SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

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Regulatory/Appellate

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66373 / February 10, 2012

Admin. Proc. File No. 3-14302

In the Matter of the Application of

JOHN EDWARD MULLINS
and
KATHLEEN MARIA MULLINS

510 North Thurlow Avenue
Margate, NJ 08402

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Conversion of Customer Property

Breach of Fiduciary Duty to Customer

Borrowing Funds from a Client Without Member Firm Notice or Approval

Failure to Disclose Information on Member Firm Compliance Questionnaire

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of member firm of registered securities association converted customer property, violated his fiduciary obligations to customer, and, as a result, engaged in conduct inconsistent with just and equitable principles of trade. Registered representative and his wife, also a registered representative of the same member firm, each failed to secure approval from member firm before accepting a loan from customer

and failed to disclose information on annual compliance questionnaires regarding that loan and regarding positions they held with a charitable foundation that was the member firm's customer. *Held*, association's findings of violation are *sustained in part*, and the sanctions imposed are *modified*.

APPEARANCES:

John Edward Mullins, pro se, and *Kathleen Maria Mullins, pro se*.

Marc Menchel, Alan Lawhead, James Wrona, and *Andrew J. Love*, for FINRA.

Appeal filed: March 21, 2011
Last brief received: Sept. 7, 2011[1]

I.

John Edward Mullins ("J. Mullins") and Kathleen Maria Mullins ("K. Mullins"), former general securities representatives formerly associated with FINRA member firm Morgan Stanley DW Inc. ("Morgan Stanley" or "the Firm"), appeal from FINRA disciplinary action against them.[2] FINRA found that: (1) J. Mullins converted customer property and breached fiduciary obligations he owed as an officer and trustee of a corporate customer, in violation of NASD Rule 2110, and misused customer funds, in violation of NASD Rules 2330(a) and 2110; (2) both J. Mullins and K. Mullins made material misstatements to the Firm on annual compliance questionnaires, in violation of NASD Rules 3110 and 2110; and (3) both J. Mullins and K. Mullins borrowed funds from a customer without approval of the Firm, in violation of NASD Rules 2370 and 2110.[3]

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[1] J. Mullins filed a timely opening brief and then requested and received two substantial extensions of time to file a reply brief. His third request for an extension was denied, and J. Mullins never filed his reply brief. K. Mullins timely filed opening and reply briefs.

[2] On July 26, 2007, we approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although the investigation into this matter was initiated before the consolidation, the complaint was filed afterwards.

[3] As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as

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FINRA barred J. Mullins in all capacities for the violations involving conversion and misuse of customer funds and the breach of his fiduciary obligations as an officer and trustee of a corporate customer.[4] For the violations involving material misstatements on firm questionnaires, FINRA suspended K. Mullins in all capacities for six months, fined her $15,000, and ordered that she re-qualify; FINRA further suspended K. Mullins in all capacities for an additional three months (to be served consecutively) and fined her $5,000 for borrowing funds from a customer without prior firm approval.[5] We base our findings on an independent review of the record.

II.

A. Introduction

This case primarily concerns J. Mullins's handling of funds held by a charitable foundation established by one of his clients, Esther Weil, and related disclosures that J. Mullins and his wife, K. Mullins, failed to make on Morgan Stanley's internal compliance questionnaires.

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[3] (...continued)
FINRA Rule 2010, effective December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). NASD Rule 2330(a) was codified as FINRA Rule 2150(a), effective December 14, 2009. *See* FINRA Regulatory Notice 09-60 (Oct. 2009). NASD Rule 2370 was codified as FINRA Rule 3240, effective June 14, 2010. *See* FINRA Regulatory Notice 10-21 (Apr. 2010). NASD Rule 3110 has not been codified as a FINRA Rule. *See generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23300 n.4 (describing rules consolidation). Because the conduct at issue here occurred before the consolidation, we will continue to refer to the NASD Rules.

NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade. NASD Rule 2330(a) prohibits persons associated with members from making improper use of a customer's securities or funds. NASD Rule 2370 prohibits associated persons of member firms from borrowing money from or lending money to a customer without receiving prior approval from the member firm. NASD Rule 3110 requires member firms to maintain books and records as required by applicable law.

[4] In light of the bar it imposed for these violations, FINRA declined to impose additional sanctions for the other violations it found J. Mullins to have committed. However, it stated that, in the absence of the bar, it would have imposed a one-year suspension in all capacities, a $25,000 fine, and an order that he re-qualify for his misstatements on firm questionnaires, and a three-month suspension, a $5,000 fine, and an order that he re-qualify for his acceptance of a loan from his customer without approval.

[5] FINRA also ordered respondents to pay, jointly and severally, hearing and appeal costs totaling $17,565.

Mrs. Weil and her husband, Paul, became clients of J. Mullins in 1981 when J. Mullins, then a salesman with Prudential Securities, Inc., solicited Mr. Weil through a "cold call." Eventually, the Mullinses began to socialize regularly with the Weils, often attending concerts and dining out together in Philadelphia and in Ocean City, New Jersey, where the Weils owned condominiums. According to testimony from several witnesses and other evidence in the record, it appears that, over time, the Weils, who did not have children of their own, came to regard the Mullinses as family members.

Shortly after her husband's death in 1999, Mrs. Weil established a non-profit corporation, at J. Mullins's urging, named the Esther C. and Paul H. Weil Foundation (the "Foundation") to further the long-standing interest that she and her husband had shared in supporting the musical arts. As they had done with so many other aspects of Mrs. Weil's life, the Mullinses assisted her in running her foundation. J. Mullins, whom Mrs. Weil named as the Foundation's vice president, frequently made purchases using Foundation funds on Mrs. Weil's behalf, ostensibly for the benefit of the Foundation. In the years following Mr. Weil's death in 1999, the Mullinses became even closer to Mrs. Weil, frequently visiting and socializing with her, and assisting her daily with personal needs such as grocery shopping, running errands, and getting to doctor's appointments. Mrs. Weil ultimately included the Mullinses in her will, bequeathing to them her Philadelphia condominium (or its value if it was sold before she died) and an additional $25,000 in cash. Mrs. Weil also appointed the Mullinses as co-executors of her estate.

As a further indication of her trust and affection for the Mullinses, on March 1, 2005, Mrs. Weil lent to the Mullinses $100,000 when the Mullinses' bank unexpectedly balked at approving their mortgage application. Neither the terms of the loan nor its repayment were documented in any way. The Mullinses immediately deposited the loan proceeds in their jointly held bank account; however, they repaid the full amount to Mrs. Weil a few days later, when their bank mortgage was approved.

B. J. Mullins makes purchases for the Foundation

The most serious allegations against J. Mullins focus on several instances when, shortly after Mrs. Weil became seriously ill, J. Mullins used Foundation funds for his own personal benefit, repaying the Foundation only after FINRA and New Jersey state securities regulators began investigating his involvement with Mrs. Weil's accounts.

Mrs. Weil opened an account for the Foundation at Morgan Stanley when the Mullinses moved from Prudential to Morgan Stanley in 2002. Account opening documents name Mrs. Weil as the only account owner and grant her sole authority to write checks against the Foundation account, and only she was authorized to use the debit card that Morgan Stanley had issued to access funds in the account.[6] Nevertheless, J. Mullins often assisted Mrs. Weil in

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[6] Statements for the Foundation account were sent to the offices of Mrs. Weil's attorney, Raymond Beebe. Beebe testified, however, that he did not review the statements,

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making purchases for the Foundation. He would sometimes use the Foundation's debit card, or blank checks that Mrs. Weil had pre-signed, to pay for Foundation expenses, which J. Mullins testified he always did with Mrs. Weil's knowledge and permission.

Among the items J. Mullins purchased with Foundation funds were gift certificates that, he testified, were intended to be donated to charities for their use as items to sell in silent auctions. J. Mullins testified that he had Mrs. Weil's permission to buy the gift certificates for the Foundation. He stated that "silent auctions . . . confused her a little bit," and that he "explained to her that any certificates that we didn't use or that if she changed her mind and we were not going to go forward with that type of silent auction, that I would buy them from the foundation and use them. She was like, 'Fine,' that's – you know, 'that's fine with me.'" Although the Foundation did donate some gift certificates to charities, few of the gift certificates at issue here were ever donated, as discussed below.

C. Mrs. Weil becomes ill, and J. Mullins begins using Foundation purchases for his own benefit

By early 2006, Mrs. Weil was ninety-five years old and had moved into an assisted living facility. She suffered from various chronic and serious health conditions, and, in April 2006, Mrs. Weil's condition declined significantly, requiring her to be admitted to the hospital on April 3, 2006 for eight days. When she was released on April 11, 2006, Mrs. Weil was too ill to return to her apartment at the facility, so she was moved to the nursing home's hospital wing, where she remained for the following month.[7]

On April 12, 2006, one day after Mrs. Weil went into the hospital wing, J. Mullins attempted to purchase $11,000 worth of gift certificates at the Four Seasons Hotel in Philadelphia using the Foundation debit card.[8] However, according to the hotel's security records, when the hotel staff asked whether J. Mullins was authorized to use the card, J. Mullins "began yelling and quickly left the hotel . . . carrying a stack of [Four Seasons] gift cards." The hotel staff then called the debit card's issuing bank. The bank stated that J. Mullins was not authorized to use the debit card, so the hotel staff placed a hold on the gift cards.

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[6] (...continued)
instead giving them unopened to J. Mullins to give to Mrs. Weil, or sending them to the independent accountant who prepared the Foundation's annual tax returns.

[7] J. Mullins testified during the investigation that the hospital wing of the nursing home was where the residents went "on [their] way out the door in a pine box."

[8] J. Mullins testified that he wished to buy these gift certificates for donation to charities, "in part, because that's one of [Mrs. Weil's] favorite places up here."

On April 14, 2006, J. Mullins returned to the Four Seasons with an $11,000 check drawn on the Foundation's Morgan Stanley account, which he had prepared but which was signed by Mrs. Weil, to pay for the gift cards.[9] The following month, the Mullinses went on vacation to London, where they stayed at a Four Seasons Hotel. J. Mullins redeemed $4,000 of the Four Seasons gift certificates he had purchased for the Foundation to pay the hotel bill.

During the following weeks, with Mrs. Weil continuing in poor health, J. Mullins made additional questionable purchases with Foundation funds. On April 15, 2006, four days after Mrs. Weil was admitted to the nursing facility's hospital wing, J. Mullins used the Foundation's debit card to purchase gift certificates totaling $3,000 from Boyds of Philadelphia, a men's clothing store that J. Mullins frequented and at which he had a personal credit account. A few days later, on April 19, 2006, J. Mullins used $2,500 worth of these gift certificates to pay off his account at Boyds. The record shows that the Foundation donated a total of only $500 in Four Seasons gift certificates and $450 in Boyds gift certificates to a non-profit organization for an auction it held on April 22, 2006.[10]

On June 26, 2006, J. Mullins purchased an additional $2,500 gift certificate at Boyds using the Foundation debit card. Two weeks later, on July 12, 2006, J. Mullins used this gift certificate to pay for more of his personal clothing purchases.

On May 8, 2006, J. Mullins purchased twenty-three bottles of wine at the Morton's Steakhouse in Atlantic City, New Jersey, using the Foundation's debit card, at a cost of $1,656.47. J. Mullins testified that the restaurant "had a special offer of a very good wine that they were discounting," and that Mrs. Weil said, "'[L]et's definitely do it.'" The wine, however, was stored in J. Mullins's personal wine locker at the restaurant, to which he alone had access. Although J. Mullins testified that he had intended to drink the wine during Foundation business dinners, he never did so—consuming four bottles on three separate occasions when, he conceded, no Foundation business was conducted and it appears that Mrs. Weil was not present. J. Mullins drank one of the bottles on August 15, 2006, another bottle on October 19, 2006, and two more of the bottles on May 3, 2007.[11]

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[9] As noted above, evidence indicates that Mrs. Weil often signed blank checks drawn on the Foundation account for J. Mullins.

[10] On April 25, 2006, J. Mullins redeemed another $500 gift certificate to pay for more of his clothing purchases at Boyds. Although J. Mullins stipulated that this gift certificate had been purchased with Foundation funds, receipts of the transactions in the record do not establish that this gift certificate was purchased with Foundation funds. We do not, therefore, consider this transaction as a basis for liability.

[11] The unconsumed bottles remained in his personal locker until New Jersey state regulators began their investigation, and J. Mullins provided reimbursement to Mrs. Weil's attorney in late 2007.

D. Morgan Stanley terminates the Mullinses' employment and they become estranged from Mrs. Weil

At the end of July 2006, Morgan Stanley commenced an investigation of activity in the accounts of Mrs. Weil and the Foundation. On August 14, 2006, the Mullinses were escorted from their offices as a result of this investigation and placed on administrative leave. Morgan Stanley contacted Mrs. Weil's attorney, Raymond Beebe, informed him the Firm was investigating the activity in Mrs. Weil's accounts, and asked him some questions about the accounts and J. Mullins's involvement with them. The next day, on August 15, 2006, Beebe visited Mrs. Weil in her apartment and questioned her briefly about her knowledge of debit card and check transfers out of her accounts. Beebe advised Mrs. Weil to retain a different attorney to represent her with this matter because Beebe was a friend to both Mrs. Weil and to J. Mullins, creating the potential for a conflict of interest. Beebe recalled telling Mrs. Weil, "Based on what I am seeing here, John could go to jail for something like this. And her response was, '[W]ell, that may be true, but I am not going to lie for him.'"

Later that day, J. Mullins visited Mrs. Weil and explained that he was upset because Morgan Stanley was investigating the Mullinses' conduct with respect to her accounts. Mrs. Weil then purportedly wrote a letter in defense of the Mullinses.[12] However, the letter makes no mention of the conduct at issue here, i.e., J. Mullins's personal use of the Four Seasons or Boyds gift certificates or the wine stored in his personal locker at Morton's.

On August 16, 2006, Morgan Stanley terminated the Mullinses. On August 17, 2006, Mrs. Weil retained a new attorney, at Beebe's suggestion, and he immediately sent a letter to the Mullinses' attorneys. In this letter, Mrs. Weil's attorney demanded the "immediate unconditional repayment" of $375,000 of Mrs. Weil's money that had recently been transferred to the Mullinses. Mr. Mullins testified that Mrs. Weil had given the Mullinses the $375,000 because it represented the value of a condominium she bequeathed to the Mullinses in her will, and that she wished for the Mullinses to have the benefit of that asset while she was still living. However, Mrs. Weil's attorney, in his August 17 letter, requested a "full and complete explanation" regarding the transfers and stated in the letter that it was Mrs. Weil's "wish that . . . beginning immediately your clients should not have any contact with Esther Weil either directly or indirectly in any way whatsoever."[13] According to a letter written in May 2007 to state securities investigators, Mrs. Weil's attorney explained that "the events surrounding the $375,000 withdrawal as well as the August 15, 2006 document that [Mrs. Weil] signed at the request of Mr. and Mrs. Mullins prompted a reconsideration of her previous will," which Mrs. Weil

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[12] As discussed later in this opinion, the Hearing Panel and the National Adjudicatory Council ("NAC") declined to admit the letter into evidence.

[13] J. Mullins returned the money following the attorney's demand letter.

amended to delete all references to the Mullinses.[14] Evidence indicates that the Mullinses had no further direct contact with Mrs. Weil, who died in 2008.[15]

E. J. Mullins reimburses the Foundation after FINRA begins its investigation

FINRA launched an investigation of the events at issue in this proceeding after Morgan Stanley filed a Form U5 with FINRA when it terminated the Mullinses.[16] In the spring of 2007, FINRA began contacting J. Mullins to request information and documents about his handling of Mrs. Weil's money. J. Mullins ultimately returned to Mrs. Weil, through her attorney, the value of the gift certificates he used for his own personal expenses, as well as the cost of the wine that he purchased, but not until after FINRA's Department of Enforcement ("Enforcement") questioned him specifically about these items, as discussed below.

On May 1, 2007, J. Mullins gave on-the-record testimony to Enforcement regarding his handling of Mrs. Weil's accounts.[17] He was asked about the $11,000 check given to the Four Seasons but did not mention that he used for himself some of the gift certificates purchased with that check. He was also asked about a May 10, 2006 purchase at Morton's for $1,634 (for the wine) but claimed not to recall the transaction. Two days after J. Mullins gave this testimony, however, he consumed two of the bottles of wine he had purchased with Foundation funds.[18]

On May 14, 2007, Enforcement sent J. Mullins a letter asking whether J. Mullins used any gift certificates purchased with Foundation funds for his own personal use, and specifically requesting information about the Boyds purchases and the Four Seasons gift certificates. On June 15, 2007, J. Mullins responded by letter and stated that he was "still trying to reconstruct"

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[14] Although FINRA had originally charged the Mullinses with wrongdoing in connection with this $375,000 transfer, FINRA ultimately dropped that charge for reasons that are not explained in the record. *See infra* text accompanying notes 62-63 and 73.

[15] The record shows that J. Mullins had contact with Mrs. Weil's attorneys at various times, but only for the purpose of returning to Mrs. Weil some personal items and, as described below, to reimburse her for the gift certificates and wine that J. Mullins personally used.

[16] Morgan Stanley reported on Form U5 that K. Mullins was terminated for "failure to comply with Firm policies, including acting as a fiduciary for a client without prior approval in writing from the Firm." J. Mullins was reported to have been terminated for the same reason, as well as for "withdrawing funds for his own benefit from a client's account."

[17] J. Mullins also gave on-the-record testimony on April 3, 2007, but was not specifically questioned about his purchases of gift certificates or wine with Foundation funds.

[18] *See supra* text accompanying note 11.

information responsive to Enforcement's questions about the gift certificates and other transactions.

On or about June 23, 2007, J. Mullins purchased $4,000 in Four Seasons gift certificates and $5,500 in Boyds gift certificates, equaling the amounts that he had purchased with Foundation funds that he could not "fully account for." J. Mullins shortly thereafter turned these certificates over to Beebe along with other unused Boyds and Four Seasons gift certificates. J. Mullins testified that he found the remaining certificates in his possession while searching for a piano bench pad that belonged to Mrs. Weil.[19]

On June 29, 2007, Enforcement contacted J. Mullins again, noting that J. Mullins had, as of that date, made only a partial response to its request for information and specifically requesting that he provide a response regarding whether he "utilized any gift certificate(s) purchased with Ms. Weil's funds for his personal use." Enforcement reiterated its request in an e-mail to J. Mullins's attorney on July 16, 2007 and once more by letter dated August 9, 2007.

On August 28, 2007, J. Mullins explained in a letter to FINRA that he used the Foundation's Four Seasons gift certificates to pay for his own vacation but did so because the hotel advised him that he could avoid credit card fees if he paid for his stay with gift certificates. "Since I did not have time before I departed to stop at the Philadelphia Four Seasons, I took a few of the ones I had in the Weil Foundation file," he wrote.[20] J. Mullins further stated, "It was my intention that I would replace them the next time I got up to Philadelphia after my return from London. Unfortunately, before I could replace them I was fired from Morgan Stanley and . . . [i]n all the confusion from the firing it totally slipped my mind until late June of 2007." He did not claim that Mrs. Weil had given him permission to use the certificates. In this letter, J. Mullins also admitted that he "personally used Boyds certificates" but had just replaced them, along with the Four Seasons gift certificates he used, and that he thereby made "sure there was [sic] no losses for Esther Weil or her Foundation that had come within my responsibility."

J. Mullins did not mention in this letter that he had drunk four bottles of wine purchased with Foundation funds. J. Mullins testified that he did not recall that he had consumed the Foundation's wine until investigators from the New Jersey Board of Securities "painted me into a

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[19] J. Mullins testified that he was looking for the piano bench pad because Mrs. Weil's attorney had requested the return of a piano that she had been keeping at the Mullinses' home.

[20] The explanation J. Mullins offered during the hearing for his use of the Four Seasons gift certificates differed somewhat from the explanation he gave in his August 28 letter. During his testimony at the hearing, J. Mullins claimed that, the day before the Mullinses left for their London vacation, an unidentified person at a Foundation lunch told him that using gift certificates to pay for his stay would lead to savings on the exchange rate, and that Mrs. Weil had then given him permission to use the Foundation's gift certificates.

corner" during a September 2007 interview and asked, "Did you drink the wine?" According to his testimony, "a thunderbolt hit me," and he realized that "I was wrong. I[t] just absolutely had gone out of my mind."[21] As noted, J. Mullins thereafter sent a check for the cost of all the wine purchased for the Foundation to Mrs. Weil's attorney.

Ultimately, J. Mullins pleaded guilty in New Jersey state court to a criminal charge of misapplication of entrusted funds in the third degree. During his plea hearing, J. Mullins admitted that he knowingly used $7,134 of Foundation funds for personal purposes – i.e., by using the Boyds gift certificates and wine for himself – without the necessary authorization from the Foundation.[22]

F. The Mullinses' positions with the Foundation and the Firm's awareness of these positions

The remaining allegations at issue involve inaccurate responses that the Mullinses gave between 2003 and 2006 on a series of routine Morgan Stanley compliance questionnaires. Their inaccurate responses relate to the positions they held in Mrs. Weil's Foundation and to the substantial loan they received from Mrs. Weil in 2005, as discussed below.

When the Foundation was created in 1999, it was established as a non-profit corporation under the laws of New Jersey and organized under Section 501(c)(3) of the Internal Revenue Code. Consistent with New Jersey state law, the Foundation's Certificate of Incorporation specified that the Foundation would be managed by a "Board of Trustees" (the apparent functional equivalent of a board of directors),[23] and it identified Mrs. Weil and the Mullinses as those "trustees." However, neither the Articles of Incorporation nor any other document in the

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[21] By late 2007, New Jersey had launched its own investigation into J. Mullins's activities.

[22] The New Jersey proceedings did not include any charges related to J. Mullins's use of the Four Seasons gift certificates. J. Mullins successfully satisfied the terms of the pre-trial intervention program into which he was diverted after pleading guilty (essentially, six months' probation), with the result that no conviction was ultimately entered against him.

[23] *See* N.J. Stat. 15A:1-2 (defining the "board" of a non-profit corporation as "the board of trustees of the group of persons vested with management of the business and affairs of the corporation irrespective of the name by which the group is designated" and defining "trustee" as "any member of the board of a corporation, whether designated as a trustee, director, manager, governor, or by any other title").

record suggests that the Foundation was a true legal trust, with identifiable trust property or designated beneficiaries.[24]

When Mrs. Weil opened an account for the Foundation with Morgan Stanley in 2002, the Foundation account was opened as a corporate account. Although the Morgan Stanley new account form provided for classification of an account as a trust account, the Foundation account was not characterized as such on the form.[25] The account generally held cash in a money market fund to cover donations to charities and other Foundation expenses but did not generally hold securities.[26]

When the Foundation was formed, Mrs. Weil became its president, J. Mullins was named vice president, and K. Mullins was named secretary and treasurer, with duties as identified in the Foundation's by-laws. In practice, however, the Foundation observed few corporate formalities. K. Mullins testified that the Foundation was "Esther's baby"; she decided which charities to support and how much to donate to them, and the Foundation was funded exclusively with Mrs. Weil's own money.[27] Although K. Mullins saw Mrs. Weil nearly every day and often assisted her in organizing events sponsored by the Foundation, she denied performing for the Foundation any of the traditional or formal functions of a corporate secretary or treasurer, such as keeping the books, records, and meeting minutes of the Foundation.[28]

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[24] *See infra* note 59 (discussing the distinctions between corporations and trusts).

[25] Morgan Stanley's account application form offered several options for classifying a new account, including an "individual," "custodian," "trust," joint accounts of several types, "partnership," "guardian," or "other." The Foundation account was classified as "other," and then specified as a "CO," or corporate account. Had the account been classified as a trust, the form required that more information be provided, including the full title of the trust, names of the grantors of the trust, and certifications by individuals authorized to act on behalf of the trust regarding their powers to enter into transactions for the trust. None of this information was provided on the account application for the Foundation.

[26] Neither of the Mullinses exercised discretionary authority over the Foundation's account or any of Mrs. Weil's other personal accounts at Morgan Stanley, but the Mullinses had authority to transfer money from Mrs. Weil's personal accounts to the Foundation account in order to cover the checks that Mrs. Weil would write and give to charities. There is no evidence, nor any allegation, that the Mullinses abused this authority.

[27] J. Mullins testified that the Foundation was simply a "conduit" for Mrs. Weil's charitable giving, providing her with a better way to organize and manage the charitable donations she had already been making independently over the years.

[28] Although Enforcement points out that K. Mullins's "activity with the Foundation generally increased beginning in 2004 and 2005 and that she performed various functions for the

(continued...)

Some of the employees at the Morgan Stanley branch office where the Mullinses worked had at least a general awareness of the Mullinses' involvement with the Foundation. Mrs. Weil, who was described as having a "strong personality" and as "the life of the party," was widely known to the office. She attended annual client appreciation events that the Mullinses organized and often visited the office on business and to make social calls (once appearing at the office on Halloween dressed as a pumpkin). Some Firm employees, including two branch managers, attended events outside the office that Mrs. Weil hosted, such as dinners, her ninety-fifth birthday party, and various concerts that Mrs. Weil organized and supported.

However, the extent of Morgan Stanley personnel's understanding of the Mullinses' involvement with the Foundation is unclear. There is evidence that J. Mullins disclosed his position as Foundation vice president to his branch manager in 2003. The branch manager, Todd Monastero, directed J. Mullins to the Firm's compliance department to obtain its permission to hold that position. The compliance department granted permission for him to serve as the Foundation's vice president but required as a condition of that approval that, among other things, J. Mullins not serve as the Foundation's financial advisor ("FA") of record on any accounts it had with Morgan Stanley. As a result, K. Mullins was designated as the account's FA, despite her own official positions with the Foundation. K. Mullins testified that Monastero "was a billion percent aware" that she was an officer of the Foundation and, in a "two-second conversation," nevertheless approved her to assume the role of FA of record for the Foundation account. She also testified that the branch's operations manager, Linda Cohen, knew K. Mullins was a Foundation officer and, by virtue of Cohen's duty to review branch correspondence, must have seen documents flowing into and out of the branch that mentioned K. Mullins's titles. Monastero and Cohen consistently testified, however, that they were unaware that K. Mullins was a Foundation officer, and the Hearing Panel credited their testimony.[29] K. Mullins concedes that she did not disclose her Foundation positions to anyone in Morgan Stanley's compliance department.

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[28] (...continued)
Foundation," Enforcement does not dispute K. Mullins's assertions that she did not perform any of the functions assigned to the Foundation's secretary or treasurer in its by-laws. From the record, it appears that no one performed these functions. The attorney for the Foundation testified that, as far as he was aware, the Foundation had no formal meetings, created no meeting agendas, and prepared no meeting minutes. The only formal financial records for the Foundation appear to have been in the form of monthly account statements from Morgan Stanley, which were sent to Beebe and then forwarded periodically to Mrs. Weil's tax accountant for use in compiling tax returns for the Foundation.

[29] Monastero's two successors as branch manager also testified that they were unaware that K. Mullins was an officer of the Foundation, as noted in the NAC's opinion, though the Hearing Panel did not mention their testimony or make a credibility determination as to them.

G. The Mullinses give incomplete responses on Firm compliance questionnaires

J. Mullins held the title of Foundation vice president, and K. Mullins held the titles of Foundation secretary and treasurer, for the duration of their employment at Morgan Stanley. Nevertheless, the Mullinses concede that they did not disclose these positions or their nominal designations as "trustees" in the Foundation's organizing documents on most of their annual compliance forms in 2003, 2004, 2005, and 2006.

Specifically, the 2003 and 2004 questionnaires each included the following requests:

> (3) List account numbers and positions for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/or beneficiary. . . .
>
> (6a) List all profit and non-profit organizations, companies and/or corporations in which you are a director, officer, employee, or representative and identify position. . . .

J. Mullins did not disclose his nominal position as trustee of the Foundation in response to these questions, but he did disclose his position as vice president of the Foundation on both forms. K. Mullins did not list the Foundation in response to any of these questions in 2003 and 2004.

The 2005 Morgan Stanley Financial Advisor Questionnaire framed the disclosure questions slightly differently from the 2003 and 2004 versions. The 2005 questionnaire stated:

> (10) List or attach account numbers and fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/ or beneficiary (except beneficiary of parent, siblings, and/ or spouse accounts).

J. Mullins replied "none" to this item. K. Mullins did not list the Foundation in response to this item.[30] The 2005 questionnaire also requested that financial advisors provide the names of any profit and non-profit organizations, companies and/or corporations in which the advisor was a director, officer, employee, or representative. Neither of the Mullinses listed the Foundation in response to this item.[31]

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[30] K. Mullins did, however, list four accounts related to a George Seeger Trust, for which she had applied to compliance for (and was later denied) permission to serve as co-executor.

[31] J. Mullins, however, listed the organization "Crimestoppers of Atlantic County" in response to this item.

The 2005 questionnaire, which was signed by each of the Mullinses on March 8, 2005, one week after the date of Mrs. Weil's $100,000 loan to them, also asked, "Have you within the past twelve months made loans to, or received loans from any of your clients or family members while they maintained accounts at Morgan Stanley?" Both of the Mullinses answered "no" to this question.

In January 2006, the Mullinses each completed an Internal Audit Branch Financial Advisor Questionnaire. The 2006 questionnaire, which was completed by the Mullinses nine months after receiving (and quickly returning) the $100,000 loan, again asked whether the advisor had made or received loans from clients within the prior twelve months. Both of the Mullinses responded "no" to this question.[32]

III.

A. J. Mullins's conversion of Foundation property and breach of fiduciary duty

We turn first to FINRA's findings that J. Mullins converted Foundation funds in violation of NASD Rule 2110 and that, in so doing, he also breached his fiduciary duties to the Foundation as a corporate officer.[33]

FINRA Sanctions Guidelines state that "[c]onversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the

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[32] The 2006 questionnaire also asked whether the FA was an officer or director of any outside business, and whether the FA maintained "fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee . . . ." The Mullinses both responded "no" to these questions; however, the amended complaint did not identify these omissions as a basis for liability, and the NAC did not find liability for these omissions.

[33] The amended complaint charges that J. Mullins, by "wrongfully using Foundation funds to purchase gift certificates and wine that he subsequently used for his own purposes," made improper use of customer funds in violation of NASD Rules 2330(a) and 2110. As an "alternative to [the] first cause of action," the amended complaint charges that J. Mullins "engaged in conduct inconsistent with high standards of commercial honor and just and equitable principles of trade by wrongfully converting property" from his customer, thereby violating NASD Rule 2110. The NAC appears to have found that J. Mullins's personal use of Foundation property constituted two violations: one of improper use of customer funds for his initial purchase of the gift certificates and wine with Foundation funds, and another of conversion for his subsequent use of the same gift certificates and wine. Because we find that J. Mullins's use of the gift certificates and wine constituted conversion, we need not reach the basis for liability charged as an alternative in the complaint.

property nor is entitled to possess it."[34] We find that the record supports a finding that J. Mullins's conduct satisfies the charge of conversion and conclude that J. Mullins thereby violated NASD Rule 2110. We also find, as charged in the amended complaint, that J. Mullins's misconduct constituted a breach of the fiduciary duty he owed to the Foundation, in further violation of Rule 2110.

It is undisputed that J. Mullins used gift certificates and wine, purchased with Foundation funds, for his own personal benefit and not in connection with Foundation business. J. Mullins also concedes that he engaged in this misconduct while serving in a fiduciary capacity as the Foundation's vice president. J. Mullins concedes that he "did not act correctly" and "committed serious wrongs." J. Mullins argues, however, that his use of the gift certificates was authorized because Mrs. Weil gave him oral permission to use them. He also argues that his use of the gift certificates does not amount to intentional conversion because he always intended to reimburse the Foundation. These arguments do not relieve J. Mullins of liability.

As an initial matter, J. Mullins has not produced any evidence, other than his own testimony, to support his statement that Mrs. Weil gave him permission to use the gift certificates, and it is his burden to do so.[35] To the contrary, the record contains evidence that contradicts his statement that Mrs. Weil gave the permission he claims. For example, Mrs. Weil told a Morgan Stanley investigator, who interviewed her briefly just after the Mullinses were terminated in August 2007, that she had no knowledge of charges to the Foundation account made at Boyds.[36] Mrs. Weil's abrupt severance of ties from the Mullinses after more than twenty-five years of friendship, precipitated by her retention of a new attorney to advise her in matters relating to their handling of her accounts, also suggests that she did not give J. Mullins the permission to use the Foundation account that he claims to have had.

Moreover, inconsistencies in J. Mullins's own testimony undermine his argument that he had Mrs. Weil's permission to use the gift certificates. For example, Enforcement asked J. Mullins about his use of Foundation gift certificates several different times during its

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[34] FINRA Sanction Guidelines 38 (2007).

[35] *See Kirlin Sec.*, 97 SEC Docket at 23324 n.87 ("[A]s we have stated previously, the applicant bears the burden of producing evidence to support his claimed defenses."); *Husky Trading LLC*, Exchange Act Rel. No. 60180 (June 26, 2009), 96 SEC Docket 18128, 18140 & n.31 ("Applicants had the burden going forward to establish any affirmative defense.") (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Donald T. Sheldon*, 51 S.E.C. 59, 77 n.70 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995)).

[36] J. Mullins appears to lay the blame for this evidence on Mrs. Weil's hearing aids, which he states could be "temperamental" at times, and suggests that Mrs. Weil therefore may have misheard the investigator's question. The investigator does not appear to have asked Mrs. Weil about the purchases of the Four Seasons gift certificates or the wine.

investigation in 2007, but he did not profess to have Mrs. Weil's permission to use them until the hearing was conducted, two years later. Further, J. Mullins claimed during FINRA's investigation that he was given the idea to use gift certificates to pay for his Four Seasons stay by an acquaintance during a luncheon attended by Mrs. Weil; yet, during the hearing he testified that the Four Seasons staff suggested he use the gift certificates in order to avoid a credit card surcharge. When his attorney pointed out the inconsistency, J. Mullins reconciled the two versions of events by claiming both were true. The Hearing Panel specifically found that J. Mullins's differing descriptions of how he came to use the Four Seasons gift certificates were not credible, and we see no basis in the record for overturning that finding.[37]

More significantly, J. Mullins did not fulfill his claimed promise to Mrs. Weil to repay the Foundation for his purportedly approved personal use of its property until FINRA and state regulators began investigating his misconduct. His failure to repay the funds until forced to do so undermines J. Mullins's claims that he had permission to temporarily "borrow" the property, and it also serves as evidence that his conversion of the property was intentional and designed to deprive the Foundation permanently of its property.[38]

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[37] *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8984 & nn.14-15 ("We give great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence.").

Even if we accepted, arguendo, that Mrs. Weil had given J. Mullins oral permission to use the gift certificates and wine for himself with the understanding that he would reimburse the Foundation, J. Mullins conceded in New Jersey state criminal proceedings that only a formal resolution of the Foundation's board could have authorized such an expenditure, and there is no evidence to suggest that ever occurred.

We note that, while claiming that he had Mrs. Weil's permission to purchase the wine with Foundation funds, J. Mullins has not argued that he ever had Mrs. Weil's permission to consume that wine on his own. Instead, he dismisses the purchase as merely something that had "gone out of his mind." Her permission to purchase the wine for Foundation use is not equivalent to permission to consume it himself, and J. Mullins has not offered any other evidence of his authority to unilaterally consume the Foundation's wine or otherwise use the Foundation's property for his personal use.

[38] *See Mission Sec. Corp.*, Exchange Act Rel. No. 63453 (Dec. 7, 2010), 99 SEC Docket 35510 A1, A9-A10 (finding applicants converted customer property where applicants "not only intended to permanently deprive their customers of their property, but did, in fact, deprive their customers of their property," notwithstanding applicants' attempts to return the property after FINRA began investigating the misconduct).

Other circumstantial evidence in the record lends further support to our conclusion that J. Mullins acted with intent. For example, J. Mullins claims he encouraged Mrs. Weil to allow him to purchase Boyds gift certificates for donation to charities and that he told her he would buy from the Foundation any that could not be used, effectively insulating the Foundation from any loss on the purchases. But J. Mullins began redeeming the Boyds certificates to cover his own personal retail purchases a mere four days after buying the certificates with Foundation money, hardly enough time for the Foundation to determine that the certificates could never be donated to charity.

Similarly consistent with a finding of intent is J. Mullins's consumption of the Foundation's wine at a non-Foundation function shortly after Morgan Stanley escorted him from his office and placed him on administrative leave, and again immediately after Enforcement took his investigative testimony. Apparently aware that Morgan Stanley was concerned about his handling of Mrs. Weil's account, J. Mullins nonetheless began consuming this wine on his own without ever even claiming to have Mrs. Weil's permission to do so.

J. Mullins asserts that he chose Four Seasons gift certificates to purchase for donation to charities "in part" because the hotel was one of Mrs. Weil's favorite places. However, he has not offered any explanation for why he chose to purchase for the Foundation gift certificates to his own favorite clothing store. As FINRA found, the timing of J. Mullins's misconduct—beginning just after Mrs. Weil's health seriously declined—"suggests that J. Mullins concluded that he could misuse his customer's funds and property with impunity." J. Mullins claims that the timing of his gift certificate purchases had nothing to do with Mrs. Weil's hospitalization but was instead driven by the needs of charities. However, although the record shows that one charity received a small number of gift certificates from the Foundation while Mrs. Weil was hospitalized, there is no evidence that this charity was in immediate need of the donations. More significantly, its need, even if proven, would not excuse his conversion of the gift certificates that were never donated to the charities that were supposedly in immediate need of them.

J. Mullins makes several other arguments in his defense that are similarly unavailing. He argues that he intended to pay the Foundation for his use of the Four Seasons gift certificates when he returned from his trip in May 2006 but that it "slipped" his mind because of the confusion and disruption during his termination by Morgan Stanley. The Hearing Panel found this explanation not credible, and we see no basis to reverse that finding.[39]

J. Mullins objects that the evidence necessary to support his defense and overturn FINRA's adverse credibility determinations would have been supplied by Mrs. Weil herself, had Enforcement taken her testimony. However, we find no fault with the record's lack of testimony from Mrs. Weil, as our decisions have long preserved the discretion of prosecutors in conducting

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[39] *Ortiz, supra* note 37.

their investigations, particularly with regard to their decisions on which witnesses to interview.[40] Moreover, as discussed above, there is sufficient evidence in the record, irrespective of Mrs. Weil's testimony, to support a finding that J. Mullins did not act with permission and that he intentionally converted the Foundation's property.

We have previously stated that conversion "is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that the NASD seeks to promote."[41] We find, therefore, that J. Mullins's conversion of the Foundation's property was a violation of NASD Rule 2110. We find that his conversion was also a clear breach of the fiduciary duty that he, as its vice president, owed to the Foundation,[42] and that this breach constitutes another violation of Rule 2110.[43]

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[40] *Thomas E. Warren III*, 51 S.E.C. 1015, 1020 (1994) (rejecting argument that NASD conducted an inadequate investigation by failing to interview persons whom the applicant claimed would have assisted in his defense). We further note that, because Mrs. Weil was not associated with a FINRA member, FINRA had no authority to compel her testimony or cooperation.

We also take note of the lack of evidence in the record that the Mullinses made any attempt to reach out to Mrs. Weil, through her attorney, to ask her to provide an exonerating statement. The evidence that does appear in the record suggests her testimony would not have supported J. Mullins's arguments. As noted, when her lawyer speculated that J. Mullins could end up in prison because of his actions, Mrs. Weil responded, "'[W]ell, that may be true, but I am not going to lie for him.'" Mrs. Weil's decision to sever all ties with the Mullinses—including removing them from her will—after a lengthy friendship also appears to contradict J. Mullins's claim that Mrs. Weil would have provided testimony favorable to the Mullinses.

[41] *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976).

[42] *See Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (noting that officers and directors of a corporation are prohibited by their fiduciary duties from using corporate funds for personal ends).

[43] *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that registered representative violated just and equitable principles of trade by misappropriating funds belonging to a political club while serving as that organization's treasurer), *aff'g*, 52 S.E.C. 339, 342 (1995) (holding that "Vail commingled his and the Club's funds for the sake of his own personal convenience" and, in doing so, "make[s] us doubt his commitment to the high fiduciary standards demanded by the securities industry"); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.").

B. The Mullinses' acceptance of a loan from a client without the required pre-approval and their failure to disclose the transaction

NASD Rule 2370 prohibited associated persons from borrowing funds from a customer unless that person's firm has a written procedure allowing such borrowing and the arrangement meets certain conditions.[44] One of those conditions was that "the lending arrangement is based on a personal relationship with the customer, such that the loan would not have been solicited, offered, or given had the customer and the associated person not maintained a relationship outside of the broker/customer relationship." The rule further required that the member firm pre-approve such lending arrangements in writing. It is undisputed that the Mullinses accepted a $100,000 loan from Mrs. Weil, and that they did so without seeking or securing approval from the Firm.

K. Mullins argues that she "mistakenly" did not consider the transaction a loan because the Mullinses returned the funds within a few days without using them for their intended purpose, i.e., to help the Mullinses finance their home purchase. However, nothing in Rule 2370 suggests that the duration of repayment of a loan impacts the prohibition on borrowing from customers without complying with the rule's requirements. Applicants also argue that Rule 2370 "does not apply" to this loan because the loan was "based on a personal relationship with" Mrs. Weil. Although, as noted, personal relationships can provide a basis for an exception to the general prohibition on lending arrangements with customers, they can do so only if the member firm gives its prior written approval, which, the Mullinses admit, Morgan Stanley did not give here. Thus, in borrowing money from Mrs. Weil, the Mullinses violated NASD Rules 2370 and 2110.[45]

In addition to violating the prohibition on unapproved lending arrangements with customers, the Mullinses also failed to disclose the loan on internal Morgan Stanley compliance questionnaires that asked for information about lending arrangements with clients.[46] We have

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[44] As noted *supra* note 3, NASD Rule 2370 was recodified as FINRA Rule 3240 after this proceeding was instituted. The new rule is substantially similar to retains all the requirements and prohibitions discussed here.

[45] Because a violation of an NASD rule is inconsistent with just and equitable principles of trade, the Mullinses' acceptance of the loan also violated Rule 2110. *See, e.g., Kirlin Sec.*, 97 SEC Docket at 23322 n.81 ("It is well established that a violation of a Commission or NASD rule or regulation is inconsistent with just and equitable principles of trade, and is therefore also a violation of Rule 2110.") (citing *Frank Thomas Devine*, 55 S.E.C. 1180, 1192 n.30 (2002)).

[46] K. Mullins now disputes the authenticity of the questionnaire she completed in 2006 because the form (which, according to testimony at the hearing, was likely automatically

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stated that it is a basic duty of all securities professionals to respond truthfully and accurately to their firm's requests for information,[47] and that the failure to do so can be inconsistent with just and equitable principles of trade, especially when the purpose of the information request is to help ensure that the associated person is in compliance with applicable laws, rules, and policies.[48] Here, the Mullinses' failure to provide truthful and accurate information prevented the Firm from properly overseeing its salespersons' compliance with NASD Rule 2370 and from identifying potentially exploitative relationships between its customers and its salespersons. This is especially troubling here because the transaction about which the Firm sought information—a sizeable loan from an elderly customer with a fixed income—carried a significant potential for conflicts of interest and misconduct.[49]

The Mullinses do not offer an explanation as to why they failed to disclose the loan on their 2005 and 2006 compliance questionnaires, except to argue generally that they do not believe the loan was improper.[50] As noted above, acceptance of the loan without approval violated both

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[46] (...continued)
dated by computer at the time it was printed for discovery) is dated December 2006, several months after she had been terminated by Morgan Stanley. However, K. Mullins stipulated in proceedings before the Hearing Panel that she completed this form on January 19, 2006, and she has never argued that the answers on the form were not hers. As noted, K. Mullins concedes that she did not disclose the loan from Mrs. Weil on her 2006 questionnaire.

[47] *Ortiz*, 93 SEC Docket at 8986 & n.20 ("[T]he 'entry of accurate information on firm records is a predicate to the NASD's regulatory oversight of its members' and a predicate for any firm's internal compliance program . . . .") (quoting *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996)).

[48] *Ortiz*, 93 SEC Docket at 8986 & n.19 ("[C]onduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade.") (citing *James A. Goetz*, 53 S.E.C. 472, 477-78 (1998)).

[49] *See* NASD Notice to Members 03-62 (October 2003) ("Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct.").

[50] The Mullinses argued before the NAC that their failure to disclose the loan was the result of an oversight because it was a very hectic time in their lives, and also that the loan did not need to be disclosed because it was an "aborted loan" that was never used for its intended purpose and repaid within a few days. The NAC rejected these arguments, noting the Hearing Panel's determination that the explanations offered by the Mullinses for their failures to disclose the loan were not credible, and concluding that the questionnaires "unambiguously" directed the
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NASD Rule 2370 and Firm policy. Moreover, whether the loan was proper is irrelevant to the issue of whether it needed to be disclosed in response to a direct and unambiguous question on Morgan Stanley's compliance questionnaire. We conclude, therefore, that the Mullinses' failure to disclose the loan from Mrs. Weil on internal Morgan Stanley compliance questionnaires constituted a violation of NASD Rule 2110.

C. The Mullinses' failures to disclose their Foundation positions on compliance questionnaires

We also find that the Mullinses failed to make required disclosures regarding their positions as officers of the Foundation, in further violation of Rule 2110.[51] As noted, an associated person's failure to provide accurate information to his or her member firm is especially problematic when that failure interferes with the firm's compliance efforts.[52] Here, the Mullinses withheld information that would have enabled Morgan Stanley to identify any conflicts of interest that their officer positions created with respect to the Foundation or Mrs. Weil—conflicts that were symptomatic of what J. Mullins himself characterized as a relationship with his client that was "too informal."[53] The Mullinses do not dispute their failure to make the requisite

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[50] (...continued)
disclosure of all loans from customers within the last twelve months. The Mullinses have not renewed these arguments on appeal to us.

[51] In the amended complaint and the NAC decision, the Mullinses' Rule 3110 violations were premised on a finding that their lack of disclosure prevented the Firm from maintaining the books and records required by Exchange Act Rule 17a-3, but that rule, which applies to records of securities purchases and sales, account ledgers, customer orders, margin accounts, associated persons' employment histories, customer complaints, and the like, does not appear to cover the records at issue here. We therefore are setting aside FINRA's finding that the Mullinses violated Rule 3110. *See supra* text accompanying note 60.

[52] *See supra* notes 47 & 48 and accompanying text.

[53] *Cf.* NASD Conduct Rule 3030, now codified as FINRA Rule 3270 (prohibiting registered persons from serving as an officer of an outside business without providing prior written notice to his or her firm); Order Approving Proposed Rule Change Relating to Outside Business Activities of Associated Persons of Member Firms, Exchange Act Rel. No. 26178 (Oct. 13, 1988), 41 SEC Docket 1775, 1775 (approving NASD's enactment of Rule 3030 to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities); Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons, Exchange Act Rel. No. 26063 (Sept. 6, 1988), 41 SEC Docket 1254, 1254 ("[I]t was appropriate for member firms to receive prompt
(continued...)

disclosures. We conclude, therefore, that this conduct was inconsistent with just and equitable principles of trade and thus violated Rule 2110.

J. Mullins claims that his branch management was apprised of his role in the Foundation. However, the branch manager who had originally advised J. Mullins to apply to the compliance department for approval to serve in the Foundation, Todd Monastero, had left the Firm in mid-2004. Monastero's replacement testified that he was not aware that either of the Mullinses served as Foundation officers. But, even if the new branch management knew about J. Mullins's role in the Foundation, that would not excuse his failure to disclose his role to the compliance department. J. Mullins was aware that approval for his Foundation activities came from compliance, not his local managers. The branch's awareness of an activity could not substitute for making full disclosure of his activities—activities which J. Mullins knew concerned compliance because of the potential for conflicts of interest with his customer—to those in the compliance department charged with monitoring employees' compliance with applicable rules.

J. Mullins also asserts that, because he had applied to the compliance department for permission to serve as the Foundation's vice president in 2003 and disclosed this role on his compliance forms in 2003 and 2004, compliance was effectively informed of his role in 2005.[54] If the compliance department failed to notice that his form did not contain the same disclosure in 2005 as it had in 2003 and 2004, J. Mullins argues, this demonstrates that the Firm either did not care or did not really need the information. However, J. Mullins's silence on the form could have indicated that he simply no longer held that position, not that he still held it and was not reporting it. More importantly, it is well established that an associated person cannot excuse his own misconduct by shifting the onus of compliance to his managers or to his firm.[55] As J. Mullins conceded in testimony, the responsibility for making the necessary disclosures to member firms rests with the associated person: "[T]he buck stops with me, I am responsible."

K. Mullins has "acknowledged she was wrong" in not disclosing her officer positions on her Firm questionnaires. She asserts that she "based her incorrect answers on a short conversation with [branch manager Todd Monastero]" who advised her that she did not need to

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[53] (...continued)
notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.").

[54] J. Mullins also claims that he disclosed his vice presidency on his 2006 questionnaire, but the questionnaire J. Mullins completed in January 2006, as it appears in the record before us, does not contain any disclosure of his position with the Foundation.

[55] *See, e.g.*, *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8141 (holding that an applicant "cannot shift the blame for his violations to his firm").

disclose her positions, which were simply a "technicality to facilitate the organizations' [sic] creation." K. Mullins concedes in her brief that Monastero "denied this conversation" and that she was "unable to definitely prove at the hearing the content of a 5 year old 5 minute conversation." But K. Mullins points to evidence that the branch received Foundation-related correspondence that identified her as an officer of the Foundation, providing effective notice to the Firm of her status; yet the Firm "declined," K. Mullins argues, "to question the conflicting answer on her annual questionnaires."

Although the evidence supports K. Mullins's claim that she had little real responsibility or authority as a Foundation officer,[56] this does not justify her non-disclosure. She deprived the Firm of the ability to determine her fitness to handle the Foundation account, based on a full understanding of her relationship with the client. The Hearing Panel credited the testimony of branch management when they testified that, branch correspondence review policies notwithstanding, they were unaware that K. Mullins was an officer of the Foundation, and we generally defer to such credibility determinations in the absence of substantial evidence to support overturning them.[57]

Even if we were to credit K. Mullins's assertion that certain branch personnel informally learned of her official positions, it was still incumbent upon K. Mullins to bring this information in a formal way to the Firm's compliance department, which was responsible for identifying and addressing conflict situations. Although K. Mullins seeks to lay part of the blame for her lack of disclosure on what she believes is the branch's lax review of correspondence, we reiterate that applicants cannot shift to others the responsibility for their own compliance with applicable rules.[58]

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[56] Enforcement has not offered evidence to challenge K. Mullins's assertion that she did not perform the formal duties of a secretary or treasurer as outlined in the Foundation's incorporating documents, although it supports the NAC's conclusion that her dealings with the Foundation were "more than merely ceremonial." *See supra* note 28.

[57] *See Ortiz, supra* note 37. We note, in addition, that there is no evidence that K. Mullins sought to confirm the advice Monastero allegedly gave her (in what K. Mullins testified was a "two-second conversation" and calls in her brief a "5 minute conversation") with the two branch managers who later replaced Monastero. Yet she continued to omit her officer status from Firm questionnaires in 2005 and 2006, after Monastero left the Firm.

[58] *John F. Lebens*, 52 S.E.C. 606, 608 (1996) (finding that broker violated the Chicago Board Options Exchange's equivalent to Rule 2110 by improperly allocating losing personal trades to proprietary accounts of his firm, which had lax internal controls, and noting that "[i]t is important that broker-dealers conduct their business operations with regularity and that their records accurately reflect those operations; it is unethical conduct for their employees to take advantage of loose internal controls to prevent achievement of these principles").

We therefore find that the Mullinses failed to observe just and equitable principles of trade when they did not disclose to the Firm their positions as Foundation officers. However, we find that the evidence does not support a conclusion that the Mullinses should be held liable for failing to disclose that they served as "trustees" of the Foundation. The record indicates that, although the Mullinses were designated as "trustees" of the Foundation in its incorporating documents, they were trustees in name but not in fact; the Foundation was not a true legal trust but a non-profit corporation, and the Mullinses possessed none of the attributes or powers of true trustees of either the Foundation or of the Foundation's account at Morgan Stanley.[59]

* * *

In summary, we affirm FINRA's findings that (1) J. Mullins converted customer property and breached his fiduciary duty to a customer in violation of Rule 2110; (2) the Mullinses violated Rule 2370 and 2110 by accepting a loan from a customer without prior Firm approval; (3) the Mullinses violated Rule 2110 by failing to disclose their acceptance of that loan on their 2005 and 2006 compliance questionnaires; (4) J. Mullins violated Rule 2110 by failing to disclose his Foundation vice presidency in 2005; and (5) K. Mullins violated Rule 2110 by failing to disclose her roles as Foundation secretary and treasurer from 2003 through 2006. We set aside FINRA's findings that (1) J. Mullins made improper use of customer funds in violation of Rule 2330; (2) the Mullinses violated Rule 3110 by failing to disclose their positions as

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[59] We note in this regard that the Foundation was a non-profit corporation and that, as a general matter, corporations are not trusts. RESTATEMENT (THIRD) OF TRUSTS § 5. Although the Mullinses were nominated as "trustees" of the Foundation in its certificate of incorporation, they were not trustees "in the strict sense" because "they [did] not hold title to the corporation's property." SCOTT AND ASCHER ON TRUSTS § 2.3.12 (5th ed.). *See also* RESTATEMENT (THIRD) OF TRUSTS § 5 ("[U]se of the word 'trust' or 'trustee' does not necessarily mean that a trust relationship is involved."); AUSTIN WAKEMAN SCOTT AND WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS (4th ed.) § 16A ("Even in the case of a charitable corporation the members of the board of management, whether called directors or trustees, are not trustees in the strict sense. The title to the property is in the corporate entity and not in the individuals who constitute the board."); *Bovay v. H.M. Byllesby & Co.*, 29 A.2d 801, 804 (Ct. Ch. Del. 1943) (holding that stockholder that "controlled the actions of a majority of the officers and agents" of a company was "in the position of a fiduciary, but it does not follow that it was a trustee of an express trust. The officers and directors of a corporation are fiduciaries; but they are not real trustees.") (internal citations omitted). Moreover, according to Morgan Stanley account opening documentation, the account opened by Esther Weil for the Foundation was opened as a corporate account, not a trust account, and only Mrs. Weil had authorized access to the funds in that account. The Mullinses cannot fairly be said to have served as "trustees" of an account that was not established as a trust and over which they had none of the authorities normally vested in a trustee of funds.

officers of the Foundation; and (3) the Mullinses violated Rules 3110 and 2110 by failing to disclose their status as Foundation trustees.[60]

IV.

The Mullinses argue that the FINRA proceedings against them were flawed and unfair for several reasons.

Exclusion from evidence of Mrs. Weil's letter. J. Mullins argues that FINRA improperly excluded from evidence the letter purportedly written by Mrs. Weil on August 16, 2006 in support of the Mullinses. Because Mrs. Weil did not herself testify on the record before her death, her letter, J. Mullins argues, is highly relevant to the issues being tried because it "addressed specific transactions [and] the flavor and the tone of a letter helps to explain how one might wrongly blur the line between the high standards of reporting expected in a more formal client relationship." After our own de novo review, we conclude that FINRA appropriately excluded the letter.[61]

NASD Rule 9263 directs that the hearing officer "shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." The hearing officer found, and the NAC agreed, that the letter was not relevant to the issues

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[60] K. Mullins appended numerous exhibits to her briefs in support of her arguments, several of which do not appear to have been introduced before FINRA. K. Mullins has not moved the Commission for leave to adduce this additional evidence as required by Commission Rule of Practice 452, 17 C.F.R. § 201.452, which states that motions for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." K. Mullins has not explained why these documents were not introduced at earlier stages in this proceeding. More significantly, these documents are not material to K. Mullins's case: several deal with Morgan Stanley's internal policies on document retention and review (the Firm's compliance with which is not on review here); others purport to show that the branch received correspondence relating to Mrs. Weil's personal care at her nursing facility (which are duplicative of other evidence in the record, as they show only that branch management knew the Mullinses were close friends of Mrs. Weil); and others deal with client accounts unrelated to Mrs. Weil's. We therefore decline to admit this new evidence. *See, e.g., CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 95 SEC Docket 13802, 13809 n.20 (Jan. 30, 2009) (declining to admit evidence under Rule 452 where applicants failed to show that the evidence was material and that there were reasonable grounds for failing to adduce the evidence previously).

[61] Although excluded from evidence, the letter was included in the record pursuant to FINRA procedural rules as a supplemental document, *see* FINRA Rules 9263 & 9267, and it (or a reproduction of its contents) appears in numerous pleadings submitted by the parties at several stages of this proceeding, permitting us an opportunity to review the letter in its entirety.

being litigated. Addressing questions that had initially been raised concerning a "gift" of $375,000 from Mrs. Weil to the Mullinses, the letter states that Mrs. Weil wanted the Mullinses to receive the benefit of the value of her Philadelphia condominium (which she bequeathed to them in her will) while she was alive and that she believed the Mullinses had handled her accounts properly.[62] Mrs. Weil apologizes in the letter for getting the Mullinses "in trouble" by giving them the $375,000 and clearly expresses her affection for the couple, referring to them as her "grandkids."[63] The legitimacy of the $375,000 gift, however, is not at issue in this proceeding. Moreover, the record already contains substantial amounts of uncontroverted evidence, including testimony from the Mullinses and from several other Enforcement witnesses, establishing that the Mullinses' relationship with Mrs. Weil was very close and even familial, rendering statements in the letter repetitious.

We also take note of the fact that J. Mullins has never explained his failure to identify the letter as evidence prior to the hearing.[64] J. Mullins, represented by counsel at the time, did not comply with the hearing officer's scheduling order in this case, which required the parties to provide the hearing officer and each other with a list of proposed exhibits and witnesses upon which they intended to rely at the hearing. When J. Mullins's attorney missed the order's deadline, the hearing officer stated, during a prehearing conference, that J. Mullins could still file his list of proposed exhibits and witnesses. J. Mullins again failed to make any filing. Instead, through counsel, J. Mullins attempted to introduce the letter repeatedly during the hearing—beginning with opening arguments—with apparent disregard for the scheduling order. J. Mullins's counsel then attempted to justify his failure to introduce the letter earlier by characterizing the letter as "rebuttal evidence," an argument that is inconsistent with both his

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[62] When Mrs. Weil wrote this letter, four checks withdrawing a total of $375,000 had recently been signed by her and used by J. Mullins to pay down his home loan. The circumstances of this supposed gift are not clear. Although this $375,000 transaction was originally a basis for FINRA's complaint against J. Mullins, Enforcement ultimately dropped this charge from the complaint for reasons that are not explained in the record before us.

[63] The circumstances of the drafting of the letter are disputed. According to J. Mullins, Mrs. Weil volunteered to write the letter and drafted it herself. According to an affidavit completed by the attorney Mrs. Weil hired to represent her in dealing with the Mullinses, J. Mullins wrote out the letter himself, and Mrs. Weil copied it onto different stationery and signed it "without thinking of its contents . . . because of her implicit trust in the Mullins[es]." When J. Mullins gave Beebe the letter later that day, Beebe refused to give it to Morgan Stanley, believing it to be "very self-serving[,] and," he testified, "I didn't have a lot of confidence in the letter."

[64] *See* NASD Rule 9280 (providing that a hearing officer may exclude from evidence exhibits that respondents, without substantial justification, fail to disclose pursuant to a scheduling order).

attempt to introduce the letter before Enforcement opened its own case and the supposed fundamental importance to his defense that J. Mullins now attaches to the letter.[65]

Even if we were to admit the letter, we find that its contents do not mitigate J. Mullins's misconduct or excuse his violations. Rather, the letter supports a finding of the considerable trust Mrs. Weil had in J. Mullins, and there is no indication in the letter that she was aware of, or condoned, his personal use of the Foundation property at issue here. We find, therefore, that the record demonstrates that the Hearing Panel did not abuse its discretion in excluding the letter, and we affirm the NAC's decision to exclude the letter.[66]

Denial of leave to file a post-hearing brief. J. Mullins also argues that the hearing officer was wrong to deny him the opportunity to file a post-hearing brief at the conclusion of the hearing. He takes issue with Enforcement's characterization of certain facts during its closing arguments and believes Enforcement's statements needed "clarification" but "went unanswered" because his request to file a post-hearing brief was denied by the hearing officer. However, J. Mullins's counsel had ample opportunity at closing arguments to provide his own characterization of the facts, and he did, in fact, respond to some of the Division's statements that J. Mullins now finds objectionable.

Moreover, FINRA rules do not grant hearing participants a right to file post-hearing briefs; instead, the hearing officer is given discretion to determine whether to order the filing of such documents.[67] In concluding that the deliberations of the Hearing Panel—whose members participated actively in the hearing and asked many of their own questions—would not be assisted by further briefing, the hearing officer noted that the parties had stipulated to many of the salient facts in this case and that the issues raised in the matter were not unduly complex. We find no basis in the record to conclude that the hearing officer thereby abused his discretion.

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[65] Admitting the letter at that late stage would have effectively denied Enforcement any opportunity to marshal evidence to controvert the letter's authenticity, which was already questionable. *See supra* note 63. We share the hearing officer's stated concern that counsel's failure to submit the letter as evidence prior to the hearing "appears to have been a pretty calculated disregard" for the terms of the scheduling order.

[66] *Robert J. Prager*, 58 S.E.C. 634, 664-65 (2005) (holding that NASD hearing officer did not abuse his discretion by excluding evidence that was submitted by applicant after the deadline set by the pre-hearing order had passed and that was not shown to have been relevant to the issues raised in the proceeding).

[67] See FINRA Rule 9266(a) ("At the discretion of the Hearing Officer, the Parties may be ordered to file proposed findings of facts and conclusions of law, or post-hearing briefs, or both.").

Severance of K. Mullins's case from J. Mullins's. K. Mullins argues that FINRA's refusal to sever her case from her husband's denied her the opportunity to settle her case and also caused FINRA decisionmakers to draw negative inferences against her because of the alleged misconduct of her husband. Her husband's use of Foundation property, K. Mullins argues, was not related to the charges against her, which focus on a loan made from Mrs. Weil's personal funds and disclosures related to her own involvement with the Foundation. She objects to what she describes as FINRA's assignment to her of "guilt by association" with her husband.

As an initial matter, we are unable to conclude from the record that K. Mullins made any settlement attempts that were thwarted by the posture of the case. Moreover, FINRA rules provide that applicants may make offers of settlement even if Enforcement is opposed to the offer, which will be considered by a hearing panel.[68] We do not find on this record, therefore, that K. Mullins suffered some procedural prejudice because she was prevented from settling her case.

Although K. Mullins takes issue with some statements in the Hearing Panel's decision that she believes unfairly merge her case with her husband's, the NAC's opinion is the only one on appeal before us.[69] The record before us indicates that the NAC "judged each Applicant solely on the record evidence pertaining to that Applicant."[70] Given the substantial overlap in the charges, documentary evidence, and witness testimony relevant to both the Mullinses' cases, we affirm the NAC's finding that the hearing officer committed no error in concluding that trying the cases together would conserve resources and not unfairly prejudice K. Mullins.[71]

Morgan Stanley's alleged failure to produce documents helpful to their case. The Mullinses both argue that Morgan Stanley "withheld essential evidence directly related to charges held against" them, namely, the discovery requested in a motion made before the hearing officer, such as dayplanner calendars, client files, and correspondence files, "and that behavior was

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[68] *See* FINRA Rule 9270(e).

[69] *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17 ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.").

[70] *Donner Corp. Int'l*, Exchange Act Rel. No. 55313 (Feb. 20, 2007), 90 SEC Docket 11, 39.

[71] *See* FINRA Rule 9214 (providing that, in determining whether to grant a request for severance, the hearing officer will consider "(1) whether the same or similar evidence reasonably would be expected to be offered at each of the possible hearings; (2) whether the severance would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties if the severance is (not) ordered."); *Donner Corp. Int'l*, 90 SEC Docket at 39.

endorsed by FINRA." The record shows that both the Hearing Panel and the NAC carefully reviewed these allegations and determined that the Firm had produced everything it possessed that was responsive to the Mullinses' document requests, and we have found no evidence that Morgan Stanley withheld responsive or exculpatory information from the Mullinses.

Moreover, the Mullinses have not shown that the documents they sought, even if produced, would have had any material impact on this case. K. Mullins states that the correspondence files "contained numerous additional examples of management signed and verified legal documents and correspondence clearly highlighting KM's officer status and detailing F[oundation] business." However, as we have already noted, even if the documents K. Mullins identified showed that branch management was fully aware that K. Mullins was an officer of the Foundation, that would not have eliminated the requirement for her to comply with Firm requests for information about those roles—information that the Firm's compliance department needed to approve and monitor the outside business relationships of its associated persons.

J. Mullins contends that these documents contain evidence regarding the use of gift certificates purchased for the Foundation, including "logs with the gift certificate numbers, their amounts, their intended projects and actual use." That some of the gift certificates he purchased for the Foundation might have been legitimately used for Foundation purposes does not mitigate the illegitimate use to which J. Mullins admittedly put the gift certificates at issue. Similarly, his contention that Morgan Stanley branch files contained "detailed information on the wine, invoices for functions held, and proposals for future events under discussion at Morton's and other venues" is of no relevance to the bottles of Foundation wine that J. Mullins admittedly consumed with no connection to Foundation business.[72]

FINRA allegedly acted in bad faith. The Mullinses both argue that FINRA acted improperly by publicizing "charges that they knew could not be sustained and which were subsequently dropped" without equally publicizing the fact that FINRA later reduced the charges against them. In particular, the Mullinses object to the fact that FINRA stated in a press release that J. Mullins had misappropriated $375,000 from a customer and used it to pay his home equity loan while her health deteriorated.

Although the record does not contain much evidence regarding the reasons why FINRA ultimately dropped this charge against J. Mullins, it does contain evidence strongly suggesting that the circumstances surrounding Mrs. Weil's $375,000 gift to the Mullinses warranted scrutiny. As noted, Mrs. Weil's newly retained attorney submitted an affidavit in which he

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[72] J. Mullins also argues that, if Morgan Stanley truly could not locate the files the Mullinses requested in discovery, this constitutes proof that they were violating their own procedures as well as document retention policies required by the securities laws. As we have previously noted, misconduct by others at his Firm (a conclusion we need not and do not make here) would not excuse or mitigate J. Mullins's own violations. *See supra* note 58.

claimed that Mrs. Weil never intended to give the Mullinses that money.[73] The Mullinses returned the funds in response to his written demand shortly after their termination from Morgan Stanley. Mrs. Weil subsequently amended her will to remove all bequests to the Mullinses, including the bequest of her Philadelphia condominium or the value thereof, which J. Mullins claims was the basis for the $375,000 "gift." We cannot conclude, therefore, that FINRA pressed this charge without basis.

Nor can we conclude that FINRA's press release was unfair to the Mullinses. FINRA is required to release to the public information about disciplinary complaints alleging violations of its rules.[74] The press release accurately recounts the charges FINRA filed against the Mullinses at the time; it also included, as required, a discussion of the fact that the Mullinses had an opportunity to respond to the charges and request a hearing, and stated that no adjudicated decision as to the allegations in the complaint had yet been made.[75] The press release as posted on FINRA's web site prominently directs visitors to "See Amended Complaint, withdrawing the $375k conversion charge against John Mullins" and contains a link thereto.[76] We cannot find, therefore, that FINRA treated the Mullinses unfairly or differently than it does other subjects of disciplinary action.[77]

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We find, in sum, that the record does not support any of the Mullinses' various allegations that the proceedings conducted against them were flawed or unfair.

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[73] *See supra* note 63.

[74] *See* NASD Interpretive Material 8310-3 (IM-8310-3) ("NASD shall release to the public information with respect to any disciplinary complaint initiated by the Department of Enforcement . . . containing an allegation of a violation of a designated statute, rule or regulation of the Commission, NASD, or Municipal Securities Rulemaking Board . . . .").

[75] *Id.*

[76] *See* http://www.finra.org/Newsroom/NewsReleases/2008/P037994.

[77] *Robert E. Strong*, Exchange Act Rel. No. 57426 (Mar. 4, 2008), 92 SEC Docket 2875, 2892 (rejecting applicant's argument that NASD press release "was an unfair punitive measure" and holding that the "press release accurately depicted the nature of the complaint against Strong and noted that Strong could respond to the complaint and request a hearing on the charges against him").

V.

Exchange Act Section 19(e)(2) directs us to sustain the sanctions imposed by FINRA unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[78] Because we have modified the findings of violation with respect to the Mullinses' disclosures of their trustee status, we modify the sanctions accordingly, as discussed below.

A. J. Mullins's conversion of Foundation property and breach of fiduciary duty

FINRA's Sanction Guidelines provide that a bar is the standard sanction for conversion, regardless of the amount converted.[79] The Guidelines do not provide a specific sanction recommendation for J. Mullins's related breach of fiduciary duty, but we, as did the NAC, consider these two violations together for purposes of our sanctions review because the violations arise from the same misconduct.

As an initial matter, we observe that conversion is generally among the most grave violations committed by a registered representative. We have stated that, by its very nature, conversion of customer assets "is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade'" that underpin the self-regulation of the securities markets.[80] Indeed, only three (out of approximately eighty) NASD rule violations carry a standard sanction of a bar, and as we have previously noted in this regard, "the misconduct (absent mitigating factors) poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy."[81] We have also recently reiterated our view that "misconduct

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[78] 15 U.S.C. § 78s(e)(2). Applicants do not allege, and the record does not show, that FINRA's action imposed an undue burden on competition.

[79] FINRA Sanction Guidelines 38 (2007). Although the Commission is not bound by FINRA's guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5125, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[80] *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976).

[81] *Charles C. Fawcett IV*, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157 n.27. The other two violations for which a bar is standard are the failure to respond in any manner to information requests from FINRA (*see* Sanction Guidelines at 35) and cheating during broker-dealer qualification examinations (*see id.* at 43).

involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . [is] egregious."[82]

The specific circumstances of J. Mullins's misconduct serve only to aggravate the seriousness of these violations. As the NAC pointed out, J. Mullins acted with intent when he used the Foundation's property for himself.[83] He knew the gift certificates and wine were not his property, but he used them for his own purposes on seven separate occasions over a period of thirteen months.[84] We find, as did the NAC, that the timing of his misconduct, beginning as it did when Mrs. Weil was hospitalized, is also an aggravating circumstance. Also significant is that J. Mullins appears to have given incomplete and at times evasive answers and information to FINRA as it conducted its investigation in the summer of 2007 and began to ask pointed and specific questions about his personal use of Foundation property.[85]

J. Mullins now appears to argue before us that he tried to repay the Foundation quickly and claims that there were "issues with combining the different amounts (Boyd's vs wine vs Four Seasons) and multiple checks were held and not cashed for close to a year until details were decided." To the extent J. Mullins is suggesting that he tried to repay the Foundation immediately after he used the gift certificates and wine, the record—including his own testimony—contradicts this claim.[86] J. Mullins testified at the hearing that he did not remember

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[82] *James C. Dawson*, Investment Advisers Act Rel. No. 3057 (July 23, 2010), 98 SEC Docket 30697, 30703.

[83] *See* FINRA Sanction Guidelines at 7 (Principal Consideration 13 ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.")).

[84] *See* FINRA Sanction Guidelines at 6 (Principal Considerations 8 ("Whether the respondent engaged in numerous acts and/or a pattern of misconduct.") and 9 ("Whether the respondent engaged in the misconduct over an extended period of time.")).

[85] *See* FINRA Sanction Guidelines at 6-7 (Principal Considerations 10 ("Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.") and 12 ("whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA"); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct).

[86] J. Mullins claims that "[t]here is a definitive explanation for the timeline of the repayment which cannot be found in the record because the question was not asked of any party

(continued...)

that he owed the Foundation for the used gift certificates until the summer of 2007, more than a year after he had used them. And, as noted, he testified that he did not even realize that he needed to reimburse the Foundation for the wine he had drunk until he was "painted into a corner" by New Jersey regulators in September 2007. Although J. Mullins ultimately returned the funds he converted from the Foundation,[87] the fact that this reimbursement was delayed by more than a year and prompted by regulatory interest all but eliminates any mitigative effect J. Mullins's reimbursement has on his sanction.[88]

J. Mullins argues that the NAC was wrong to assign any significance to the fact that he began using the Foundation's gift certificates while Mrs. Weil was hospitalized, claiming that Foundation events scheduled prior to her hospitalization required him to purchase the gift certificates. However, the record shows the Foundation donated only a small amount of gift certificates to charity during this period. Moreover, even if we accept for the sake of argument that the Foundation needed to purchase the gift certificates when it did, this would not permit or excuse his conversion of those assets at any time, and far less so when Mrs. Weil was hospitalized and then recovering from illness.

Finally, J. Mullins points to his heretofore clean disciplinary history, and he asserts that his misconduct will not be repeated because the informal nature of the Foundation caused him to "mistakenly relax[] the more formal conduct normally associated with foundations" and the

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[86] (...continued)
during the hearing and only entered as an 'issue' into the record during closing arguments after testimony had been concluded." We reject this claim. J. Mullins himself testified extensively about the circumstances surrounding his return of the gift certificates, as did Beebe. J. Mullins's own failure to raise defenses and introduce evidence supporting those defenses despite clear notice of the charges against him does not render this proceeding unfair. *KPMG Peat Marwick*, 55 S.E.C. 1, 4 (2001) ("As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also supra* note 35. Moreover, the issue of J. Mullins's repayment was raised in pre-hearing briefing by FINRA. J. Mullins's tardy repayment was discussed as an aggravating factor in the Hearing Panel decision, as well, yet J. Mullins made no mention of this in his two briefs on appeal to the NAC.

[87] *See* FINRA Sanction Guidelines at 11 ("(a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury").

[88] *See* FINRA Sanction Guidelines at 6 (Principal Considerations 4 ("Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct."); *Arthur Lipper Corp.*, 46 S.E.C. 78, 98 (1975) (holding that repayment made after commencement of investigation into violative conduct has minimal mitigative weight), *aff'd*, 547 F.2d 171 (2d Cir. 1976).

character of his unique relationship with Mrs. Weil "contributed to the serious lapse in judgment." These arguments fail to mitigate the severity of J. Mullins's misconduct. As we have often noted, an applicant's "lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."[89] And J. Mullins's claims that his misconduct will not be repeated because his relationship with Mrs. Weil will not be duplicated suggest a failure on his part to take responsibility for his actions.[90]

We support the NAC's conclusion that J. Mullins's misconduct "reveals a troubling disregard for fundamental principles of the securities industry" and that a bar is "necessary to deter him and others similarly situated from engaging in similar misconduct." We therefore affirm FINRA's imposition of a bar against J. Mullins for conversion and breach of fiduciary duty, finding that this sanction is neither excessive nor oppressive under the circumstances.[91]

B. K. Mullins's acceptance of a loan from Mrs. Weil without Firm approval

The NAC imposed upon K. Mullins a three-month suspension and $5,000 fine for borrowing funds from a customer without Firm approval.[92] In making its determination, the NAC noted that its Sanction Guidelines do not specifically address the acceptance of a customer loan without approval as a distinct violation, but it noted that the Guidelines' Principal Considerations apply to all sanctions determinations.

We note that K. Mullins's acceptance of the loan appears to have been an isolated violation, that the loan was received and then repaid in a matter of days, and that Mrs. Weil suffered no apparent financial harm from the transaction. However, $100,000 is a significant amount of money and represented a substantial benefit to the Mullinses, who needed the loan (at least temporarily) to help finance their new home. We find it troubling, as did the NAC, that no

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[89] *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 13833, 13865 (quoting *Keyes*, 89 SEC Docket at 801 n.20), *petition denied*, 416 F. App'x 142 (3d Cir. 2010) (unpub.).

[90] *Epstein*, 95 SEC Docket at 13865 (rejecting applicant's "efforts to blame his conduct on his working environment" and noting that these efforts only served to "demonstrate his failure to accept responsibility for his own actions").

[91] Although, as noted above, we have not included misuse of customer funds as a basis for J. Mullins's liability in this case, we conclude that the facts of this case still provide ample support for a bar based only on J. Mullins's conversion of Foundation property and his breach of fiduciary duties as an officer of the Foundation.

[92] The NAC also concluded that J. Mullins's identical misconduct merited the same sanction but declined to impose additional sanctions in light of the bar already assessed against him. These sanctions against J. Mullins are therefore not on review before us.

documentation was created to memorialize this substantial loan or its terms of repayment, which left Mrs. Weil—and her estate, should she and her knowledge of the loan have passed away before the Mullinses fulfilled their obligation to repay her—extremely vulnerable. For these reasons, the potential for conflict of interest was great, and the failure to notify the Firm prevented it from assessing that conflict.[93] In light of the need to impress upon K. Mullins and other associated persons the need to prevent serious conflicts of interest with their clients by observing the restrictions on borrowing from customers, we conclude that FINRA's sanctions are appropriately remedial. We find the suspension, fine, and order to requalify neither excessive nor oppressive, and we affirm them.[94]

C. K. Mullins's failures to disclose information on compliance questionnaires

There is no FINRA sanction guideline for violations of Rule 2110 that involve associated persons' failures to disclose information to their member firms. Therefore, the NAC looked to the Guidelines' recommendation for sanctioning violations of the recordkeeping requirements in NASD Rule 3110. This guideline suggests a suspension of up to thirty business days and a fine of $1,000 to $10,000 or, in egregious cases, a suspension of up to two years or a bar as well as a fine of $10,000 to $100,000.[95] It also directs adjudicators to consider the nature and materiality of the inaccurate or missing information. Using this guidance, the NAC imposed upon K. Mullins a six-month suspension, a $15,000 fine, and an order to requalify for her failure to disclose her status as an officer and trustee of the Foundation and the loan she accepted from Mrs. Weil on Firm compliance questionnaires.[96]

In assessing the sanctions imposed on K. Mullins, we note, as did the NAC, that she failed to disclose her roles with the Foundation on three annual compliance questionnaires, and did not disclose the loan she accepted from Mrs. Weil on two different forms. The circumstances

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[93] *See* NASD Notice to Members 03-62 (Oct. 2003) (discussing the Commission's approval of NASD Rule 2370 and noting that "[l]oans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct").

[94] We note that K. Mullins does not make any specific arguments in mitigation of the sanctions imposed for her acceptance of a loan from Mrs. Weil, other than to argue that the loan did not violate NASD rules or Firm policy. We have rejected these arguments in our earlier discussions. *See supra* section III.B.

[95] *See* FINRA Sanction Guidelines at 30.

[96] It also concluded that a twelve-month suspension, $25,000 fine, and order to requalify were warranted for J. Mullins. However, because the NAC declined to impose these sanctions in light of the bar he had already received, the question of whether these sanctions are excessive or oppressive is not before us.

of her failure to disclose the loan were especially troubling, given that she had entered into the transaction with Mrs. Weil just days before she signed and submitted her compliance questionnaire in March 2005. The nature of the information withheld was serious, because K. Mullins's fiduciary role with the Foundation and the personal loan she received from her client were material and important to the Firm's ability to identify and manage real or potential conflicts of interest between its associated persons and their customers. Under the circumstances, we conclude, as did the NAC, that K. Mullins's disclosure failures were egregious.

Nevertheless, we note that some mitigating factors exist. K. Mullins asserts, as she did during sworn testimony at the hearing, that she was wrong to have failed to disclose her officer positions on disclosure forms, that she takes responsibility for her misstatements, and that "it was not intentional." The Hearing Panel noted in this regard that "K. Mullins appeared sincerely remorseful for these [disclosure] violations." Although the Hearing Panel did not credit her testimony that she had fully informed her branch management of her position as Foundation secretary and treasurer, the record does indicate that branch personnel were generally aware that K. Mullins was close to Mrs. Weil and helped her with the Foundation, lending some support to her argument that she was not engaged in a course of conduct designed to deceive Morgan Stanley about her involvement in the Foundation.[97] That K. Mullins appears to have cooperated fully with FINRA's investigation lends some further mitigative effect. We also observe that a reduction in sanctions is appropriate because we have set aside FINRA's finding that the Mullinses violated Rule 2110 by failing to disclose their roles as trustees of the Foundation. Accordingly, we reduce the sanction against K. Mullins for her disclosure failures to a four-month suspension and a $10,000 fine. We leave in place FINRA's order that she requalify upon

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[97] K. Mullins also points out that she had a "pristine compliance record" until now, but, as we previously noted, this does not serve to mitigate the sanctions imposed. *See supra* note 89 and accompanying text.

her return to the industry. We affirm the NAC's decision to require K. Mullins to serve her suspensions consecutively,[98] as we concur with its determination that her failure to disclose information on compliance forms is "fundamentally different" from her failure to obtain the appropriate approval from her Firm before accepting a loan from a client,[99] and that consecutive suspensions appropriately remedy the two types of violation.

An appropriate order will issue.

By the Commission (Commissioners AGUILAR, PAREDES, and GALLAGHER; Chairman SCHAPIRO and Commissioner WALTER not participating).

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[98] K. Mullins stated in her brief that her "time sanction has been satisfied" because she had already served it by the time of her appeal to the NAC. However, FINRA Rule 2370 automatically stays all sanctions (except for bars or expulsions) pending appeal, with the result that K. Mullins has not yet begun to satisfy any suspension imposed. FINRA notified K. Mullins of this in the February 24, 2011 transmittal letter accompanying the NAC's decision.

[99] *Michael Patrick Siegel*, Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501, 10520, *aff'd in rel. part*, 592 F.3d 147 (D.C. Cir. 2010).

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66373 / February 10, 2012

Admin. Proc. File No. 3-14302

In the Matter of

JOHN EDWARD MULLINS
and
KATHLEEN MARIA MULLINS

510 North Thurlow Avenue
Margate, NJ 08402

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the findings of violation by FINRA against John E. Mullins and Kathleen M. Mullins be, and they hereby are, SUSTAINED, with the exception that FINRA's findings that (a) John E. Mullins violated NASD Rule 2330 by making improper use of customer funds, (b) John E. Mullins and Kathleen M. Mullins violated NASD Rule 3110 by failing to disclose information to their firm, and (c) John E. Mullins and Kathleen M. Mullins violated NASD Rules 3110 and 2110 by failing to disclose their status as trustees of the Foundation or its account be, and they hereby are, VACATED; and it is further

ORDERED that the bar imposed by FINRA on John E. Mullins be, and it hereby is, SUSTAINED, for converting customer funds and breaching his fiduciary duty to a customer in violation of NASD Rule 2110; and it is further

ORDERED that the ninety-day suspension, $5,000 fine, and order to requalify imposed upon Kathleen M. Mullins for accepting a loan from a customer without member firm approval, in violation of NASD Rules 2370 and 2110, be, and they hereby are, SUSTAINED; and it is further

ORDERED that the six-month suspension, $15,000 fine, and order to requalify imposed upon Kathleen M. Mullins for failing to disclose information to her firm, in violation of NASD Rules 3110 and 2110, be, and they hereby are, SET ASIDE; and it is further

ORDERED that Kathleen M. Mullins be suspended for four months, pay a $10,000 fine, and requalify for failing to disclose information to her firm, in violation of NASD Rule 2110; and it is further

ORDERED that Kathleen M. Mullins serve her two suspensions consecutively, not concurrently; and it is further

ORDERED that FINRA's order to pay costs, imposed jointly and severally upon John E. Mullins and Kathleen M. Mullins, be, and it hereby is, SUSTAINED.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary