formation.[183]

On April 29, 2015, a month after amending the Trust agreement, Mehringer resigned as a co-trustee. Mehringer testified that he resigned because, after the Trust agreement was amended, JB would not agree to fund the charity to help underprivileged children. Mehringer thought the IRS would not approve the Trust if JB "kept running it the way we had been."[184]

2. Mehringer Used Trust Funds to Pay JB's Children's Tuition

From 2013 to 2015, Mehringer wrote checks totaling $154,310 to a private school from the Trust account at Western International. Nearly all of the money—$142,560—was used to pay tuition and other fees for JB's six children, who were going to the school. This effectively permitted JB to use untaxed income to pay his children's tuition.

In March 2013, the private school sent six summer school tuition invoices totaling $3,750 for JB's children. On June 10, 2013, at JB's direction, Mehringer sent the school a check for that amount. Mehringer made a notation on a copy of one of the invoices to pay the amount from the Trust's account at Western International. On the memo line of the check, he wrote "summer school scholarship."[185]

In July 2013, a billing service sent JB a notice that it would process a payment of $69,310 to the school from his bank account on July 15, 2013. On July 11, 2013, JB's wife emailed the notice to Mehringer with instructions to have a check sent to "the kids' school for tuition in the Amt below. Due date is Monday [July 15], so sorry for the late notice."[186] She provided the school's mailing address. Mehringer made a handwritten notation on a printed copy of the email "sell $63,300 from [Trust account]."[187] Mehringer wrote a check to the school dated July 11, 2013 for $69,310 drawn on the Trust account. He wrote "tuition" on the check's memo line.[188]

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[182] The amended Trust agreement stated, "Settlor desires to maintain a revocable trust which collects monies from donors for the exclusive benefit of underprivileged children. Said funds shall be used for investments and distributions for the exclusive benefit of underprivileged children for academic scholarships to educational institutions licensed in the State of California." RX-36, at 1. The Trust agreement was executed a second time, in July 2015, to include the signature of JB as a co-trustee. Tr. 525-26; JX-3.

[183] Tr. 552-53.

[184] Tr. 527; RX-37.

[185] Tr. 218-19, 527; CX-12, at 7.

[186] CX-13, at 1.

[187] Tr. 226-29; CX-13, at 1.

[188] CX-11, at 3. Mehringer testified that at the time he did not know that the check was for JB's children because he "didn't inquire about it all." Tr. 227-30; CX-3, at 40. Given the circumstances surrounding the bill and JB's wife's instructions to Mehringer, the Panel does not find it credible that Mehringer did not know the money was for JB's children's tuition.

In June 2014, Mehringer completed an annual tax return (IRS Form 1041-A, "U.S. Information Return, Trust Accumulation of Charitable Accounts") for the Trust for the 2013 tax year and filed it with the IRS. On the form, Mehringer wrote that the Trust had distributed $75,560 "for charitable purposes" to the private school. The figure represented the total amount the Trust paid to the school in 2013, which included $69,310 that he paid on July 11, 2013, to cover the tuition for JB's children.[189] Mehringer testified that at the time he submitted the return to the IRS, he did not believe the $69,310 was used for charitable purposes. He nonetheless treated the amount as a charitable donation because he "trusted [JB] to fund money to the school for other people, a substantial amount," and so it was "okay" to tell the IRS the tuition payment was appropriate.[190]

On July 10, 2014, Mehringer wrote another check to the school for JB's children, for $69,500. He wrote "tuition scholarships" on the memo line of the check. Mehringer testified that he knew the money was to cover JB's children's tuition because he saw a copy of the school's bill.[191]

3. Respondent Commingled Trust Funds to Purchase Property in Alaska

In June 2013, Mehringer used Trust money to purchase a residential property in his name in Alaska. He testified that during a trip to Alaska with his wife, they saw a property that they believed would be a good investment.[192] JB suggested that Mehringer also invest the Trust's funds, according to Mehringer.[193] On June 19, 2013, Mehringer wired $123,880 from the Trust account at Western International to a title company in Alaska.[194] Mehringer sold a portion of the Trust's holdings in a bond fund to make the transfer.

The same day, Mehringer wired approximately $112,000 from his 401(k) account at Western International to pay for half of the Alaska purchase.[195] The 401(k) account held $116,034 at the beginning of June 2013, an amount insufficient to finance the entire purchase of

[189] Tr. 233; CX-10.

[190] Tr. 234-35. In addition to the $69,310 payment, the $75,560 includes the $3,750 paid to the school for the six children's summer school tuition (at $625 each) and $2,500 paid in May 2013, which is the only payment made during 2013 that Mehringer identified as a proper charitable donation to the general scholarship fund of the school. Tr. 214; CX-11, at 1.

[191] Tr. 232; CX-11, at 5.

[192] Tr. 532-33.

[193] Tr. 534.

[194] Tr. 326; CX-17. Mehringer and JB signed the letter of authorization to transfer the funds from the Trust account to the title company. The transfer instructions stated that the funds sent to the title agency were "FBO Dennis Albert Mehringer." CX-17.

[195] Tr. 333-34.

the Alaska property.[196] The Trust, however, held sufficient assets in its account at Western International to purchase the property.[197]

Despite the fact that about half of the money used to buy the property belonged to the Trust, the settlement papers show that Mehringer purchased the property in his own name. He testified at the hearing that he intended to hold the property in the name of the Trust and his 401(k) profit sharing plan, but he had "great difficulty" with the title company, which put only his name on the papers even though, he claimed, he had insisted that the Trust be identified as a co-owner. He said he signed all documents as "trustee."[198]

In August 2013, two month after purchasing the property, Mehringer sold the home for a profit of approximately $20,000.[199] He wrote two checks to the Trust drawn from a personal bank account. One was for $123,880, the amount he had wired from the Trust's account at Western International to the Alaska title company to purchase the property. The other check was for $10,146, which represented half of the profit made on the purchase and sale of the property.[200] Mehringer paid the other half to his 401(k) account.[201]

4. Mehringer Mishandled Trust Funds When Making an Investment

In 2014, Mehringer invested over $128,000 of the Trust's assets in a mortgage on a nursing home in California that was partly owned by MM, who, according to Mehringer, was a friend of JB's. JB told Mehringer that MM had a "lucrative" investment opportunity. MM told Mehringer that Trust funds would be used to pay off the nursing home's existing mortgage and replace it with a new loan.[202] Instead, the money was seized by the IRS because the nursing home had unpaid taxes.

Mehringer wrote checks for $65,000 and $63,412, both dated October 3, 2014, and made payable to MM personally, from the Trust's brokerage account at Western International. Mehringer wrote on the checks that the funds were a "loan."[203] MM told Mehringer that he would deposit the checks into an escrow account. A few weeks after writing the checks to MM, Western International's anti-money laundering officer asked Mehringer what the money was for. He told her that the checks represented an investment by the Trust and constituted a deposit towards the purchase of an interest in the nursing home. Mehringer testified that the two checks

[196] Tr. 335, 533-34.

[197] Tr. 332.

[198] Tr. 327-28.

[199] Tr. 330; CX-20.

[200] Tr. 331-32; CX-21.

[201] Tr. 332.

[202] Tr. 318-19.

[203] Tr. 317-18; CX-9, at 4; CX-22. The two checks were also signed by JB as co-trustee. Tr. 604; CX-22.

were supposed to go into an escrow account before being used to pay off the nursing home's existing mortgages.[204] However, no escrow account had been established when Mehringer gave MM the checks.[205] MM deposited the two checks in a bank account belonging to the nursing home. Mehringer learned from MM that a tax lien had been levied against the nursing home's bank account into which the two checks were deposited.[206]

Mehringer testified that he paid the money directly to MM because JB was in a hurry to make the investment. Before paying MM, Mehringer did not first determine if an escrow account existed or whether there were any liens against the assets of the nursing home. He did not ensure there was a written loan agreement.[207] Nor did Mehringer obtain from MM any other documentation concerning the existence of the debt or an obligation to repay the loan. Neither MM nor the nursing home paid back the money to the Trust.[208]

B. Conclusions of Law

The Complaint alleges that Mehringer "violated his fiduciary obligations by using the Trust funds for non-charitable purposes, thereby violating the intent of the Trust and endangering the tax exempt status of the Trust and of donations to the Trust."[209] A trustee of a charity is a fiduciary.[210] Mehringer was a co-trustee of the Trust, along with JB. A broker violates Rule 2010 by breaching his fiduciary duties.[211] A registered representative who also serves as a trustee violates Rule 2010 when he breaches his fiduciary duties.[212]

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[204] Tr. 319-20, 537. In an email, Mehringer told the firm's anti-money laundering officer shortly after giving MM the checks that "[e]scrow instructions are in the process of being drafted to support the investments prior to closing." CX-5, at 1. Mehringer also testified that MM told him that there was no need to make the checks payable to an escrow account because he had one that he used to do business with. JB told Mehringer to give MM the money because "he's an honest guy." Tr. 583.

[205] Tr. 319-20.

[206] Tr. 320-21, 538; CX-3, at 62.

[207] Tr. 323-25.

[208] Tr. 321-33; CX-3, at 61-62. Mehringer told his firm in December 2014 that MM would "return the funds by the end of the month." He did not disclose that the investment was lost as a result of a tax lien and told his firm instead that the investment transaction "f[ell] through." CX-6, at 1.

[209] Compl. ¶ 43. The Complaint also alleges that Mehringer breached his fiduciary obligation to the Trust "by establishing it in such a manner as to give himself potential ownership of the Trust's assets and by failing to ensure that it would fulfill its purported charitable purposes." Compl. ¶ 35.

[210] *See Blau v. Lehman*, 368 U.S. 403, 417 (1962).

[211] *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *17-20 (Mar. 29, 2016) (as manager and sole member of entity responsible for managing a fund, his conversion of fund assets constitute a breach of his fiduciary duties and violated FINRA Rule 2010).

[212] *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012) (finding that respondent's breach of his fiduciary duties by converting a charity's assets constituted a separate violation of Rule 2010).

To constitute a violation of Rule 2010, a broker's misconduct need not relate to a securities transaction. The SEC has consistently held that the FINRA's "disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."[213] In determining whether conduct violates FINRA Rule 2010, the SEC examines whether the wrongdoing reflects on the associated person's capacity "to comply with the regulatory requirements of the securities business and to fulfill [his or her] fiduciary duties in handling other people's money."[214]

1. The Trust Was Not Organized as a Charity and Its Funds Were Not Used for Charitable Purposes

For a charity to be tax exempt and for its contributions to be tax deductible, the charity must be established and operated according to the Internal Revenue Code. To be exempt under Section 501(c)(3) of the Internal Revenue Code, the entity must be organized and operated exclusively for exempt purposes set forth in the section, and none of its earnings may benefit any private shareholder or individual.[215] "If an organization fails to meet either the organizational test or the operational test, it is not tax exempt."[216]

The Trust Mehringer created failed both tests because the organizing document—the original Trust Agreement—did not refer to any charitable purposes and, once the Trust was formed, Mehringer did not limit the use of Trust funds to charitable purposes. The Trust Agreement did not identify any charitable or educational purposes or restrict the use of Trust funds to such purposes. In fact, the first section of the Agreement required that income be used for the benefit of the settlor (Mehringer) and allowed him to withdraw principal for his own personal use. The organizational documents of a charity cannot permit the distribution of the charity's assets for non-exempt purposes, such as distributing assets to the entity's members or shareholders.[217] Another section of the Trust Agreement permitted Mehringer to terminate the Trust at any time, but did not require that remaining assets be used for tax-exempt purposes upon termination. Yet another provision of the Trust Agreement required that in the event of Mehringer's death, Trust assets were to be distributed to named beneficiaries, but it did not identify the beneficiaries. This meant that Trust assets might not be used for an exempt charitable purpose upon dissolution.[218]

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[213] *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996).

[214] *Grivas*, 2016 SEC LEXIS 1173, at *10 (quoting *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002)).

[215] Organizations described in Section 501(c)(3) are exempt from taxation, and include, "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, … no part of the net earnings of which inures to the benefit of any private shareholder or individual."

[216] 26 C.F.R. § 1.501(c)(3)-1(a)(1).

[217] *See* RX-39, at 7; 26 C.F.R. § 1.501(c)(3)-1(b)(4).

[218] JX-2.

Setting aside deficiencies associated with the Trust Agreement, Mehringer operated the Trust in a manner inconsistent with a lawful charity. He violated IRS regulations that require a charity's funds be used only for exempt purposes.[219] A charity must serve a public interest, not private interests.[220] Mehringer used Trust assets for private purposes—to benefit JB's wealthy family by paying their children's tuition. He did not use assets to advance the education of needy children. This violated Section 501(c)(3)'s prohibition that no part of a charity's assets may "inure[]to the benefit of any private shareholder or individual."[221]

As a fiduciary, a trustee has "an overarching obligation" to use "reasonable care, skill and diligence."[222] Failing to take reasonable efforts to protect an organization's tax exempt status violates a fiduciary's obligations.[223] Mehringer did not fulfill his fiduciary obligations. He formed an entity that did not conform to IRS regulations applicable to charities and, almost immediately, knowingly used Trust assets for non-charitable private purposes.

2. Commingling of Trust Assets to Buy Alaska Property and Failing to Perform Due Diligence Regarding Nursing Home Investment

The Complaint also alleges that Mehringer "breached his fiduciary obligation to the Trust by commingling his personal assets with those of the Trust, and by holding title to the property in his own name" when he invested in the Alaska property in June 2013.[224] Enforcement also charges that in connection with the October 2014 nursing home investment Mehringer breached his fiduciary obligations to the Trust "and endangered its assets by making an undocumented investment, by failing to conduct due diligence, and by failing to ensure that funds were being deposited into an escrow account."[225]

The trustee of a charitable trust may not commingle trust assets with his personal assets[226] and he owes the charitable trust the duty to act reasonably and prudently.[227] However,

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[219] IRS regulations provide, "An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes identified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." 26 C.F.R. § 1.501(c)(3)-1(c)(1).

[220] A charity cannot be operated "for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests." 26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii).

[221] *See* IRS Private Letter Ruling 200844022, 2008 PLR LEXIS 2461, at *19 (Apr. 22, 2008) (donors' money given to a charity used to pay children's tuition determined to be a tax avoidance scheme).

[222] *Evvtex Co. v. Hartley Cooper Assocs.*, 102 F.3d 1327, 1332 n.7 (2d Cir. 1996).

[223] *United States v. Bennett*, 161 F.3d 171, 196 (3d Cir. 1998) (defendant diverted funds donated for charity for private purposes, and used false filings to gain and retain tax-exempt status), *cert. denied*, 528 U.S. 819 (1999).

[224] Compl. ¶ 50.

[225] Compl. ¶ 60.

[226] "A trustee has a duty to see that trust property is designated or identifiable as property of the trust, and also a duty to keep the trust property separate from the trustee's own property and, so far as is practical, separate from other

the Panel does not make findings of violation here as to the Alaska property and nursing home investment because Mehringer and JB did not form or operate the Trust as a lawful charity.[228] The Trust Agreement did not set forth charitable purposes and from the outset most of its funds were not in fact used for public and tax-exempt purposes. The account effectively was handled as a regular customer account, funded by money owed or belonging to JB. JB knew of the Alaska investment and he proposed the nursing home investment to Mehringer. Had the Trust been formed and operated as a lawful charity, with a proper charitable purpose and identified beneficiaries, the Panel would have found Mehringer's commingling of his money with Trust money and mishandling of the investment in the nursing home violated his fiduciary obligations as the trustee of a charitable trust.

3. Conclusion

The Panel finds that Mehringer violated his fiduciary obligations in handling the Trust account by failing to ensure that it was organized for charitable purposes and that its funds were used for tax-exempt purposes, and not primarily to benefit JB's family, as alleged in cause three. By engaging in this misconduct, Mehringer violated FINRA Rule 2010.

Because the entity was not in fact a charitable trust, we decline to find violations as to the additional allegations in cause three that Mehringer breached his fiduciary obligations to the Trust by (i) commingling Trust money with his own money when he invested in the Alaska property and (ii) investing Trust funds recklessly in the nursing home.

VII. Mehringer Gave His Firm False and Misleading Information about His Use of Trust Funds

A. Findings of Fact

Mehringer provided Western International false information about the use of Trust assets. In late October 2014, the firm's AML officer asked Mehringer to explain the "business purpose" of the $150,000 check (dated October 4, 2014) from IR that he deposited into the Trust's brokerage account. Mehringer responded that it was a donation to the Trust "to benefit

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property not subject to the trust." Restatement (Third) of Trusts, § 84 (2007). "A trustee has a duty not to commingle property of the trust with the trustee's own property. Thus, it is improper for a trustee to deposit money of the trust in the trustee's personal account in a bank, even if the trustee maintains records continuously and carefully showing the trust's interest in the account." Restatement (Third) of Trusts, § 84, comment b.

[227] A trustee also has "a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." Restatement (Third) of Trusts, § 90. This standard "requires the exercise of reasonable care, skill, and caution" in connection with investment decisions. *Id.* § 90(a).

[228] *See Wolfchild v. United States*, 559 F.3d 1228, 1238 (Fed. Cir. 2009) (rejecting claim that congressional appropriations to benefit Native American tribe constituted a trust giving rise to fiduciary obligations) (quoting Restatement (Third) Trusts, § 13 ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.")).

underprivileged children."[229] The AML officer provided the information Mehringer gave her to the firm's chief compliance officer. He in turn provided the information to FINRA in April 2015.[230]

On November 4, 2014, Western International's compliance department followed up and asked Mehringer, "How does the money get to the underprivileged children?" He responded via email, "The money is sent to the schools where they attend as a scholarship."[231] On December 9, 2014, Mehringer told the firm in another email that the "donations were made to" the private school.[232]

In approximately April 2015, in response to an inquiry from the firm about activity in the Trust account, Mehringer represented to the firm's compliance department that the $69,310 check he wrote to the school, dated July 11, 2013,[233] was a donation.[234]

B. Conclusions of Law

FINRA Rule 2010 is a broad ethical rule that obligates associated persons to conduct their business in accordance with "high standards of commercial honor and just and equitable principles of trade." Cause four charges Mehringer with violating Rule 2010 by making three misrepresentations to Western International about the payments he made to the school using Trust funds on behalf of JB's children. His statements to the firm that the payments were for donations intended for charitable purposes were false or misleading.

Giving an employer member firm false information in response to an inquiry violates 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.[235] The Panel finds that Mehringer's statements were deliberate and were intended to hide what he was doing with Trust funds so as to evade scrutiny about his handling of the account. The Panel therefore concludes that Mehringer violated FINRA Rule 2010.

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[229] CX-5, at 1.

[230] Tr. 248-50; CX-7, at 1-3.

[231] CX-6, at 2-3.

[232] CX-6, at 1.

[233] Mehringer wrote this check at the behest of JB's wife to cover their children's tuition at the private school. Tr. 226-29; CX-11, at 3; CX-13, at 1.

[234] Tr. 247-48; CX-7, at 1-2; CX-11, at 3.

[235] *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *16-17 (NAC Mar. 9, 2015) (providing false information to a member firm violates FINRA Rule 2010) (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *16-17 (Feb. 24, 2012)); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *10 (NAC May 7, 2003) (finding the respondent violated NASD Rule 2110, the predecessor to FINRA Rule 2010, by misrepresenting to his firm that he had not borrowed from customers), *aff'd in relevant part*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012).

VIII. Mehringer Settles a Customer Complaint Without Disclosing It to His Firm

A. Findings of Fact

1. The Customer Transaction

In the spring of 2014, customer MN instructed Mehringer to sell bonds his wife owned in an account at Western International. Before the trade was executed, the issuer of the bonds filed a bankruptcy petition causing the value of the bonds to collapse.[236]

As a result of the fall in the price of the bonds, Mehringer offered to purchase them directly from MN for their value at the time of the order, but the firm's head trader would not permit him to do so. The trader told Mehringer that the bonds would have to be sold at the then-current market price and Mehringer could pay MN the difference.[237] On May 20, 2014, the firm sold the bonds at the then-current market price. Upon seeing the execution price, MN emailed Mehringer asking, "I see the sale at our full loss -- now what?"[238]

Mehringer responded that he would overnight a personal check for the difference. The same day Mehringer sent MN a check (made out to his wife) dated May 20, 2014, for $47,777.98 to cover the loss. On the memo line of the check, Mehringer wrote "Settlement of Claim." Mehringer told MN that because the check was for a "settlement of a legal claim" it was not taxable income.[239]

MN asked Mehringer if the "settlement of a legal claim" would result in a "black mark" on his disciplinary record. Mehringer responded that there would be no "black mark" because MN "did not file a formal complaint."[240] Mehringer testified that because MN did not send him "anything in writing," he "assumed it wasn't a complaint."[241]

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[236] Mehringer admitted in his Answer that MN had instructed him to sell the bonds and that he did not execute the trade until a week later, after its price had "fallen drastically." *See* Compl. ¶¶ 67-68; Ans. ¶¶ 67-68. After learning of the settlement a year later, the firm amended Mehringer's Form U4 (Uniform Application for Securities Industry Registration or Transfer) and reported that the "matter was settled between rep & client for a trade not executed on 5/20/14." CX-1, at 25. At the hearing, Mehringer testified that there was no unexecuted sell order from MN. Instead he had agreed to pay MN the difference between the 2013 purchase price and the May 2014 value of the bonds because the investment was not profitable. Tr. 510, 516. The Panel finds that the circumstances underlying MN's dissatisfaction are not material to Mehringer's decision to settle the complaint without disclosing it to his firm.

[237] Tr. 185, 188, 510-11, 577-78.

[238] CX-23.

[239] Compl. ¶¶ 69-71; Ans. ¶¶ 69-71; Tr. 186-87; CX-23; CX-24. Mehringer testified that he in fact considered MN's claim to be a "legal claim."

[240] CX-23.

[241] Tr. 512.

2. Western International's Procedures for Handling Customer Complaints

Mehringer did not report MN's complaint to his immediate supervisor or the firm's chief compliance officer or anyone else in the compliance department.[242] The firm's written supervisory procedures required that registered representatives report written or oral complaints to the firm. When a registered representative receives a written complaint from a customer, the procedures provide that "a copy should be forwarded immediately to Compliance for follow-up."[243] Oral complaints were to be handled similarly. According to the firm's procedures, they "should be reported immediately to the designated supervisor for sales practice issues, or to Operations for operational issues." The procedures defined "sales practice issues" as including "complaints regarding losses, improper trades, and other complaints involving the quality of investments or wrongdoing by the [registered representative] or the Firm."[244]

Western International's procedures also instructed employees that they may "not make payments to customers of any kind to resolve an error or customer complaint. Errors and customer complaints must be brought to the attention of the employee's designated supervisor."[245]

Mehringer acknowledged that he did not comply with the firm's policy about reporting customer complaints.[246] He testified that he did not understand at the time that oral complaints had to be reported to the firm.[247] He further testified that he believed the bond trader had told compliance about his trying to resolve MN's complaint.[248] However, there is no evidence that Mehringer specifically told the trader that his motive in buying the bond was to resolve MN's complaint. In any event, Mehringer had an independent obligation to report the complaint to the proper person himself and not rely on someone else. The Panel also notes that Mehringer's explanation is inconsistent: if he did not believe at the time that MN's dissatisfaction constituted a reportable (written or oral) complaint, there would have been no reason for him to assume the trader would report MN's complaint to compliance.

Mehringer also testified that he did not understand at the time that he could not write a check directly to a client. He claimed that because he had a $50,000 deductible on his insurance policy he believed that he could settle a claim below that amount on his own without going

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[242] Tr. 188-89.

[243] Tr. 189; CX-25, at 9. *See also* Tr. 256-58.

[244] CX-25, at 9.

[245] CX-25, at 6.

[246] Tr. 190-91.

[247] Tr. 513.

[248] Tr. 578.

"through … the compliance department and the law firm to incur more expense."[249] Mehringer said he believed that the compliance department's function was to get the insurance company involved when the complaint amount exceeded $50,000. And since he was settling MN's claim himself, there was no need for him to inform compliance.[250] This defense, too, is inconsistent: if Mehringer truly believed that MN's displeasure did not amount to a complaint, the fact that the settlement fell below $50,000 should not have been a factor in his calculations about whether to report it or not.

Western International did not learn of Mehringer's settlement with MN for more than a year. In July 2015, FINRA examiners discovered a copy of his check to MN's wife during an audit of his offices.[251]

B. Conclusions of Law

It is a violation of FINRA Rule 2010 for a registered representative to settle a customer complaint without his firm's knowledge or approval.[252] MN's email on its face undoubtedly constitutes a "complaint," one sufficiently serious that it caused Mehringer to pay a substantial amount of money out of his own pockets to make the customer whole.[253] Mehringer settled the customer complaint without any notice to Western International that he was doing so. Nor did he tell the firm that MN had complained. Mehringer does not dispute that he settled MN's complaint without his firm's knowledge or authorization. He claims that he believed that telling the firm's head trader that he wanted to buy MN's bond was equivalent to disclosing the existence of a complaint to compliance personnel because the trader was a principal. The Panel does not find his explanations to be credible. Mehringer is a seasoned broker and he also has served as a supervisor. Disclosing customer complaints to one's compliance department is a basic and widely known obligation of a broker.

Mehringer's conduct is inconsistent with just and equitable principles of trade. His failure to notify the firm of the complaint and settlement was unethical. Information about customer complaints is important to member firms and investors. Mehringer's actions thwarted Western International's ability to supervise him so as to ensure that he dealt with customers fairly. The Panel finds that Mehringer violated FINRA Rule 2010.

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[249] Tr. 514. Mehringer also testified that he did not know who his supervisor was at the time so he did not have an "available resource" to turn to if he had a question about settling a customer's claim directly. Tr. 514-15.

[250] Tr. 578, 600.

[251] Tr. 192-93. *See also* Tr. 253-54. The firm amended Mehringer's Form U4 on August 10, 2015, disclosing that it had learned of MN's complaint on July 24, 2015. CX-1, at 25; CX-26, at 8-10.

[252] *Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, *13 (NAC Mar. 7, 2008); *Dist. Bus. Conduct Comm. v. DiAngelo*, No. C10960003, 1996 NASD Discip. LEXIS 34, at *5-6 (NBCC Oct. 16, 1996).

[253] *Dep't of Enforcement v. Clark*, No. 2011027402201, 2014 FINRA Discip. LEXIS 37, at *21 (OHO Aug. 5, 2014) (finding that a customer's grievance delivered by email constitutes a complaint).

IX. Mehringer Falsely Told His Firm that He Disclosed All Customer Complaints and Did Not Pay Money to a Client

A. Findings of Fact

On October 28, 2014, Mehringer completed his firm's 2014 online compliance questionnaire. One of the questions asked, "Are you now or have you been while at the firm, the subject of any oral or written customer complaints?" Mehringer answered "yes" to this question because, he testified, at the time he was the subject of other customer complaints besides MN's complaint.[254] The next question asked, "If Yes, have you promptly reported all written or oral customer complaints you have received to the firm's Compliance Department?" Mehringer answered "yes" because, according to his testimony, he "interpreted [the question] to mean written complaints" only, not oral complaints, even though the question specifically included "oral" customer complaints.[255]

The compliance questionnaire also asked, "While associated with the firm, have you ever promised or actually paid money to a client in connection with a securities transaction?" Mehringer answered "No."[256] He testified that he thought the question was "vague" and interpreted it "to mean as an inducement of the transaction, which in this case clearly was not. I promised a man I'd make him whole. That didn't have anything directly to do with the transaction."[257]

Western International's chief compliance officer testified that the firm considered that a customer complaining about a failure to timely execute a trade constituted a complaint involving a "sales practice issue."[258] The firm's policy was that all settlements with a customer should be done by the firm, not registered representatives. Furthermore, registered representatives were not allowed to make payments of any kind to customers to resolve a complaint or error.[259] The chief compliance officer testified that Mehringer provided a false answer to the question asking whether he had paid money to a client "in connection with a securities transaction." According to the chief compliance officer, the firm's procedures did not contemplate exceptions for payments made for other reasons, as Mehringer argued.[260] Therefore, according to the chief compliance

[254] Tr. 193; CX-27, at 1. Registered representatives completed the annual compliance questionnaire electronically by logging onto the website of a third-party vendor through their own computers. Tr. 286-88.

[255] Tr. 193-95; CX-27, at 1.

[256] CX-27, at 4.

[257] Tr. 194-95.

[258] Tr. 257-58.

[259] Tr. 258.

[260] Tr. 260.

officer, Mehringer failed to comply with the firm's policies about reporting customer complaints and settling them with customers.[261]

B. Conclusions of Law

Mehringer falsely answered that he had promptly reported all written or oral complaints from customers to the compliance department. Mehringer's explanation for this false answer—he was in a computer stall completing lengthy on-line questionnaires and could not focus on MN's complaint—is not credible. Because he settled MN's complaint in May 2014, the answer was false.

He also falsely answered "No" to the question asking if he had paid money to a client in connection with a securities transaction. The question is not ambiguous. The Panel does not find Mehringer's explanation for this false answer credible either—that he interpreted the question as asking whether he gave someone money as an inducement to engage in a securities transaction. This is a tortured reading of a simple question that is plainly meant by the firm to ensure that none of its brokers engage in settling customer complaints away from the firm.

FINRA Rule 2010 "includes the obligation to disclose truthfully material information to an associated person's firm."[262] A failure to disclose such information "calls into question the registered representative's ability to comply with regulatory requirements necessary for the proper functioning of the security industry and the protection of the public."[263] Mehringer's false responses on the compliance questionnaire that he had reported all customer complaints and had not settled customer claims violated FINRA Rule 2010.

X. Sanctions

In determining the appropriate sanctions for Mehringer's misconduct, the Panel considered FINRA's Sanction Guidelines ("Guidelines"),[264] including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions. Two of the General Principles are applicable here. General Principle No. 1 states that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct." Adjudicators accordingly should "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." Sanctions

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[261] Tr. 258-59. The chief compliance officer testified that the firm did not discipline Mehringer for violating the firm's procedures because "we believe[d] we addressed this situation with" him and because FINRA was going to take action. Tr. 259.

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

[263] *Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *30 (NAC Feb. 24, 2011) (quoting *Davenport*, 2003 NASD Discip. LEXIS 4, at *9.

[264] *See* FINRA Sanction Guidelines (2017), http://www.finra.org/industry/sanction_guidelines.

should "reflect the seriousness of the misconduct at issue."[265] General Principle No. 3 instructs adjudicators to "tailor sanctions to respond to the misconduct at issue," so that the sanctions imposed "address the misconduct involved in each particular case."[266]

A. Unsuitable Recommendations (Cause One)

Violating FINRA's suitability rule breaches "an important duty that is fundamental to the relationship between registered representatives and their customers."[267] The Guideline for making unsuitable recommendations provides for a fine between $2,500 and $110,000. Adjudicators should consider suspending an individual in any or all capacities for a period of ten business days to two years. In cases where aggravating factors predominate, adjudicators should "strongly consider" a bar for an individual respondent. There are no specific considerations for this guideline. Instead, adjudicators are directed to apply the General Principles and Principal Considerations applicable to all sanctions determinations.[268]

The Panel found multiple aggravating factors in this case, and no mitigating circumstances.[269] Mehringer's misconduct resulted in significant benefits for himself while causing considerable harm to ES. Mehringer's trading in Class A shares caused ES to pay over $182,000 in commissions, of which Mehringer received 90 percent, or $164,069.16.[270] He engaged in the misconduct for over three years.[271] Although ES operated a successful business, it is apparent to the Panel that he was not a sophisticated or experienced investor.[272] Mehringer protested that he was "not a greedy person," but the Panel finds that he took advantage of ES's

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[265] Guidelines at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

[266] Guidelines at 3 (General Principles Applicable to All Sanction Determinations, No. 3).

[267] *Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *128.

[268] Guidelines at 95.

[269] Mehringer's arbitration settlement with ES is not mitigating. The Guidelines state that adjudicators should consider whether a respondent voluntarily and reasonable attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct. Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 4). Mehringer and the firm settled the case in 2016, two years after ES filed his arbitration claim and after FINRA learned of the potential misconduct.

[270] Guidelines at 7-8 (Principal Considerations in Determining Sanctions, Nos. 11 and 16) (whether respondent's misconduct resulted in injury to the investing public and the potential for the respondent's monetary or other gain).

[271] Guidelines at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, and 17) (whether the respondent engaged in numerous acts and/or a pattern of misconduct; whether the respondent engaged in the misconduct over an extended period of time; and the number, size, and character of the transactions at issue).

[272] Guidelines at 8 (Principal Considerations in Determining Sanctions, No. 18) (the level of sophistication of the injured or affected customer). Although ES was relatively wealthy, we find that Mehringer did not demonstrate that he was sophisticated. *See Dep't of Enforcement v. Scholander*, No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *82 (NAC Dec. 29, 2014) (finding that a customer's net worth does not provide information about that customer's level of sophistication).

lack of experience with investments and inattention to his accounts.[273] Mehringer acted intentionally, thinking only of his own financial well-being and not ES's interests.[274] Finally, Mehringer never accepted responsibility for his actions.[275] The Panel finds Mehringer's lack of candor and multiple efforts to minimize his responsibility during the proceedings to be disturbing.

The Panel concludes that Mehringer's misconduct was egregious and he is therefore not fit to work in the securities industry. Accordingly, for the unsuitable recommendations to ES, the Panel bars Mehringer from associating with any member firm in all capacities, fines him $50,000, and orders that he disgorge $108,131.21. The fine is a little less than the losses of $54,581.43 suffered by ES as a result of Mehringer's trading in Class A shares.[276]

Disgorgement is also appropriate because Mehringer made considerable money in commissions from trading Class A shares in ES's accounts. Where a respondent "obtained a financial benefit from [the] misconduct, … Adjudicators may require disgorgement of such ill-gotten gain by fining away the amount of some or all of the financial benefit derived, directly or indirectly" by the respondent where appropriate to remediate misconduct.[277] The amount disgorged need not be precise, but it should be a reasonable approximation of the respondent's ill-gotten gains.[278] The Panel concludes that it is appropriate and remedial to order Mehringer to disgorge $108,131.21.[279] Mehringer shall also pay prejudgment interest on the disgorgement

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[273] Tr. 567. *See* Guidelines at 8 (Principal Considerations in Determining Sanctions, No. 19) (whether the respondent exercised undue influence over the customer). *See also Dep't of Enforcement v. Gomez*, No. 2011030293503, 2018 FINRA Discip. LEXIS 10, at *59 (NAC Mar. 28, 2018) (finding aggravating that respondent engaged in "a clear pattern of misconduct" involving unsuitable recommendations and "abused the trust and confidence" that customers placed in him).

[274] Guidelines at 8 (Principal Considerations in Determining Sanctions, No. 13) (whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence).

[275] Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 2) (whether respondent accepted responsibility for and acknowledged the misconduct to his employer before detection and intervention by the firm).

[276] The Guidelines provide that adjudicators generally should impose a fine in all sales practice cases even if a respondent is barred if the case "involves widespread, significant and identifiable customer harm" or the respondent has retained substantial ill-gotten gains. Guidelines at 10. The Panel finds that both conditions are met.

[277] Guidelines at 5 (General Principles Applicable to All Sanctions Determinations, No. 6). "Financial benefit" is defined to include any "revenues, profits, gains, compensation, income, fees, other remuneration, or other benefits the respondent received directly or indirectly, as a result of the misconduct." Guidelines at 5 n.4.

[278] *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *73 (Mar. 17, 2016).

[279] *See* Guidelines at 95 n.1 (instructing adjudicators to order disgorgement in cases involving unsuitable recommendations) (citing General Principle No. 6) (adjudicators may require disgorgement of ill-gotten gain when determining sanctions); Guidelines at 10 (disgorgement is appropriate even if an individual is barred); see also *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *50-51 (NAC Dec. 29, 2015) (ordering respondent to disgorge ill-gotten gains from converting investor funds), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

ES was charged $182,299.07 in front-end loads. Western International paid Mehringer 90 percent of this amount, or $164,069.16, as commissions. Mehringer also paid the firm 6 percent in ticket charges. Tr. 169. Mehringer

amount from December 9, 2013, which is the date of the last violative transaction in Class A shares he made in one of ES's accounts, as set forth in the Complaint.[280]

B. Exercising Discretion Without Written Authority (Cause Two)

For exercising discretion without a customer's written authority, the Guidelines suggest that, in cases where aggravating factors predominate, an individual respondent should be suspended in any or all capacities for at least 10 to 30 business days. Adjudicators should consider a fine between $2,500 and $15,000. Principal considerations in determining sanctions include whether a customer's grant of discretion was express or implied, whether the firm's procedures prohibited discretionary trading, whether the firm prohibited the respondent from exercising discretion in customer accounts, and, finally, whether the respondent's exercise of discretion went beyond time and price discretion.[281]

Aggravating factors are present. ES did not give Mehringer implied or express authority to engage in the transactions and Mehringer's actions went beyond time and price discretion. Based on the evidence presented at the hearing, the Panel concludes that ES was not informed in advance of the vast majority of transactions in Class A shares and therefore did not authorize them. Mehringer's unauthorized trading facilitated his excessive buying and selling of Class A shares.

For engaging in unauthorized trading, the Panel finds that it is appropriate to suspend Mehringer for 30 business days in all capacities and fine him $7,500. In light of the bar for the unsuitable recommendations, the Panel does not impose these sanctions.

C. Mehringer's Misconduct with Respect to the Purported Charitable Trust (Cause Three)

There are no guidelines for a registered representative's breach of his fiduciary duties towards a customer. Mehringer's misconduct involves primarily his misuse of Trust assets. Accordingly, the most appropriate guideline is for conversion or improper use of funds or

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accordingly retained $153,131.21 in commissions from the violative Class A share transactions. The disgorgement amount of $108,131.21 takes into account $45,000 that Mehringer contributed towards the settlement with ES. Enforcement's Pre-Hearing Br., at 25 n.57; Enforcement's Post-Hearing Br., at 33 n.130. Mehringer testified that in addition to paying $45,000 he also paid his firm $50,000, but he produced no documentary evidence substantiating this. Tr. 553-54. The Central Registration Depository reflects that he paid $45,000. CX-1, at 21.

Enforcement acknowledges that ES was made whole as a result of the arbitration settlement. ES included the company employee account in his arbitration claim. CX-2, at 7; Enforcement's Pre-Hearing Br., at 25 n.57. Accordingly, the Panel does not order Mehringer to make restitution to ES.

[280] CX-28, at 4. *See also Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *43 (NAC Apr. 26, 2013) (applying prejudgment interest to order of disgorgement).

[281] Guidelines at 86.

securities.[282] In cases other than conversion, the Guidelines provide for a fine between $2,500 and $73,000 and a suspension in any or all capacities for six months to two years, where the improper use resulted from the respondent's misunderstanding of the customer's intended use of the funds or securities. There are no specific principal considerations for misuse of funds.

The Panel considered that the overriding purpose behind the charity, which Mehringer facilitated, was to allow JB, a wealthy medical doctor, to shelter income and provide tax deductions to which he was not lawfully entitled. The tuition payments to the private school for JB's children were not proper charitable donations, and therefore constituted a misuse of the charity's funds. The Panel also finds aggravating that Mehringer knowingly submitted a form to the IRS that falsely stated the Trust's funds were used for charitable purposes.

The Panel finds that appropriate and remedial sanctions for Mehringer's misconduct surrounding his handling of the Trust are a six-month suspension in all capacities and a fine of $15,000. In light of the bar for the unsuitable recommendations, the Panel does not impose these sanctions.

D. Mehringer's False and Misleading Statements to the Firm and Settling Customer Complaint Away from the Firm (Causes Four, Five, and Six)

The Panel finds that it is appropriate to assess a unitary sanction for the misconduct alleged in causes four through six, each of which relates to his failure to make required disclosures to his firm.[283] We find that Mehringer's misconduct under these three causes is egregious in that it involves repeated efforts to conceal his activities from his employer. As a result of his efforts, Western International was prevented from exercising reasonable supervision over Mehringer's activities.

1. False and Misleading Statements to the Firm

There is no guideline for giving a firm false information in response to an inquiry, as alleged in cause four, charging Mehringer with giving misleading answers about his use of Trust funds. Nor is there a guideline for failing to disclose information on a compliance questionnaire, as alleged in cause six directed at Mehringer's failure to disclose a customer complaint and

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

[283] *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *37-40 (applying a single sanction for respondent's churning and excessive trading); *see also Escarcega*, 2017 FINRA Discip. LEXIS 32, at *67 (applying a single sanction for fraudulent misrepresentations and unsuitable recommendations based on same facts) (citing *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *59 (Sept. 24, 2015) (affirming FINRA's imposition of a single sanction for violations that are based on the same facts)).

settlement. For these two violations, we consulted the guidelines for recordkeeping violations and for falsification of records.[284]

The guideline for recordkeeping violations recommends a suspension in any or all capacities for between 10 business days and three months. When aggravating circumstances predominate, a longer suspension of up to two years, or a bar, is appropriate. The guideline also recommends a fine between $1,000 and $15,000, but states that when aggravating factors predominate, adjudicators should consider a fine between $10,000 and $146,000. An even higher fine should be considered where significant aggravating factors predominate.[285] The guideline for forgery or falsification of records recommends a suspension of 10 business days to two years, depending on whether the falsification was authorized, there was customer harm, and the misconduct involved other violations. When a respondent falsifies a document in furtherance of another violation, resulting in customer harm or accompanied by significant aggravating factors, a bar should be considered standard.[286] In the absence of customer harm and other violations, a fine of $5,000 to $10,000 is appropriate.[287]

The guidelines for recordkeeping violations and falsification of records recommend that the Panel consider the nature and materiality of the inaccurate or missing information and the nature of documents falsified.[288] Other relevant considerations involving recordkeeping violations include the nature, proportion, and size of the firm records at issue, and whether the inaccurate or missing information was entered or omitted intentionally, recklessly, or as the result of negligence. Adjudicators also should consider whether the violations occurred over an extended period of time, or involved a pattern or patterns of misconduct, and whether the violations allowed other misconduct to occur or to escape detection.[289]

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[284] Guidelines at 29, 37. *See Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *94 (NAC Oct. 1, 2013) (applying guidelines for recordkeeping violations and for forgery and/or falsification of records for providing firm false information about customers' sources of funds to purchase annuities and concealing the nature of the transactions); *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *86-87 (NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *appeal docketed*, No. 17-1240 (2nd Cir. Apr. 26, 2017) (applying guidelines for recordkeeping violations and falsification of records for respondent's misrepresentations on annual compliance questionnaire); *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *69-70 (NAC July 18, 2014) (applying guideline for falsification of records for respondents' misstatements on compliance questionnaires concerning their outside business activities), *aff'd*, 2015 SEC LEXIS 3927; *Dep't of Enforcement v. Braff*, No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *26-27 (NAC May 13, 2011) (applying guidelines related to the falsification of records for respondent's false statements on compliance questionnaires about outside brokerage accounts), *aff'd*, 2012 SEC LEXIS 620, at *1; *Dep't of Enforcement v. Duma*, No. C8A030099, 2005 NASD Discip. LEXIS 46, at *27 n.15 (NAC Oct. 27, 2005) (same).

[285] Guidelines at 29.

[286] Guidelines at 37.

[287] Guidelines at 37.

[288] Guidelines at 29, 37.

[289] Guidelines at 29.

2. Settling a Customer Complaint Away From Firm

For settling customer complaints away from the firm, the guideline advises adjudicators to consider suspending a respondent in any or all capacities for up to two years. In egregious cases, consideration should be given to barring a respondent. An appropriate fine ranges from $2,500 to $73,000.[290]

There are two principal considerations specific to this misconduct and both are relevant. One is whether the respondent provided his employer with verbal notice of the settlement and the employer acquiesced, or whether the respondent deceived his employer. Mehringer hid the settlement from his firm. The other principal consideration is whether the failure to provide the employer with notice of the settlement delayed or obviated the filing of a required Form U4 or Form U5 (Uniform Termination Notice for Securities Industry Registration) or a FINRA Rule 4530 filing (known as NASD Rule 3070 until July 1, 2011).[291] Western International did not update Mehringer's Form U4 to disclose MN's complaint until August 2015, more than a year after the settlement.

3. Conclusion

Mehringer's false statements and pattern of deceiving his employer constitute egregious misconduct. They allowed him to hide his activities with respect to the Trust and settle a customer complaint without alerting the firm to his possible misconduct. We find that Mehringer's intentionality significantly aggravates his misconduct.[292] Taking together his failure to disclose to his firm the purpose and use of Trust funds, settling a customer complaint away, and giving false answers on a compliance questionnaire, the Panel finds that it is appropriate to suspend Mehringer for two years in all capacities and fine him $50,000. Because of the bar for the unsuitable recommendations, we do not impose these sanctions.

XI. Order

Respondent Dennis A. Mehringer, Jr., made unsuitable recommendations that resulted in excessive trading in mutual fund Class A shares in customer ES's accounts, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010, as alleged in cause one of the Complaint. For this misconduct, the Panel bars Mehringer from associating with any FINRA member firm in

[290] Guidelines at 34.

[291] Guidelines at 34.

[292] *Dep't of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *52 (NAC July 28, 2011) (finding that respondent's books and records violations concealed from his firm that he was soliciting customers, which "compounded his offense by the deliberate deception he practiced on his employer").

any capacity, fines him $50,000, and orders him to disgorge $108,131.21, plus prejudgment interest.[293]

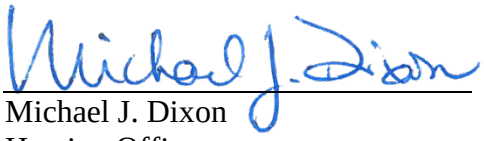
Mehringer exercised discretion without authority by executing unauthorized trades in Class A shares in ES's accounts in violation of NASD Rule 2510 and FINRA Rule 2010, as alleged in cause two. For exercising discretion without authority, the Panel assesses, but does not impose in light of the bar, a 30-business-day suspension in all capacities and a $7,500 fine.

Mehringer breached his fiduciary obligations by failing to organize and operate the Mehringer Educational Trust as a tax-exempt charity, which constitutes a violation of FINRA Rule 2010. For this misconduct, Mehringer is suspended for six months in all capacities and fined $15,000. In light of the bar, the Panel does not impose these sanctions.

Mehringer violated FINRA Rule 2010 by making false and misleading statements to his firm about his use of Trust funds, failing to disclose a customer complaint and his settlement with the customer, and falsely telling his firm he had not settled a customer complaint, as alleged in causes four, five, and six. The Panel suspends Mehringer for two years in all capacities and fines him $50,000. In light of the bar, the Panel does not impose these sanctions.

Mehringer is ordered to pay the costs of the hearing in the amount of $6,568.43, consisting of a $750 administrative fee and $5,818.43 for the cost of the transcript.

If this Decision becomes FINRA's final disciplinary action, the bar will take immediate effect. The $50,000 fine, the $108,131.21 in disgorgement (including prejudgment interest), and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this Decision becomes FINRA's final action.[294]



Michael J. Dixon
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For the Extended Hearing Panel

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[293] Interest shall accrue from December 9, 2013, until paid. The prejudgment interest rate shall be 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* Guidelines at 11.

[294] The Extended Hearing Panel has considered and rejects without discussion any other arguments made by the parties that are inconsistent with this Decision.

ADDENDUM A

Intra-Day Switches in Mutual Fund Class A Shares in Customer ES's Accounts

Date	Name of Class A Fund	B/S	Shares	Price	Amount	Load
9/12/12	PNC Multi-Factor Small Cap	S	93.279	$12.72	$1,156	
9/12/12	Putnam Equity Spectrum	B	38.710	$31.00	($1,200)	$60
9/20/12	Transamerica Cap Growth	S	2,108.30	$16.23	$34,187	
9/20/12	PNC Multi-Factor Small Cap	B	1,537.34	$13.66	($21,000)	$1,050
9/20/12	Putnam Equity Spectrum	B	415.719	$30.79	($12,800)	$480
11/06/12	Putnam Equity Spectrum A	S	3,184.876	$30.23	$95,763	
11/06/12	Amer. Beacon High Yield Bond	B	3,682.720	$10.59	($39,000)	$1,365
11/06/12	JP Morgan Income Builder	B	5,610.186	$9.75	($57,280)	
11/06/12	Putnam Equity Spectrum	S	1,221.96	$30.23	$36,540	
11/06/12	Transamerica Capital Growth	B	2,222.90	$16.42	($36,500)	$1,733
11/06/12	Putnam Equity Spectrum	S	1,590.39	$30.23	$47,566	
11/06/12	Invesco Global Health Care	B	859.076	$33.99	($29,200)	$1,168
1/30/13	Transamerica High Yield Bond	S	4,930.15	$9.83	$48,433	
1/30/13	PNC Multi-Factor Small Cap	B	3,455.72	$13.89	($48,000)	$2,280
2/25/13	Transamerica High Yield Bond	S	2,033.503	$9.85	$20,000	
2/25/13	PNC Multi-Factor Small Cap Value	B	496.046	$13.91	($6,900)	$327
2/25/13	Putnam Equity Spectrum	B	413.003	$31.84	($13,150)	$657
4/3/13	Invesco Global Health Care	S	2,856.956	$35.11	$100,277	
4/3/13	Pimco Real Estate Real Return	B	9,351.145	$5.24	($49,000)	$2,327
4/3/13	Prudential Financial Services	B	3,227.931	$14.42	($49,000)	
4/4/13	Pimco Real Estate Real Return	B	299.057	$5.30	($1,585)	$63
7/15/13	American Beacon High Yield Bond	S	7,078.808	$10.25	$72,527	
7/15/13	Invesco Global Health Care	B	1,205.116	$40.66	($49,000)	$2,450
7/17/13	Invesco Global Health Care	B	851.064	$39.95	($34,000)	$1,360
7/18/13	Growth Fund America Income	S	1,974.340	$40.70	$80,325	
7/18/13	Legg Mason Opportunity	B	3,230.150	$14.86	($48,000)	$1,320
7/18/13	Franklin Mutual European	B	824.063	$24.27	($20,000)	$750
7/18/13	Prudential Financial Services	B	684.932	$15.46	($11,000)	

7/23/13	JP Morgan Small Cap Value	S	3,131.120	$25.55	$80,000	
7/23/13	Invesco Global Health Care	B	1,231.780	$39.78	($49,000)	$1,470
7/23/13	DWS Mid Cap Value	B	1,996.198	$14.870	($31,500)	
7/23/13	Columbia Global Infrastructure	S	1,993.357	$23.32	$46,455	
7/23/13	Alliance Bernstein High Income	B	4,668.010	$9.94	($46,400)	$1,856
7/24/13	Legg Mason Opportunity	S	6,849.060	$14.23	$97,432	
7/24/13	American Funds Smallcap World Income	S	1,122.110	$46.41	$52,047	
7/24/13	Alliance Bernstein High Income	B	5,393.150	$9.92	($53,500)	$2,140
7/24/13	Franklin Mutual European	B	1,059.550	$24.35	($25,800)	$722
7/24/13	Invesco Global Health Care	B	1,259.446	$38.31	($50,000)	
7/24/13	SunAmerica Focused Dividend Strategy	B	1,277.205	$16.63	($22,300)	
8/20/13	Fidelity Advisor Leverage Co. Stock	S	1,212.140	$47.76	$57,841	
8/20/13	Transamerica Cap Growth	B	2,684.900	$19.74	($53,000)	$1,457

Sources: CX-28, RX-2, at 10-12, and RX-3, at 6.

All 14 sets of same-day switches involve at least one transaction that is included in the 82 sets of violative trades identified in the Complaint. The table identifies the front-end loads for Mehringer's purchases of Class A shares that ES sold before he closed his accounts at Western International. These purchases are included among the 82 sets of violative transactions identified in the Complaint. No front-end load is provided for Mehringer's purchases of Class A shares that ES still owned when he closed his accounts in late 2013 because they are not among the 82 sets of violative transactions.