FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BLAIR C. MIELKE (CRD No. 1878222), FREDERICK W. SHULTZ (CRD No. 5239977), THOMAS J. GORTER (CRD No. 1008601), and MICHAEL L. TRIER (CRD No. 1628954), Respondents.	Disciplinary Proceeding No. 2009019837302 Hearing Officer – MC **HEARING PANEL DECISION** September 20, 2012

Respondents Blair C. Mielke, Thomas J. Gorter, Frederick W. Shultz, and Michael L. Trier engaged in private securities transactions, in violation of NASD Rules 2110, 3040, and FINRA Rule 2010. In addition, Respondents Mielke, Gorter, and Shultz engaged in the following misconduct:

- **Respondent Mielke engaged in outside business activities, in violation of NASD Rules 3030, 2110, and FINRA Rule 2010; made misstatements on compliance questionnaires of a FINRA member firm, in violation of NASD Rule 2110 and FINRA Rule 2010; and failed to respond timely to requests for information, in violation of FINRA Rules 8210 and 2010.**
- **Respondent Gorter caused inaccurate entries to be made in the books and records of a FINRA member firm, in violation of NASD Rule3110 and FINRA Rule 2010, and failed to respond timely to a request to provide on-the-record testimony, in violation of FINRA Rules 8210 and 2010.**
- **Respondent Shultz engaged in outside business activities, in violation of NASD Rule 3030 and FINRA Rule 2010; caused inaccurate entries to be made in the books and records of a FINRA member firm, in violation of NASD Rule 3110 and FINRA Rule 2010; made misstatements on compliance questionnaires of a FINRA member firm,**

in violation of FINRA Rule 2010; misused customer funds, in violation of FINRA Rules 2150 and 2010; and failed to appear timely to provide on-the-record testimony, in violation of FINRA Rules 8210 and 2010.

The Hearing Panel imposes the following sanctions: Respondents Mielke, Gorter, and Shultz are barred from associating with any FINRA member firm in any capacity; Respondent Trier is suspended from associating with any FINRA member firm in any capacity for 30 business days, and fined $2,500.

Appearances

Dale A. Glanzman, Senior Regional Counsel, and UnBo Chung, Senior Regional Counsel, Chicago, Illinois, for the Department of Enforcement.

Jason L. Hargadon, Esq., Lexington, Kentucky, for Respondents Mielke, Shultz, and Gorter.

Michael L. Trier, pro se.

I. Introduction

The gravamen of the Complaint that the Department of Enforcement filed against Respondents in this disciplinary proceeding is that they engaged in private securities transactions, or selling away, without first giving the FINRA member firm with which they were associated written notice. The Complaint focuses on a period from January 2008 through October 2009 ("relevant period") when Respondents Blair C. Mielke, Frederick W. Shultz, Thomas J. Gorter and Michael L. Trier were registered with Brookstone Securities, Inc. ("Brookstone"). The charges stem from Respondents' involvement with a private placement offering promoted by a subsidiary of Harvest Holding Company, LLC ("Harvest Holding"), a company Mielke created. The subsidiary, a hedge fund called Midwest Investment Partners, LLC ("Midwest"), marketed the private placement. Brookstone formally approved a selling agreement permitting its representatives to sell the Midwest offering in June 2009.

The Complaint's second cause of action is the central charge in this case. For this reason, the Decision considers it first. It is the only cause of action directed at all four Respondents. It

alleges that Respondents sold or participated in sales of investments in the Midwest offering before Brookstone gave its approval. The Complaint charges that by doing so, Respondents violated NASD Rules 2110 and 3040, and FINRA Rule 2010.[1] In their defense, Respondents claim that they provided the firm with written and oral notice of their sales activity and that Brookstone approved of it.

The remaining seven causes of action allege a variety of rule violations against Mielke, Shultz, and Gorter. These violations fall into two categories: (i) misconduct directly related to their involvement in the Midwest offering; and (ii) their delays in responding to FINRA's investigative requests for information or testimony pursuant to Rule 8210. In the first category, the Complaint charges that:

- Mielke and Shultz engaged in outside business activities by operating and participating in the management of Midwest, and receiving compensation for doing so, without giving prompt written notice to Brookstone, in violation of NASD Rules 3030 and 2110, and FINRA Rule 2010 (first cause of action).
- Shultz and Gorter failed to inform Brookstone of sales of investments in Midwest, causing Brookstone's books and records to be inaccurate, in violation of NASD Rule 3110 and FINRA Rule 2010 (third cause of action).

[1] As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). Because Respondents participated in sales of the Midwest offering from January 2008 through October 2009, this Decision relies on the NASD and FINRA Rules in effect at the time of the alleged misconduct. The applicable rules are available at www.finra.org/rules.

- Mielke and Shultz made false and misleading statements when they answered questions on Brookstone's outside business questionnaires, in violation of NASD Rule 2110 and FINRA Rule 2010 (fourth cause of action).
- Shultz misused customer funds, in violation of FINRA Rules 2150 and 2010 (fifth cause of action).

In the second category, relating to FINRA's investigative requests, the Complaint's last three causes of action allege that Mielke, Shultz, and Gorter failed to comply in a timely fashion to provide information, or on-the-record testimony, in violation of FINRA Rules 2010 and 8210.[2]

In their Answers, Respondents deny the allegations.[3]

A Hearing Panel convened the four-day hearing on March 5, 2012, in Chicago Illinois. For the reasons set forth below, the Panel unanimously finds Respondents liable for the charges alleged in the Complaint. The Panel imposes bars upon Mielke, Gorter, and Shultz, and a suspension and fine upon Trier.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

During the relevant period, Respondents were registered with FINRA through Brookstone. Mielke, Gorter, and Shultz were registered as Investment Company and Variable Contracts Products Representatives, and Trier was registered as a General Securities

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[2] The Complaint originally charged Mielke with failing to respond to Rule 8210 requests for information and Shultz with failing to appear at an on-the-record interview pursuant to Rule 8210. At the outset of the hearing, Enforcement, without objection, amended the sixth cause of action to charge Mielke with failing to respond completely and timely to Rule 8210 requests for information, and the seventh cause of action to charge Shultz with failing to appear timely for his on-the-record interview. Tr. 10-11. References to the testimony at the hearing are designated "Tr." with transcript page numbers. References to exhibits introduced by Enforcement are designated "CX-___." References to exhibits introduced by Respondents are designated "RX-___."

[3] Trier and Gorter each filed an Answer on his own behalf. Mielke and Shultz filed their Answers through counsel. Gorter, Mielke, and Shultz raised affirmative defenses. Among their affirmative defenses, Mielke and Shultz assert that the Complaint should be dismissed because Enforcement failed "to provide evidence required by Rule 9251." At the hearing, Mielke and Shultz formally waived this defense.

Representative.[4] Brookstone terminated Trier in October 2009 for lack of production, and terminated Mielke, Shultz, and Gorter in November 2009 for engaging in private securities transactions.[5] None of the Respondents is currently registered with a FINRA member firm. Under Article V, Section 4 of FINRA's By-Laws, however, they remain subject to FINRA's jurisdiction for the purposes of this disciplinary proceeding because Enforcement filed the Complaint on April 8, 2011, within two years after Respondents' last FINRA registrations terminated. In addition, the Complaint alleges that all of the Respondents engaged in misconduct while registered with FINRA, and that Mielke, Gorter, and Shultz failed to comply with Rule 8210 requests FINRA made within two years after their FINRA registrations terminated.

B. The Respondents

1. Mielke

Mielke has been engaged in the securities business for 24 years and holds Series 6, 63, and 65 licenses.[6] He joined Brookstone in June 2007.[7] At the time, Mielke was involved with a number of partners in the operation of Harvest Holding and its subsidiaries.[8]

Harvest Holding is the parent to several companies, including Harvest Midwest Group, LLC, which Mielke and his partners created in January 2008 to manage Midwest.[9] Mielke describes himself as a managing member of Midwest.[10]

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[4] The Central Registration Depository ("CRD") records reflecting their employment history are found at CX-4 (Mielke); CX-45 (Shultz); CX-58 (Gorter); and CX-86 (Trier).

[5] Tr. 53-54, 231.

[6] Tr. 818.

[7] CX-4, at 2; Tr. 838.

[8] Tr. 825.

[9] CX-1, at 1; Tr. 832-833.

[10] Tr. 830-832; CX-5. CX-5 is a schematic depiction of the relationship between Harvest Holding and its related entities. Harvest Holding was initially called Harvest Financial. Tr. 831.

2. Shultz

Shultz, a retired mathematician, knew Mielke's parents and has known Mielke since Mielke was a child. After retiring, Shultz became interested in working in the securities industry. In 2006, at Mielke's suggestion, Shultz acquired Series 6, 63, and 65 licenses.[11] With Mielke, he joined Brookstone in June 2007.[12] However, he did little securities-related work until September 2008, when Mielke asked him to become involved in Midwest.[13] In February 2009, Shultz moved from West Virginia to Indiana to manage financial matters for Harvest Holding and Midwest. He worked in Mielke's Brookstone branch office in Evansville, Indiana.[14]

3. Gorter

Gorter began his career in the securities industry in 1988 as an Investment Company and Variable Contracts Products Representative with a FINRA member firm.[15] Gorter signed an agreement to be a registered investment advisor with Brookstone on January 26, 2008.[16] According to Gorter, Brookstone's president Antony Turbeville hired him to advise the firm's representatives on how to convert from a commission-based to a "fee based system" of doing business.[17]

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[11] Tr. 999.

[12] CX-45, at 2.

[13] Tr. 1002, 1086-1087.

[14] Tr. 999-1003, 1006.

[15] CX-58.

[16] CX-59, at 23.

[17] Tr. 524-525.

Gorter's CRD records show he was registered with FINRA through Brookstone from February 2008 until November 2009.[18] When Gorter joined Brookstone in January 2008, he also signed a consulting agreement with Harvest Holding[19] and a selling agreement with Midwest.[20] The consulting agreement gave Harvest Holding the option to purchase Gorter's "block of business," for which he received substantial compensation.[21] He testified that, during the relevant period, Midwest and/or Harvest Holding initially paid him $18,000 monthly, and subsequently $15,000 per month,[22] for referring clients to Midwest.[23]

4. Trier

Trier began his career in the securities industry in 1987 and obtained Series 6, 7, and 63 licenses. Trier was registered through Brookstone as a General Securities Representative from April 2005 to October 2009.[24] Trier learned about Midwest from Gorter. Through Gorter, Trier sold interests in Midwest to two Brookstone customers.[25]

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[18] CX-58, at 2. At the hearing Gorter claimed that his registration with Brookstone was not effective until August 2008 because he was suspended until then as a result of a disciplinary action brought against him by Kentucky regulators. Tr. 530-533. However, in his Answer, Gorter admitted he was registered with Brookstone from February 2008, which is consistent with the entries in CRD. Furthermore, as set forth below, the evidence demonstrates that Gorter actively participated in sales of the Midwest private placement from the time he registered with Brookstone.

[19] CX-10. The consulting agreement identifies the parties as Gorter and Harvest Financial, Inc. However, as noted above, Harvest Financial, Inc. became Harvest Holding. Tr. 831.

[20] CX-143.

[21] Tr. 541. Gorter gave conflicting stories relating to the sale of his business to Harvest Holding and the compensation he received. At one point, he testified that the price was $4 million, but the purchase "never materialized." Tr. 606. At another point, Gorter maintained that Harvest Holding never paid him for his block of business, but that Midwest paid him with one or two checks in 2009 for consulting services and salary, and that he ultimately "gave" Harvest Holding the block of business. Tr. 542. Then Gorter insisted that Harvest Holding paid him "[s]trictly as a consultant." Tr. 608. However, the credible evidence shows, and Gorter ultimately conceded, that Harvest Holding and Midwest compensated him for referring customers to Midwest. Tr. 642-643.

[22] Tr. 545.

[23] Tr. 643.

[24] Tr. 53; CX-86, at 2.

[25] Tr. 58-60.

C. The Private Securities Transactions

1. Rule 3040

NASD Rule 3040(a) states unambiguously: "No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." Rule 3040 (b) specifies, in equally plain language, prerequisites with which an associated person must comply in order to participate in a private securities transaction. In pertinent part, it requires the person to give written notice to his firm, "describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction." The Securities and Exchange Commission ("SEC") has held that failure to provide these particulars in writing to one's firm violates Rule 3040.[26]

Rule 3040(e) defines "private securities transaction" to include "any securities transaction outside the regular course or scope of an associated person's employment with a member, including ... new offerings of securities which are not registered with the Commission ...." Section (e) also clarifies that "selling compensation" means "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions ... rights of participation in profits ... as a general partner or otherwise; or expense reimbursements." If an associated person expects to derive compensation from a private securities transaction, he must obtain permission from his firm in advance of the transaction.[27]

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[26] *Anthony H. Barkate*, Exchange Act Rel. No. 49542, 2004 SEC LEXIS 806, at *2 (Apr. 8, 2004), *aff'd*, 125 F. App'x. 892 (9th Cir. 2005); *Dep't of Enforcement v. Keyes*, No. C02040016, 2005 NASD Discip. LEXIS 9, at *13 (NAC Dec. 28, 2005).

[27] *Dep't of Enforcement v. Nugent*, No. C01040010, 2006 NASD Discip. LEXIS 1, at *11 (NAC Feb. 23, 2006).

2. Mielke, Shultz, and Gorter Participated in Sales of the Midwest Offering

Mielke testified that he and his partners formed Midwest in January 2008 to invest in "mid-term notes" through two hedge funds, Vestium Equity Fund ("Vestium") and Arcanum Equity Fund ("Arcanum"), which Mielke described as related entities.[28] Mielke testified that, with his partners and Harvest Holding's lawyer, he conducted due diligence on Vestium and Arcanum.[29] The due diligence included meeting with principals of the hedge funds.[30] According to Mielke, "everything checked out and we proceeded."[31] Mielke represented that the notes would yield interest of one to two percent monthly, generated from the spread between the purchase and sales prices of the notes.[32]

All four Respondents participated in the sales of the Midwest offering: Mielke, Gorter, and Trier sold directly to customers, and Shultz participated by managing the business with Mielke from the Evansville branch office. Mielke, Gorter, and Shultz held "rights of participation in profits" because of their ownership interest as partners in Harvest Holding, and Mielke and Gorter were compensated for their customer sales. Trier anticipated receiving selling compensation by earning commissions for his sales, but he did not receive any.[33]

Thirty-one investors invested a total of $4,618,492.25 in Midwest.[34] The first purchase, by one of Mielke's customers, occurred on January 22, 2008. The other purchases occurred

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[28] Tr. 833-834; CX-1, at 1.

[29] Tr. 822.

[30] Tr. 835-836.

[31] Tr. 837.

[32] Tr. 738-741, 833-835.

[33] Even if an associated person does not profit monetarily from his participation in a private securities transaction, he is subject to sanctions if the transaction held the potential for monetary gain. *Dep't of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *44 (NAC May 11, 2007), *aff'd*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008).

[34] Tr. 742; CX-20.

between August 1, 2008, and October 5, 2009. Mielke sold investments to six of his customers and Gorter sold to 23 of his customers. The Evansville branch office sent none of the necessary paperwork associated with the transactions to Brookstone's main office for processing,[35] even though the last nine transactions all occurred after Brookstone approved the Midwest selling agreement in June 2009.[36]

Enforcement depicted Mielke's operation of the Brookstone Evansville branch office during the relevant period through witness Danny Woosley. Woosley started working for Mielke in 2001, acquired Series 6, 63 and 65 licenses, and followed Mielke to several firms and eventually to Brookstone.[37] Woosley characterized himself as "low man on the totem pole," who did as Mielke instructed.[38] Woosley identified Mielke and Gorter as the two who sold the Midwest private placement to their customers.[39] He described Shultz's role as that of a manager who handled the money and performed accounting responsibilities.[40] In addition, Shultz reviewed and approved subscription agreements submitted on behalf of investors,[41] calculated earnings that were owed to each investor,[42] and filed the Form D Notices of Exempt Offering of Securities with the SEC.[43]

Woosley's responsibilities included performing an initial review of the paperwork associated with each investment to ascertain whether it was properly completed, and forwarding

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[35] Tr. 230.

[36] CX-20.

[37] Tr. 731-732. Woosley remains licensed through Brookstone.

[38] Tr. 776.

[39] Tr. 743. Trier sold the investment to two of his customers through Gorter. Because Gorter sent Woosley the paperwork, Woosley testified that he thought that Trier's customers were actually Gorter's. Tr. 768.

[40] Tr. 744.

[41] Tr. 745.

[42] Tr. 1070.

[43] RX-107, at 4 and 12.

it to Shultz.[44] After Shultz approved, Woosley contacted a trust company, Sterling Trust, to create an account for the investor's funds, from which the money would be transferred to Midwest.[45]

The private placement paperwork contained a line for Woosley's signature, underneath which there were additional blank spaces for information identifying the broker-dealer conducting the transaction, including the broker-dealer's name, address, phone number, and authorized signature.[46] Woosley did not, however, fill in those blank lines. Woosley conferred with Mielke about this because he wondered if he should include the information to identify Brookstone as the broker-dealer for Midwest sales.[47] Because Mielke told him that it was unnecessary, he left the lines blank.[48] Woosley testified that he had no idea if anyone at Brookstone knew he was setting up the accounts at Sterling Trust. He did not take it upon himself to inform Brookstone because Mielke had told him it was "already taken care of."[49] Woosley testified that the Evansville branch sent none of the paperwork for sales of the Midwest offering to Brookstone's main office.[50]

3. Trier Sold Interests in Midwest to Two Customers

As noted above, the Complaint charges Trier with engaging in two private securities transactions.

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[44] Tr. 746.

[45] Tr. 746-747.

[46] *See, e.g.*, CX-18, at 4.

[47] Tr. 751.

[48] Tr. 748-749.

[49] Tr. 749.

[50] Tr. 754. Brookstone's headquarters are located in Florida. Tr. 649.

Trier learned of Midwest from Gorter. They first met at a Brookstone annual compliance meeting in September 2008.[51] Gorter made a presentation giving marketing advice to approximately two hundred Brookstone representatives. Trier was interested in what Gorter said, and asked to meet with him after the conference.[52]

When they met again in November 2008, Gorter told Trier that Midwest would be appropriate for clients interested in income-producing investments. Gorter explained that Midwest generated income through trading European notes, yielding as much as 30% annually.[53] Gorter represented that there was no risk, the notes were traded repeatedly, and each transaction generated a fee or commission.[54] Trier was unable to understand how the investment worked, but Gorter told him it did not matter because the return to investors was based on the transaction fees.[55]

Trier specifically asked Gorter if Midwest had a selling agreement with Brookstone. Gorter replied that one would be in place soon.[56] Trier followed up with calls to Gorter in January and February 2009, and Gorter informed him that Brookstone's chief compliance officer, David Locy, was reviewing the agreement. In one call, Gorter assured Trier that the selling agreement was on Locy's desk and that Locy would sign it later that day.[57]

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[51] Tr. 58.

[52] Tr. 106.

[53] Tr. 59-60.

[54] Tr. 64-65.

[55] Tr. 117-118.

[56] Tr. 60.

[57] Tr. 71-72.

Gorter sent Trier drafts of the private placement memorandum ("PPM"), subscription agreement, and operating agreement for Midwest,[58] but Trier never received a copy of the selling agreement.[59] Trier testified that he did not find the PPM helpful because it was "very vague."[60]

Despite not understanding the nature of the investment, Trier decided to offer it to clients who needed a "decent income stream" with "no risk."[61] Trier initially thought that it was limited to accredited investors. However, Gorter assured Trier that he could sell the product to anyone as long as the client understood there was a 90-day waiting period for withdrawing principal, and that Midwest was making an exception to the requirement that investors be accredited.[62] Based on Gorter's assurances, Trier assumed that Midwest was "very safe" and that there was "no way to lose any money."[63]

When Gorter told Trier that Brookstone had approved the selling agreement, Trier believed him and did not confirm it with anyone at Brookstone.[64] Trier testified he did so because he thought Gorter was "an extension of Brookstone," and that "whatever he said came from Brookstone."[65] Consequently, in March 2009, Trier sold shares in Midwest to two customers. At Gorter's direction, Trier submitted the paperwork for the transactions to Gorter,

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[58] Tr. 62-63.

[59] Tr. 72.

[60] Tr. 64.

[61] Tr. 70.

[62] Tr. 71.

[63] Tr. 112.

[64] Tr. 103.

[65] Tr. 128-129.

not to Brookstone.[66] He testified that he believed Gorter would ensure the documents were complete and correct,[67] and forward them to Brookstone.[68]

Trier testified that sending the paperwork to Gorter instead of Brookstone was an exception to his normal business practice. He also departed from his usual practice by not including a new account form with the documents he sent to Gorter. When asked why, Trier could not explain. He answered, "You know, that's a good question. ... I don't know why ... a new account form, I don't know why I didn't fill one out."[69]

Trier was fully aware of the terms of Brookstone's written supervisory procedures governing private securities transactions. Brookstone required representatives to provide written notice with details of prospective private securities transactions and to obtain firm approval before engaging in such transactions.[70] Trier did not do so in this instance because, relying on Gorter, he thought Brookstone had already approved the selling agreement.[71]

Trier's customers' Midwest investments were troubled from the start. Gorter had assured him that investors would begin receiving income three months after investing, but they waited six months before the income stream began. Even then, the checks arrived late.[72] Gorter attributed the delay to "international processing" of the paperwork.[73] Concerned by the delays, Trier recommended that his customers liquidate their investments and recover their capital. In October 2009, Trier notified Gorter that his customers wanted to withdraw their funds from the

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[66] Tr. 75.

[67] Tr. 125-126.

[68] Tr. 104-105.

[69] *Id.*

[70] Tr. 84.

[71] Tr. 85-86.

[72] Tr. 77.

[73] Tr. 78.

investments.[74] The customers did not receive the return of their principal until January 2010. Trier expected to be paid a three percent commission on the transactions, but received no compensation. Commissions were due when the revenue stream began, but by then his objective was simply to recover his clients' funds for them.[75]

4. The Defense Claim: Brookstone Knew and Approved of the Midwest Offering

a. Mielke

According to Mielke, Turbeville wanted Brookstone to market Midwest.[76] Mielke testified that when he joined Brookstone in the summer of 2007, he fully informed Turbeville of the project, discussed it in conference calls with Brookstone's compliance department, and provided Brookstone with the results of the due diligence he had performed.[77] Mielke testified that he also provided Brookstone with a copy of the initial draft of the Midwest PPM in November 2007 and discussed it with Brookstone's compliance personnel.[78]

Mielke claimed Brookstone gave "verbal and written approval" to sell membership interests in Midwest in January 2008, before the first sales.[79] He testified that e-mails between Brookstone and Midwest's attorney document the approval, and that Brookstone's chief compliance officer, David Locy, personally gave Mielke approval in a telephone conversation.[80] By Mielke's account, Locy knew Mielke was marketing Midwest, but

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[74] Tr. 80-81.

[75] Tr. 82-83.

[76] Tr. 848-849.

[77] Tr. 838-840. Mielke testified that he asked Harvest Holding's attorney to provide him with copies of the due diligence materials he reviewed, but that the attorney has refused to do so. Tr. 842-844.

[77] Tr. 846-847.

[78] Tr. 842-843.

[79] Tr. 846-847.

[80] Tr. 848.

wanted him to revise the PPM before selling through Brookstone.[81] According to Mielke, Brookstone's position was that although the PPM was inadequate, Midwest was "fine for [Mielke]" to sell to investors but "there's no way that we can market this through a broker-dealer."[82] In the meantime, Mielke testified, Turbeville told him "to go ahead and sell it."[83] Mielke even claimed that, in December 2008 and January 2009, he identified for Brookstone the clients who had already invested in Midwest.[84]

b. Gorter

Gorter echoed Mielke's claims that Brookstone approved the marketing of Midwest. Gorter testified that between January and February 2009, Turbeville endorsed the project with the expectation that Brookstone would soon formally accept the selling agreement.[85] Gorter testified that, in the meantime, Harvest Holding's attorney advised him that he, Mielke, and Shultz did not need to process Midwest sales through Brookstone because they were owners of Harvest Holding.[86] He did not explain why their ownership exempted them from selling through Brookstone.

Nonetheless, Gorter conceded that he never received an "official go-ahead."[87]

c. Shultz

Shultz, too, testified that Harvest Holding's attorney indicated that he had discussed Midwest with Brookstone and that the firm "knew we were operating Midwest."[88] However,

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[81] Tr. 848-849.

[82] Tr. 855.

[83] Tr. 939.

[84] Tr. 855-856.

[85] Tr. 568-569.

[86] Tr. 646-647.

[87] Tr. 650, 652.

[88] Tr. 1011.

Shultz offered no direct evidence of Brookstone's knowledge and supposed approval. He did not recall any mention of Midwest when he attended the Brookstone compliance meeting in September 2008.[89] Shultz testified that in another meeting in late 2008, Turbeville did not specifically approve selling the Midwest product but "the whole assumption" was that Turbeville, and therefore Brookstone, knew about the sales activity.[90] Shultz said he was "not 100% sure," but thought that in the last quarter of 2008, Locy participated in a conference call discussing "eventually marketing Midwest through Brookstone."[91]

5. Brookstone Was Unaware of the Midwest Sales Activity

Turbeville and Locy adamantly insist that they did not know about or approve the Midwest sales prior to accepting the sales agreement in June 2009, and had no idea Mielke, Shultz, and Gorter started selling the offering in 2008.

a. Turbeville Did Not Know and Approve of Midwest Sales

There is no dispute that in December 2008, Turbeville met with Mielke, Shultz, Gorter, and Mielke's attorney at an airport in Orlando, Florida, to discuss Midwest. Turbeville remembered that Mielke and Gorter requested the meeting. They described the investment as suitable for institutional investors, with "high return to the investor, high commission, and extremely safe." Turbeville recalled reacting by remarking, incredulously, that they needed to "look under the hood" at Midwest, because no private placement could meet "all those criteria." They insisted that Midwest did.[92]

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[89] Tr. 1004.

[90] Tr. 1067.

[91] Tr. 1004-1005.

[92] Tr. 138-140.

According to Turbeville, he was not the Brookstone principal with the expertise or responsibility to approve the firm's involvement in sales of a private placement.[93] Consequently, Turbeville directed Mielke and Gorter to submit their proposal in writing to Locy, who is a CPA, the firm's chief compliance officer, and the principal responsible for approving or disapproving private placements.[94]

Turbeville testified emphatically that he did not approve sales of Midwest prior to the Orlando meeting, and he did not do so at the meeting.[95] He insisted that Mielke, Gorter, and Shultz said nothing to suggest that they were already selling the offering to the public.[96]

After Locy approved the selling agreement, Turbeville expected Brookstone would review all paperwork associated with Midwest sales and record the transactions on Brookstone's books and records. Turbeville testified that when he discovered that Mielke, Gorter, and Shultz had not processed Midwest sales through Brookstone, he immediately terminated their registrations with the firm.[97]

One of Respondents' central contentions is that "nothing in the selling agreement called for [Midwest] transactions" to be "run through" Brookstone and recorded on its books and records.[98] Hence, they claim there was no need to forward paperwork to Brookstone. To lay the foundation for this argument at the hearing, Respondents' counsel challenged Turbeville to find "any provision in this agreement for any sale to be recorded on the books and records of

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[93] Tr. 147.

[94] Tr. 140-141. Locy was chief compliance officer from June 2005 until June 2008, when he became Brookstone's president. He was president until August 2009, after which he also became chief executive officer. Tr. 186.

[95] Tr. 139.

[96] Tr. 143.

[97] Tr. 148.

[98] Tr. 1253.

Brookstone."[99] In response, Turbeville insisted that the absence of such an explicit provision is irrelevant.[100] He pointed out that the selling agreement contains a number of provisions that implicitly required Brookstone to review the Midwest sales paperwork. For example, the agreement made Brookstone responsible for ensuring suitability for individual customers and reviewing for compliance with anti-money laundering laws.[101] Without receiving paperwork for the transactions, the firm would be unable to do so.

Furthermore, the approved selling agreement contains provisions detailing Brookstone's share of compensation from Midwest sales.[102] According to Turbeville, from their initial discussions, Mielke touted Midwest as a "great" opportunity for them all to "make a lot of money." If the brokers did not conduct the business through Brookstone, Turbeville asked, "how were we going to make money?"[103]

b. Locy Did Not Know of Midwest Sales

Locy first learned of Midwest after the Orlando airport meeting. Turbeville informed him that he had instructed Mielke, Shultz, and Gorter to obtain Locy's approval.[104] Locy's review required him to receive Midwest's PPM and operating agreement, and to attempt to conduct due diligence.[105]

Locy received the PPM in January or February 2009. Turbeville called him repeatedly to ask about the status of the review. Locy found the document inadequate. He informed Mielke

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[99] Tr. 154.

[100] Tr. 154, 157-158.

[101] Tr. 174-175.

[102] Tr. 171-172; CX-15, at 3, ¶ 4.

[103] Tr. 177.

[104] Tr. 198.

[105] Tr. 199-200.

that it was incomplete and contained insufficient disclosures. He recommended that Mielke find an attorney familiar with Regulation D offerings to assist in revising the PPM.[106]

Like Turbeville, Locy testified that Mielke said nothing to indicate that he, Gorter, and Shultz were already selling the Midwest offering, and gave him no reason to suspect that they were doing so.[107]

In June 2009, Mielke gave Locy a revised PPM, operating agreement, selling agreement, and subscription. On June 26, 2009, Locy approved and signed the selling agreement, authorizing Brookstone representatives to sell interests in Midwest to qualified investors.[108]

Locy's contemporaneous notes show that he conducted an initial review of the revised PPM on July 11, 2009, and had a series of conversations about it with Mielke extending into August.[109] Locy's notes reflect that Mielke told him that the project was "just getting started" with "no sales" yet.[110] Locy made additional notations which corroborate his hearing testimony. He wrote that he told Mielke that "all sales must go thru [Brookstone] in normal course of business;" that he and Mielke "talked about processing of paperwork;" that all sales "must come through Brookstone and be approved by compliance;" and that "Brookstone to review and approve all investors is a strong plus."[111]

After further discussion with Mielke, Locy approved the PPM for distribution on August 13, 2009.[112]

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[106] Tr. 201-202.

[107] Tr. 202-203.

[108] CX-15; Tr. 204.

[109] Tr. 208, 211; CX-97.

[110] Tr. 210; CX-97, at 4.

[111] CX-97, at 1, 5, 8, 9; Tr. 218.

[112] RX-117, at 1. Locy testified that the date he wrote next to his signature when he approved the PPM, "8-13-08," was a "typographical error" and that he was certain he approved it on August 13, 2009. Tr. 222.

Locy testified that he was surprised when, following the approvals, he did not see any evidence of Midwest sales. He then asked Gorter about the status of the project. Gorter told him he did not know but that he would find out from Mielke and provide Locy with a status report. Gorter did not do so, and did not disclose that he had been selling investments in Midwest to numerous customers. Locy never saw any indications of sales of Midwest on Brookstone's books and records.[113]

6. Brookstone Discovers the Midwest Sales

Denise Zumbrun became Brookstone's chief of compliance in November 2008.[114] Shortly afterward, on a day when Locy and Turbeville were both out of the office, a securities regulator called to inquire if Brookstone was aware that Mielke's Evansville branch office was actively marketing investments in Midwest. Because she did not recognize the product, she called Locy to find out what it was.[115] The regulator sent her a list of Midwest investors, not all of whom were Brookstone customers.[116] Zumbrun testified that Locy and Turbeville were surprised and angry when she told them of the sales activity.[117] Locy, in particular, was "livid."[118] Mielke, Shultz, and Gorter denied they were selling interests in Midwest when Locy had recently asked them about it. According to Zumbrun, Locy was angry not only because Mielke, Shultz, and Gorter had sold away from Brookstone, but also because they had done so in private securities transactions that Brookstone would never have permitted, exposing Brookstone

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[113] Tr. 229-230.

[114] Tr. 1125.

[115] Zumbrun was unable to recall whether the regulator who called was from FINRA or the SEC. Tr. 1130-1131. She was responsible for notifying Brookstone representatives of approval of new products on the firm website but had not posted such an announcement relating to Midwest. Tr. 1149-1150.

[116] Tr. 1132, 1134.

[117] Tr. 1133.

[118] Tr. 1132.

to the risks inherent in the transactions, with no benefits accruing to the firm.[119] Shortly thereafter, Brookstone terminated Mielke, Shultz, and Gorter.[120]

7. Respondents Engaged Improperly in Private Securities Transactions

a. Brookstone Did Not Approve Midwest Sales Until June 2009

The Panel finds that Turbeville and Locy, on behalf of Brookstone, neither knew nor approved Midwest sales prior to Locy's final approval of the selling agreement in June 2009 and the PPM in August 2009.

The Panel finds unreasonable, and does not credit, Respondents' uncorroborated claims that they gave written and oral notice to Brookstone, and that Turbeville and Locy gave oral approval to Mielke, Shultz, and Gorter to sell interests in Midwest and to refrain from sending any of the associated paperwork to Brookstone. Despite Mielke's assertion that e-mails exist documenting that he disclosed the sales of Midwest, and Brookstone's approval, Respondents produced no such records.[121]

The Panel notes that Rule 3040 requires written, not merely oral, notice to a firm before a representative participates in a private securities transaction, and that the notice must provide the firm with details describing the associated person's role in the transaction as well as any selling compensation. Mielke, Shultz, and Gorter provided no such written notice over almost two years of active participation in sales of interests in Midwest, and Trier provided no such notice for his two sales.[122]

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[119] Tr. 1134.

[120] Tr. 1131, 1134-1135.

[121] Mielke claimed the lawyers he retained to work on the PPM possess the records but refused his request to provide them to him. Tr. 973.

[122] Although the Panel finds credible Trier's account that he relied on Gorter's representation that Brookstone had approved the selling agreement before he sold the product to two customers, the Panel concludes Trier was negligent and exercised poor judgment by relying on Gorter. By his own account, Trier failed to follow his routine procedures

Brookstone had nothing to gain by allowing the Evansville branch to sell Midwest without any supervision. Furthermore, the Panel finds Zumbrun's testimony strongly corroborates the testimony of Turbeville and Locy that they were ignorant of Mielke's and Shultz's extensive Midwest sales. Zumbrun, who no longer works for Brookstone, displayed no bias against Respondents.[123] Prior to the hearing, she did not confer with Locy or Turbeville about Midwest.[124] When she described their discovery in November 2009 that Respondents had been selling interests in Midwest, she provided a vivid and convincing description of their surprise and anger, corroborating their testimony that they were unaware Respondents had been marketing Midwest on their own.[125]

Mielke, Shultz, and Gorter insist that they provided Locy with a draft of the PPM that contained information putting Brookstone on notice that they were already actively selling Midwest, because it disclosed sales and clearly stated that Midwest had assets under management. However, the evidence does not support the assertion that Mielke, Shultz, Gorter or their attorney provided Locy with a draft PPM that contained such disclosures.[126]

By failing to provide Brookstone with the required written notice describing proposed Midwest sales, and by concealing their sales of the Midwest private offering from Brookstone,

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when he sent the completed paperwork to Gorter instead of Brookstone, and did not include a new account form with the documents.

[123] Tr. 1123.

[124] Tr. 1143-1145.

[125] Tr. 1132-1134.

[126] Tr. 1175-1176. Counsel for Mielke, Shultz, and Gorter argued strenuously that Brookstone knew of the Midwest sales because the firm possessed a PPM stating that Midwest had assets under management. Counsel based his argument on his having obtained a copy of a PPM with such a disclosure from FINRA that contained Bates stamped pages, and that the copy had to have come from Brookstone, since Harvest and Midwest did not use Bates stamps on their documents. Enforcement, however, established that a FINRA employee, not Brookstone, had placed the Bates stamps on the PPM critical to Counsel's argument. Counsel's premise was therefore mistaken. There is no documentary evidence in the record that put Brookstone on notice that Mielke, Shultz, and Gorter had engaged in sales of Midwest. Tr. 1185-1191; CX-151.

Respondents violated NASD Rule 3040, and thereby also NASD Rule 2110 or FINRA Rule 2010.[127]

D. Mielke and Shultz Engaged in Outside Business Activities

1. NASD Rule 3030

NASD Rule 3030 states that no associated person "shall be employed by, or accept compensation ... as a result of any business activity ... outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member ... in the form required by the member." [128] The rationale for the Rule is to allow firms to supervise properly all of the business activities of their representatives[129] to prevent customer harm and avoid a firm's unwitting entanglement in legal difficulties based on an associated person's unmonitored outside business activities.[130]

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[127] Violating Rule 3040, or any NASD rule, also violates Rule 2110. *Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006), *aff'd*, 209 F. App'x. 6 (2d Cir. 2006). Because Mielke's and Gorter's participation in the Midwest sales began in early 2008, and Shultz's began in September 2008, and the participation of all three continued until Brookstone terminated their employment in November 2009, Mielke, Shultz and Gorter also violated both NASD Rule 2110 and FINRA Rule 2010. Because Trier's two sales of Midwest violating NASD Rule 3040 occurred in March 2009, he violated FINRA Rule 2010. As noted above, FINRA Rule 2010 replaced NASD Rule 2110 on December 15, 2008.

[128] Rule 3030 provides that "[a]ctivities subject to the requirements of Rule 3040 shall be exempted from this requirement." As a result, Rule 3030 has generally been applied to activities unrelated to securities transactions. *Dist. Bus. Conduct Comm. v. Douglas*, Nos. C06920046 and C06930068, 1995 NASD Discip. LEXIS 217, at *18 (NBCC Sept. 19, 1995). In other cases, Enforcement has charged Rule 3030 and Rule 3040 violations in the alternative. *See, e.g., Dep't of Enforcement v. Nugent*, No. C01040010, 2006 NASD Discip. LEXIS 1 (NAC Feb. 23, 2006). In this case, in the first cause of action Enforcement charged Mielke and Shultz with "receiving compensation for owning and participating in the *management of Midwest*" in violation of Rule 3030, and in the second cause of action charged them with engaging in private securities by participating in the *Midwest sales* in violation of Rule 3040 (emphasis added). The Panel therefore treats the Rule 3030 and Rule 3040 charges against Mielke and Shultz separately for ascribing liability, although, as set forth below, because of the overlapping the nature of the factual foundations of the violations as charged, the Panel is not imposing separate sanctions for the Rule 3030 violations.

[129] *Dep't of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at *12-13 (NAC Dec. 7, 2005).

[130] *Abbondante*, 2006 SEC LEXIS 23, at *46.

2. Mielke and Shultz Concealed Their Activity on Brookstone's "Outside Business Interests Schedule"

When Brookstone required Mielke and Shultz to complete an annual outside business activities disclosure form, titled Outside Business Interests Schedule, they failed to disclose their employment with, or receipt of compensation from, Midwest.

On the form Mielke signed and dated April 8, 2008, he made no mention of Midwest.[131] The following year, on a form he signed and dated April 4, 2009, Mielke again failed to describe his activities with Midwest or to disclose the compensation he received from his outside business activities. Instead, the form contains a misleading addendum. It does not identify Midwest. It merely states, "In the planning stages of a) working with an investment group dealing in medium term notes 4 hrs/wk b) a marketing company ... 2 hrs/wk."[132]

Shultz first signed a Brookstone outside business activities disclosure form on April 30, 2008, prior to his involvement with Midwest. The following year, despite his daily involvement with Midwest, Shultz did not disclose Midwest as an outside business activity on the form he signed on April 17, 2009. Instead, he wrote an addendum on his outside business disclosure form essentially identical to the one appearing on Mielke's.[133]

At the hearing, Shultz explained the genesis of the addenda, which conflicted with Mielke's explanation. Shultz testified that he consulted with Mielke when he received the form, and wrote, for both of them, what Mielke told him to write. Shultz conceded that it "may be

[131] CX-34.

[132] CX-35, at 2.

[133] CX-46, at 3. The only differences between the two addenda are that Shultz wrote he spent six hours weekly engaged in work with the "investment group," and only one hour working with "a marketing company."

misleading" to have described Midwest as being "in the planning stages" in April 2009, since the Evansville branch office was then actively selling interests in Midwest to customers.[134]

In contrast to Shultz, at first Mielke claimed that he wrote what Midwest's attorney told him to write on the disclosure form.[135] He then equivocated, expressed uncertainty, and testified that he could not recall if he spoke to the lawyer about it. He denied knowing how Shultz came to use identical language in the addendum to his disclosure form.[136] Mielke argued that it did not matter what he wrote on the form because Brookstone had already approved the sales of Midwest.[137] The Panel does not find Mielke's inconsistent accounts to be credible.

3. Mielke and Shultz Violated Rule 3030

As noted above, Mielke had engaged in outside business activity with Harvest Holding since 2007, when he created Harvest Holding and its affiliates, acquired an ownership interest, and actively managed the companies.[138] All the while, Mielke was registered with Brookstone.[139] Mielke derived a substantial amount of his income from Midwest.[140]

From September 2008, Shultz was an owner of Harvest Holding and managing member of Midwest. He received a monthly salary of $1,000 for his financial management of Midwest.

Therefore Mielke and Shultz, while registered with Brookstone, engaged in outside business activities by participating in the ownership and management of Midwest, and received

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[134] Tr. 1100, 1105.

[135] Tr. 911-912.

[136] Tr. 913.

[137] Tr. 863-864, 914.

[138] Tr. 821-824, 832; CX-11.

[139] Tr. 903.

[140] In his on-the-record interview, Gorter estimated that Midwest provided "the bulk of [Mielke's] income. Tr. 640-644.

compensation for doing so.[141] They failed to make the prompt written disclosures of their participation in the management of Midwest required by FINRA rules and by Brookstone. The forms Mielke and Shultz submitted to Brookstone made no mention of Midwest or their compensation, and misleadingly characterized Mielke and Shultz's outside activity as being merely in a planning phase.

Mielke thus violated NASD Rules 3030 and 2110, and FINRA Rule 2010, and Shultz violated NASD Rule 3030 and FINRA Rule 2010.[142]

E. Shultz and Gorter Caused Inaccurate Entries in Brookstone's Books and Records

NASD Rule 3110 requires firms to create and maintain records consistent with applicable FINRA rules and SEC Rule 17a-3, which in turn requires broker-dealers to create and maintain accurate current records of their business activities.[143] Causing a member firm to enter false or inaccurate information in its books and records violates NASD Rules 3110, 2110, and SEC Rule 17a-3.[144]

On June 26, 2009, Brookstone approved the selling agreement to permit Brookstone representatives to recommend and sell the Midwest private placement to qualified investors.[145] Thereafter, as Locy testified, and as his handwritten notes of conversations with Mielke underscore, Brookstone expected all of the Midwest sales to be processed through Brookstone's home office, where the firm would record the sales on its books and records.[146]

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[141] Sample pages from Midwest's General Ledger and Midwest's check register show regular payments by Midwest to Mielke and Shultz. CX-29, at 6-9; CX-30, at 9-11.

[142] The Complaint does not charge Gorter with improper outside business activities.

[143] 17C.F.R § 240.17a-3(a)(6)(i), §240.17a-4(b).

[144] *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005).

[145] Tr. 204-206; CX-15.

[146] Tr. 207, 212; CX-97.

Following approval of the selling agreement, from August through October 2009, Gorter sold interests in the Midwest private placement to eight customers and Mielke sold to one customer.[147] These investors paid a total of approximately $1,479,182.[148] For these sales, Shultz was the manager reviewing and approving investors' paperwork and overseeing Midwest's financial operations.[149] As set forth above, Shultz and Gorter routed none of the sales or the paperwork relating to Midwest investments to Brookstone's main office.[150]

By failing to forward the information and paperwork to Brookstone headquarters, Shultz and Gorter caused the firm's records to be inaccurate. Brookstone's books and records could not, and did not, reflect fundamental information Brookstone should have maintained, such as the names of Midwest investors and the dates and amounts of the Midwest investments that Brookstone representatives sold and processed. For these reasons, the Hearing Panel finds that Shultz and Gorter violated NASD Rule 3110 and FINRA Rule 2010, as alleged in the Complaint's third cause of action.[151]

F. Mielke and Shultz Made Misstatements on Compliance Questionnaires

The Complaint's fourth cause of action alleges that when Mielke and Shultz filled out Brookstone's Outside Business Schedules, as Brookstone requested them to do in April 2008 and April 2009, they failed to disclose their outside business activities related to Midwest. The

[147] Despite Mielke's central role in Midwest, his participation in the sales, and in concealing them from Brookstone throughout the relevant period, Enforcement did not charge him with causing inaccurate entries in Brookstone's books and records.

[148] CX-20.

[149] Tr. 1003, 1050-1051.

[150] Tr. 902-903, 1069.

[151] In what appears to be a typographical error, the Complaint's third cause of action inaccurately cites FINRA Rule 3110 for the substantive rule violations committed by Shultz and Gorter. The language of the third cause of action, however, makes clear that it alleges a violation of NASD Rule 3110, which was in effect during the relevant period. The FINRA Rule that replaced NASD Rule 3110 took effect December 5, 2011.

Complaint alleges that they therefore violated NASD Rule 2110, which was in effect when they filled out the 2008 questionnaires, and FINRA Rule 2010, in effect in 2009.

Shultz explained, however, that in April 2008 he had not yet begun to participate in Midwest.[152] The Panel finds that Mielke first told Shultz of Midwest and invited him to become a managing member of the partnership in September 2008. Therefore, the Panel dismisses the allegation that Shultz made a misstatement to Brookstone on his April 2008 Outside Business Schedule by failing to describe activity with Midwest.

Mielke violated NASD Rule 2110 when he failed to disclose Midwest on his April 2008 questionnaire. At that time, Mielke was involved in Midwest through his ownership and management capacities and had already sold an interest in the private placement to one of his customers.[153] Both Mielke and Shultz violated FINRA Rule 2010 in April 2009 when they falsely indicated on their April 2009 Outside Business Schedules that they were engaged in the "planning stages" of an investment group, as alleged in the fourth cause of action.

G. Shultz Misused Customer Funds

FINRA Rule 2150 states: "No member or person associated with a member shall make improper use of a customer's securities or funds."

One of Shultz's responsibilities as financial manager at Midwest from September 2008 through September 2009 was to calculate the profits generated by the investments in the Arcanum or Vestium Equity Funds.[154] After making his calculations, Shultz distributed the profits, dividing them between the customers and Midwest.[155]

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[152] Tr. 1008.

[153] Tr. 824-827. Mielke sold a customer an interest in Midwest for $500,000 in January 2008. CX-20.

[154] Shultz was supposed to pay fifty percent to Midwest and fifty percent to the investors. Tr. 1069-1070.

[155] Tr. 1077-1078.

On September 18, 2009, Midwest's check register showed an account balance of $13,504.31.[156] On September 30, 2009, the account balance increased with the deposit of a customer investment of $174,000. On October 5, 2009, there was another customer investment of $200,000 deposited in the account, which brought the account balance to $375,957.31.[157]

Between September 23 and November 18, 2009, in a series of withdrawals recorded in the Midwest account check register as "Part of profits" or "Part of Harvest Profits," Shultz withdrew a total of $147,000.[158] Treating the funds as profits, Shultz transferred them to Harvest Midwest Group, the entity managing Midwest.[159] However, the investor statements of Vestium show no profits generated in August, September, and October 2009.[160] Therefore, Shultz's withdrawals in excess of $13,504.31 consisted partly of customer funds that should have been invested through Vestium, and not treated as "profits" by Harvest Midwest Group.

Shultz conceded that by making the withdrawals, he mistakenly paid more to Harvest Management Company as "profits" than he should have.[161] A newly hired accountant, Brad Pund, discovered the problem while reviewing Midwest's books in June 2010[162] and rectified the error with an infusion of cash from Harvest Holding Company into Midwest.[163] Shultz was unable to explain how he made the mistake, other than to attribute it to his "bad accounting."[164]

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[156] CX-30, at 57.

[157] CX-30, at 58.

[158] CX-30, at 57-60;Tr. 1078-1079.

[159] CX-30, at 58-60; Tr. 466-468.

[160] Tr. 468-469; CX-30, at 61.

[161] Tr. 1024-1026.

[162] According to Shultz and Pund, Midwest hired Pund to provide accounting services in September 2009. Tr. 1070, 1113. Shultz testified that it was in June 2010, when Pund had been "looking at the books and getting his arms around it" and was completing the previous year's tax work, that he discovered Shultz's misallocation. Tr. 1080.

[163] Tr. 1080-1081, 1112.

[164] Tr. 1081-1082.

Pund initially testified that he believed Shultz's distribution of "profits" was not a misuse of funds.[165] He based this conclusion on his misunderstanding of the source of the funds. He had at first thought Shultz took the "profits" from Midwest funds which were intended for redemptions or other purposes.[166] When he learned that most of the distributed funds consisted of customer investments, Pund reversed himself and agreed that Shultz's transfer constituted a misuse of investor money.[167]

The Panel concurs with Pund's revised conclusion. Because Shultz withdrew customer funds intended for investment, the Panel finds him liable for misuse of those funds when he improperly distributed them as "profits" between September 23 and November 18, 2009, in violation of FINRA Rules 2150 and 2010.

H. Mielke, Gorter, and Shultz Failed to Respond Timely to Rule 8210 Requests

As noted above, the sixth, seventh, and eighth causes of action charge Mielke, Shultz, and Gorter, respectively, with misconduct related to requests issued to them pursuant to Rule 8210.

1. Mielke Failed to Respond Completely and Timely to Requests for Information

On January 22, 2010, FINRA sent a request to Mielke pursuant to Rule 8210 for information and documents related to its investigation into the Midwest private placement offering. FINRA requested: (i) correspondence between Brookstone and Midwest's attorney, because Mielke had indicated the correspondence showed Brookstone's approval of Mielke's

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[165] Tr. 1114-1115.

[166] Tr. 1115-1116.

[167] Pund agreed that the misuse involved approximately $45,000 of customer funds. Tr. 1120. In his on-the-record interview, Shultz conceded that the distribution to Midwest should have been only $102,000, which represented the share of profits that ought to have gone to Midwest. Thus, the $147,000 payment included $45,000 that belonged to investors. CX-131, at 43-44 (transcript pages 166-171).

and Gorter's sales of the Midwest offering; (ii) Mielke's tax returns and personal bank statements; (iii) documentation of due diligence Mielke conducted for the offering; (iii) spreadsheets of funds, profit allocations and payments to Midwest investors; and (iv) a list of investors. After two extensions of the date for providing the information, on February 19, 2010, Mielke provided only his tax returns for 2007 and 2008.[168]

For almost two years, Mielke provided none of the additional information required in response to the Rule 8210 request. Then, on January 9, 2012, less than two months before the hearing, Mielke submitted an e-mail with some additional information. He sent another response on January 30, 2012, which was incomplete and misleading. It incorrectly stated that Gorter "did not sell Midwest membership interests."[169]

Despite these eleventh-hour responses, Mielke never satisfied the original Rule 8210 request. He did not provide the requested correspondence between his attorney and Brookstone, check registers or copies of interest payment checks issued to Midwest investors, or a list of customers to whom Gorter sold Midwest investments and his compensation for doing so.[170]

In his defense, Mielke claimed that he does not recall personally reviewing the Rule 8210 request. He testified that because he was seriously ill at the time, others in his office responded to the request. Mielke testified that his attorney never informed him that FINRA had concluded that he had not fully complied with the requests.[171]

Mielke failed over a protracted period of almost two years to provide information FINRA sought and needed in its investigation of the Midwest offering. Even when he belatedly

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[168] Tr. 444; CX-41; CX-124, at 1.

[169] Tr. 446, 449-450; CX-126.

[170] Tr. 448-449.

[171] Tr. 881-882.

supplemented his response just before the hearing, he still failed to provide a substantial part of the information requested and gave a grossly inaccurate response. On the basis of this record, the Panel finds that Mielke violated FINRA Rules 8210 and 2010 by failing to provide a timely and complete response to FINRA's Rule 8210 requests, as alleged in the Complaint's amended sixth cause of action.

2. Gorter Failed to Appear Timely to Provide Testimony

On November 13 and 20, 2009, FINRA issued Gorter requests pursuant to Rule 8210 to provide testimony and documents, respectively. After Gorter requested extensions, FINRA staff set the deadline for submitting the documents and information for December 11, 2009, and scheduled the interview for December 17, 2009, at 9:30 a.m.[172] Gorter did not provide the documents. At 11:30 a.m. on the interview date, more than two hours after he was scheduled to begin his testimony, Gorter left a voicemail message informing FINRA staff that he would not attend because his attorney had a conflict of interest.[173] The staff then called Gorter and informed him that he may have violated Rule 8210 by not providing the documents as requested on December 11, 2009, and by failing to appear for the interview.[174] On February 18, 2010, pursuant to Rule 9552, the staff sent Gorter a notice suspending him for failure to provide information requested pursuant to Rule 8210 and notifying him that if he failed to file a written request for the termination of the suspension within six months, he would be barred automatically on July 28, 2010.[175]

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[172] CX-76,77, at 1.

[173] Tr. 456; CX-78.

[174] Tr. 458.

[175] Tr. 459; CX-80.

On July 22, 2010, Gorter responded through counsel by letter requesting that the suspension be lifted.[176] He subsequently provided some documents and appeared for the on-the-record interview on August 25, 2010.[177]

At the hearing, Gorter testified that the delay in producing the documents was because he consulted with three attorneys before finally obtaining representation.[178] He also testified that when he received the Notice of Suspension, his lawyer advised him that FINRA could not take any action until July 2010.[179]

The Panel finds this to be a tacit admission by Gorter that he chose to ignore the staff's requests as long as possible, until the eve of the imposition of an automatic bar. The Panel concludes therefore that Gorter violated FINRA Rules 8210 and 2010 by failing to appear in a timely fashion for an on-the-record interview and failing to provide documents and information in a timely fashion.

3. Shultz Failed to Appear Timely to Provide Testimony

On December 3, 2009, FINRA sent, and Shultz received, a request to provide on-the-record testimony at the FINRA district office in Chicago on December 18, 2009, pursuant to Rule 8210.[180] FINRA rescheduled the interview for January 15, 2010, the day following Mielke's scheduled on-the-record interview.[181] The interview location was an address in Louisville, Kentucky, a site selected in order to accommodate Mielke because of his illness.[182]

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[176] CX-81.

[177] Tr. 460.

[178] Tr. 581-582.

[179] Tr. 595.

[180] CX-48.

[181] CX-49; Tr. 450.

[182] CX-49; Tr. 451.

Shultz drove Mielke to the interview hoping to be able to testify at the conclusion of Mielke's interview. When it ended, however, the lawyer representing them both announced that he would have a conflict of interest if he represented Shultz during his testimony. Shultz went on the record to state that he wished to retain another lawyer. Everyone agreed to reschedule the interview for March 5, 2010, in Chicago.[183]

On March 3, 2010, the new lawyer representing Shultz wrote to inform FINRA that Shultz would not attend the interview because his "familial situation makes traveling extremely difficult" and because the Harvest Companies expected to receive an audit that would "make the ... interview moot." The lawyer requested a postponement until after FINRA reviewed the audit.[184] FINRA staff responded by informing Shultz's lawyer that the interview would not be postponed and that Shultz's failure to appear could result in disciplinary action.[185] Shultz's lawyer replied that he had advised Shultz about the ramifications of failing to appear and that Shultz had instructed him to inform FINRA that he would not attend and to ask for the address "as to where to send his license."[186] Shultz did not appear for the interview.[187]

At the hearing, Shultz testified that he had decided to "surrender" his securities license and cease working in the securities industry instead of attending the March 2010 interview. [188] Later, he learned that the consequences of doing so would be "prejudicial" for him because he would be barred, and the bar would prevent him from continuing to be a managing member of

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[183] Tr. 452-453.

[184] CX-55. Shultz has an adult daughter with disabilities living with him; she requires full-time care. Shultz's daughter and wife both have serious health issues. Tr. 997-998.

[185] CX-56.

[186] CX-57.

[187] Tr. 453-454.

[188] Tr. 1032.

Midwest.[189] Consequently, Shultz changed his mind and agreed to appear. He did so in February 2012, the month prior to the hearing.[190]

By failing to attend the March 5, 2010, on-the-record interview, and declining to provide testimony for almost two years thereafter, Shultz violated FINRA Rules 8210 and 2010.

III. Sanctions

A. Private Securities Transactions: Mielke, Gorter, Shultz, and Trier

Enforcement recommends a bar as the appropriate sanction to impose upon Mielke, Shultz, and Gorter for what Enforcement characterizes as their egregious selling away activity. For Trier, noting his minimal involvement and his successful efforts to recover his clients' investments, Enforcement recommends imposing a fine of $5,000 and a suspension in all capacities for 30 days.[191]

Mielke, Shultz, and Gorter argue that barring them would be disproportionate and excessive. They reiterate that they provided Brookstone with "verbal and written notice of the Midwest offering" as early as January, 2008,[192] but that if the Panel should find them liable, it ought to impose "the lowest sanction."[193]

It is well established that engaging in private securities transactions constitutes serious misconduct; the prohibition against this activity is designed to protect investors from being subjected by brokers to unsupervised sales, and to protect member firms from exposure to liability and losses.[194]

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[189] Tr. 1035.

[190] Tr. 1032-1033, 1035. Because of the needs of his wife and daughter, at Shultz's request, the interview took place in Evansville, Indiana.

[191] Department of Enforcement's Pre-Hearing Br. 40-41.

[192] Respondents' Pre-Hearing Statement 13.

[193] *Id.*, at 16.

[194] *Siegel*, 2007 NASD Discip. LEXIS 20, at *41-42 (citing *Keyes*, 2005 NASD Discip. LEXIS 9, at *14-15).

FINRA's Sanction Guidelines prescribe a framework for determining sanctions for selling away. The Guidelines require adjudicators to start by considering a number of quantitative and qualitative factors to weigh in mitigation and aggravation. The quantitative factors are: (i) the dollar value and number of sales; (ii) the number of customers; and (iii) the length of time over which the misconduct occurred.[195]

Mielke and Gorter began selling away in January 2008 and continued for 18 months, until Brookstone approved the selling agreement on June 26, 2009. During this period, they sold the offering to 22 customers who invested approximately $3 million in Midwest. Shultz's participation began in September 2008, prior to Brookstone's approval of the selling agreement, and continued for approximately ten months, during which he processed and managed the investments of 19 customers who invested a total of over $3 million in Midwest. Trier's participation was much briefer; he sold the offering in March 2009 to two customers, whose combined investments totaled $109,000.

The Sanction Guidelines recommend adjudicators consider imposing a suspension of 12 months to a bar when sales exceed $1 million. For sales totaling $100,000 to $500,000, the Guidelines suggest a suspension of six to 12 months. For sales up to $100,000, the recommended range is suspension of 10 business days to three months.[196]

After considering the quantitative factors, the Guidelines focus adjudicators on qualitative factors enumerated by the Principal Considerations in Determining Sanctions. The relevant qualitative factors applicable in this case include: (i) whether the investment violated federal or state securities laws or regulations; (ii) whether the respondent had a proprietary or beneficial interest in the selling enterprise, and if so, whether the respondent disclosed the

[195] *FINRA Sanction Guidelines*, at 14 (2011).

[196] *Guidelines*, at 14.

interest to customers; (iii) whether the respondent attempted to create the impression that his employer member firm sanctioned the activity; (iv) whether the selling away resulted in injury to the investing public, and if so, the nature and extent of the injury; (v) whether the respondent sold away to customers of the firm; (vi) whether the respondent gave oral notice of the proposed transaction and, if he did, the firm's oral or written response; (vii) whether the respondent sold directly to customers; (viii) whether the respondent recruited other registered individuals to sell the product; and (ix) whether the respondent misled his employer about the selling away or concealed it.[197]

In applying these factors, the Panel finds:

(i) Enforcement did not establish that the Midwest offering violated any securities laws or regulations.[198]

(ii) Even though Mielke, Shultz, and Gorter held ownership interests in Harvest Holding, which controlled Midwest and to which Midwest's profits were paid, the record does not disclose if Mielke or Gorter failed to disclose their ownership interests to customers. As for Trier, he had no ownership interest in Midwest or Harvest.

(iii) There is no evidence that Respondents attempted to create the impression that Brookstone sanctioned the offering.[199]

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[197] *Guidelines*, at 14-15.

[198] Enforcement introduced pleadings from a federal court case that resulted in default judgments with findings that the defendants committed numerous securities laws and regulatory violations. The violations included misrepresentations about the profitability and performance of the Vestium and Arcanum Equity Funds. There is no evidence, however, of any findings of illegality pertaining specifically to the Midwest private placement. CX-2.

[199] Two Gorter customers and one Mielke customer testified; none indicated that Gorter or Mielke mentioned Brookstone when recommending Midwest. Tr. 335-336, 359, 420.

(iv) As for injury to the investing public, the record suggests Respondents' selling away may have caused some customer injury, but the extent is unclear. Gorter's customer DW invested $250,000, but after a time became concerned about the investment and asked for a refund of his principal. DW received a refund, but he did not receive all of the interest to which he felt entitled.[200] Gorter's customer JT invested approximately $48,000, asked for a refund, and testified that Gorter and Shultz told him he would incur a penalty unless he delayed his withdrawal. At the time of the hearing, JT had not received his funds.[201] Mielke's customer CC stated she requested and recovered $94,000 of her $100,000 investment and has been assured she will receive the remaining funds, although she had not at the time of the hearing.[202] Trier's two customers recovered the principal they invested and some interest.[203] Based on these facts, the Panel does not find that Respondents' selling away violations resulted in quantifiable customer harm.

(v) Trier's sales were to Brookstone customers. Some of the customers to whom Gorter and Mielke sold Midwest were Brookstone customers. Two of Gorter's customers testified that Gorter did not mention Brookstone to them.[204] The single Mielke customer to testify stated that she signed a Brookstone new account form in 2008 but that Mielke gave no indication that

[200] Tr. 300, 319-320.

[201] Tr. 370-372, 393.

[202] Tr. 422-423.

[203] Tr. 81.

[204] Tr. 335-336, 359.

Brookstone was involved in Midwest.[205] Zumbrun, the former Brookstone compliance officer, testified that when she reviewed the list of Midwest investors regulators provided to Brookstone in November 2009, "[n]ot all of them" were Brookstone customers.[206]

(vi) The Panel finds that, despite their claims to the contrary, Mielke, Shultz, and Gorter did not give oral notice of their Midwest sales to Brookstone, and did not receive oral approval to engage in the sales.

(vii) Mielke, Gorter, and Trier all sold Midwest directly to customers; Shultz did not sell directly, but participated as a manager of the Evansville branch office.

(viii) The evidence shows that Gorter recruited Trier to sell the Midwest product.

(ix) Mielke and Gorter were the two most responsible for deceiving Brookstone.

Taking the above factors into consideration, and applying the other considerations relevant to a determination of sanctions, the Panel's analysis of the sanctions appropriate for each Respondent's selling away follows:

1. Mielke

A person who has previously been sanctioned for violating Rule 3040 should be expected to have a "heightened awareness" of its requirements.[207] Mielke was the subject of a prior disciplinary proceeding for selling away.[208] Thus, he was particularly aware of the requirements of Rule 3040. Indeed, he claims that he had resolved not to violate them in his promotion of the

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[205] CX-101, at 36-37; Tr. 413, 420.

[206] Tr. 1134.

[207] *Dist. Bus. Conduct Comm. v. Gluckman*, No. C02960042, 1998 NASD Discip. LEXIS 8, at *17 (NBCC Jan. 23, 1998).

[208] Mielke agreed to a settlement of the disciplinary action in April 2008, accepting a six-month suspension from associating with FINRA member firms in any capacity, and a fine of $5,000, for violating NASD Rules 2110 and 3040 by selling away to 11 customers. CX-4, at 18-22.

Midwest offering.[209] Mielke testified emphatically that because of his previous suspension for selling away, he did not want to be exposed again to any "selling away issues."[210] He claimed that it was partly to avoid running afoul of Rule 3040 that he called for the December 2008 meeting in Orlando with Turbeville.[211] He coupled these assertions with repeated insistence that he had informed Brookstone of his activity with Midwest and that Brookstone had given "verbal" approval.[212]

The Panel recognizes that it could be mitigating if Mielke orally disclosed the details required by Rule 3040 to Brookstone and obtained oral approval before embarking on sales of the Midwest offering.[213] But the Panel, after carefully considering the substance of Mielke's testimony and observing his demeanor during more than three hours of testimony, does not credit Mielke's claims that he did so. Rather, the Panel concludes that Mielke intentionally concealed the selling away of the Midwest offering from Brookstone while he negotiated approval of the selling agreement and private placement memorandum with Locy and Turbeville, and continued thereafter to conceal the activity, by not forwarding the paperwork associated with the sales to Brookstone even after the selling agreement was approved.

Finally, the Panel is mindful of its obligation to weigh the factors identified in the Guidelines' Principal Considerations applicable to all violations. In doing so, the Panel additionally finds the following to be significantly aggravating factors: (i) Mielke's failure to accept responsibility for selling away; (ii) the number of Mielke's sales, which establish a pattern

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[209] Tr. 934.

[210] Tr. 935-936.

[211] Tr. 933-934.

[212] Tr. 936-937, 939.

[213] *Siegel*, 2007 NASD Discip. LEXIS 20, at *45.

of misconduct; (iii) the clear evidence that Mielke's misconduct was intentional; and (iv) Mielke's potential for monetary gain.[214]

For the reasons set forth above, the Panel finds Mielke's participation in the Midwest private securities transactions was egregious. The Panel concludes that, to deter Mielke and others from such misconduct, it is necessary to impose a bar.

2. Gorter

Similar considerations lead the Panel to conclude that Gorter's selling away violations were equally as egregious as Mielke's. Like Mielke, Gorter has a disciplinary history with significant sanctions imposed upon him for selling away. Thus, Gorter is no stranger to the requirements of NASD Rule 3040.[215]

As set forth above, Gorter misled Turbeville about his and Mielke's numerous sales of the Midwest offering. In addition, Locy provided unchallenged testimony describing how, when Brookstone terminated Gorter, Gorter falsely claimed that he had nothing to do with Midwest.[216] The Panel finds Locy's testimony credible and accepts it as additional evidence of Gorter's concealment and lack of credibility.

Furthermore, it is an aggravating factor that Gorter recruited Trier to recommend the Midwest product to his customers.[217] Considering all of these factors, along with the length of time Gorter participated in selling away, the dollar value of his sales, and his significant remuneration for successfully soliciting 23 of his customers to invest in Midwest, the Panel

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[214] Principal Considerations in Determining Sanctions Nos. 2, 8, 13, and 17, *Guidelines* at 1-2.

[215] To resolve a complaint filed against him, on November 5, 2005, Gorter submitted an Offer of Settlement agreeing to a two-month suspension in all capacities, and a fine of $2,000, for participating in private securities transactions involving sales of nearly $1 million. CX-59.

[216] Tr. 232.

[217] Principal Consideration No. 12, *Guidelines* at 15.

concludes that a bar is necessary to deter Gorter, and others similarly situated, from such misconduct.

3. Shultz

The Panel finds that although fewer aggravating factors identified in the Principal Considerations apply to Shultz, his violations of Rule 3040 were nonetheless serious. Shultz participated in selling away from Brookstone, from September 2008 through June 26, 2009, prior to the firm's approval of the selling agreement. During that time, 19 customers invested over $3 million. Shultz, like Mielke and Gorter, holds a proprietary interest in Midwest through his share in Harvest Holding. Unlike Mielke and Gorter, there is no evidence that he sold the product directly to customers. Nonetheless, he was an integral part of the enterprise to sell away from Brookstone. By keeping all of the Midwest sales records at the Evansville branch office, and not sending them to the Brookstone home office, Shultz played an essential part in concealing the activity from the firm.

Despite his relative lack of experience in the securities industry, Shultz admitted knowing that he was required to give written notice before engaging in private securities transactions.[218] He was personally aware that Brookstone had not approved the selling agreement and private placement memorandum because he sent copies of those documents to Gorter and asked him to obtain Brookstone's approval as soon as possible.[219] He understood that it was misleading to write, at Mielke's direction, that the private placement was "in the planning stages" on his and Mielke's outside business activities questionnaire.

Under all of the circumstances of Shultz's participation in the selling away scheme, the Panel finds that a bar is necessary to deter Shultz, and others, from similar misconduct.

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[218] Tr. 1063-1064.

[219] CX-98; Tr. 1066.

4. Trier

Enforcement recommends a fine of $5,000 and suspension in all capacities for 30 days for Trier. Trier sold to only two customers, and their total investments were small compared to the amounts invested by other customers. Trier had no ownership interest in Midwest or Harvest Holding, and there is no evidence that he engaged in intentionally deceptive conduct to conceal his participation from Brookstone. Although not a defense, the Panel finds believable Trier's claim that because he knew Gorter was a Brookstone agent, he placed undue faith in Gorter's representation in March 2009 that Brookstone had approved the Midwest selling agreement. In the Panel's view, Trier exercised poor judgment by relying entirely on Gorter's representations. Trier was also negligent when he permitted Gorter to persuade him that Midwest was an investment fitting his customer's needs, and ignored his usual procedure by sending the paperwork, without a new account form, to Gorter instead of to Brookstone.

The Panel agrees with Enforcement that once Trier realized that there were problems with Gorter's handling of the investments, Trier vigorously and successfully endeavored to recover their money. The Panel credits Trier's testimony that he was motivated to serve his clients' interests, and notes that Trier did not pursue obtaining his commissions for the transactions.

For all of these reasons, the Panel concludes that, for the purposes of deterring Trier and others similarly situated from future similar misconduct, it is appropriate to impose a fine of $2,500 and a suspension for 30 business days upon Trier for his two instances of selling away.

B. Outside Business Activities: Mielke and Shultz

For engaging in outside business activities, in violation of NASD Rule 3030, the Sanction Guidelines recommend a fine of $2,500 to $50,000 and suspension for up to 30 days. When aggravating factors are present, the Guidelines recommend considering suspension for up to one

year. In egregious cases, such as those involving a substantial volume of business, the Guidelines suggest considering imposing a longer suspension or a bar in all capacities.[220]

Enforcement argues that a bar is appropriate for both Mielke and Shultz because of the presence of three aggravating factors listed in the Principal Considerations: (i) the misconduct involved customers of Brookstone; (ii) Mielke and Shultz engaged in the activity for such a prolonged period, with a large number of customers and volume of sales; and (iii) they misled Brookstone about what they were doing.[221]

As noted above, at least some of the Midwest investors were Brookstone customers. The Panel agrees with Enforcement that the other two factors are also aggravating, although less so for Shultz than for Mielke, because Shultz engaged in the activity for significantly less time than Mielke, and Mielke took the lead in concealing the outside activity from Brookstone.

For their part, Mielke and Shultz contend there are a number of mitigating factors. They assert: (i) Brookstone knew of the activity; (ii) they reasonably relied on competent legal and accounting advice; (iii) Brookstone punished them by terminating them for the activity; (iv) they did not create the impression that Brookstone approved the offering; (v) they did not mislead customers about their role in Midwest; and, finally, (vi) "their relevant disciplinary history."[222]

First, as previously noted, the record demonstrates that Brookstone was unaware of Mielke's and Shultz's outside activity. Second, the Panel finds that Mielke and Shultz failed to establish that they relied in good faith on legal or accounting advice. The Panel finds unpersuasive Mielke's and Shultz's uncorroborated claims that their Midwest lawyer said

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[220] *Guidelines*, at 13.

[221] Enforcement's Pre-Hearing Br. 38.

[222] Respondents' Pre-Hearing Statement 13.

Brookstone was aware of the Midwest sales activity.[223] Furthermore, Mielke and Shultz did not provide evidence that they sought and received legal or accounting advice that their conduct was permissible, or that such advice, if they received it, would have been reasonable.[224]

Third, as for Brookstone terminating Mielke and Shultz, generally adjudicators should give termination of a representative no weight because FINRA's imposition of sanctions is independent of a firm's decision to terminate its employees.[225]

In considering the arguments in (iv) and (v) above, the Panel agrees with Mielke and Shultz that there is no evidence they promoted Midwest under the aegis of Brookstone, and no evidence they misled investors about their ownership roles in Midwest. However, under the circumstances of this case, the Panel finds that these constitute absence of aggravation, rather than affirmatively mitigating factors.

Finally, the Panel rejects the argument that Shultz's and Mielke's disciplinary histories are mitigating. As to Shultz, it is well established that the absence of a disciplinary history is not a mitigating factor.[226] For his part, Mielke, remarkably, claims his "previous alleged violation was without merit and was a compromise to avoid litigation expenses."[227] The Panel disagrees and finds Mielke's disciplinary history to be aggravating because selling away is so similar to engaging in outside business violations. The Guidelines specifically provide that adjudicators

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[223] *See Dep't of Enforcement v. VMR Capital Markets US,* No. C02020055, 2004 NASD Discip LEXIS 18, at *38-39 (NAC Dec. 2, 2004).

[224] *See Dep't of Enforcement v. Padilla*, No. 2006005786501, 2010 FINRA Discip. LEXIS 42, at *52-53 (NAC Oct. 18, 2010).

[225] Neither are adjudicators to penalize more harshly respondents whose firms retain them. *Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS. 18, at *11 (NAC Dec. 18, 2000).

[226] *Guidelines*, at 6, n.1, *citing Rooms v. SEC*, 444 F.3d 1208, 1214-1215 (10th Cir. 2006) (absence of a disciplinary history is not mitigating, but existence of a disciplinary history is an aggravating factor).

[227] Respondents' Pre-Hearing Statement 13, n.12.

should consider respondent's disciplinary history as aggravating when past misconduct is similar to the conduct alleged in the current case.[228]

In this case, however, the outside business in which Mielke and Shultz were involved was Midwest, and Midwest's primary function was to sell the Midwest offering. Mielke's and Shultz's outside business activity extended over the same period as their participation in selling away, and their management of Midwest involved much of the same activity that constituted their violations of Rule 3040. When violations of Rules 3030 and 3040 arise essentially from a single course of misconduct, it is appropriate to aggregate the sanctions, because the violations of each rule are so closely related. This is consistent with the remedial goal of the FINRA sanctions.[229] Consequently, the Panel finds it unnecessary to impose additional sanctions upon Mielke and Shultz for their violations of NASD Rules 3030 and 2110, and FINRA Rule 2010.

C. Inaccurate Entries in Firm Records: Gorter and Shultz

The Guidelines recommend considering a fine of $1,000 to $10,000, and suspension for up to 30 business days, or, in egregious cases, a fine of $10,000 to $100,000 and suspension for up to two years or a bar, for violating NASD Rule 3110 by causing a member firm to enter false information in its books or records.[230] Enforcement recommends bars for Shultz and Gorter because they intentionally kept from Brookstone all information related to the sales of Midwest membership interests between July and October 2009, even though Brookstone had approved the selling agreement. Consequently, Brookstone was totally unaware that its representatives were engaging in approved sales involving risky securities. This ignorance deprived Brookstone of the basic information the firm needed to record in its books and records, including the identity of

[228] General Principle No. 2, *Guidelines* at 2.

[229] *Dep't of Enforcement v. Vietien*, No. 2006007544401, 2010 FINRA Discip. LEXIS 45, at *31-33 (NAC Dec. 28, 2010).

[230] *Guidelines*, at 29.

investors, the size and volume of the investments, and related information. As a result, Brookstone was incapable of supervising the sales and making suitability determinations.[231]

Counsel for Gorter and Shultz argues that they relied on advice of counsel "for proper procedure on books and record[s]," and that the absence of any explicit provision in the selling agreement requiring them to route Midwest transaction records through Brookstone absolves them of failing to do so.[232]

The Panel finds here, as before, that the record does not support the claim that Gorter and Shultz in good faith sought and followed the advice of counsel in deciding to refrain from forwarding documents relating to Midwest securities transactions to Brookstone. The Panel also finds that Gorter knowingly and intentionally kept records of his and Trier's sales from reaching Brookstone. The Panel concludes that although Shultz may have relied on Mielke telling him that he did not need to route the Midwest sales paperwork to Brookstone, he knew or should have known better.

Based on Gorter's extensive experience in the securities industry and his disciplinary history, the Panel finds his violations of NASD Rule 3110 and FINRA Rule 2010 to be egregious, and concludes that a bar is necessary to deter him and others like him from such intentionally deceptive misconduct.

For Shultz, in light of the bar imposed for the Rule 3040 violation, there is no need to impose additional sanctions for his violations of NASD Rule 3110 and FINRA Rule 2010. Were it necessary to impose a sanction, however, for the reasons set forth above, the Panel concludes that a one-year suspension from associating in any capacity with any FINRA member firm, and a

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[231] Enforcement's Pre-Hearing Br. 41.

[232] Tr. 1253.

fine of $10,000, would be sufficient to deter him, and others similarly situated, from this particular misconduct.

D. Misstatements on Firm Compliance Questionnaires: Mielke and Shultz

Enforcement argues that Mielke and Shultz should be barred for making misleading statements on Brookstone's Outside Business Interests Schedules because they failed to disclose and misrepresented their involvement with Midwest.[233] As explained above, the Panel finds that Mielke failed to disclose his involvement in the form he signed in 2008, and both Mielke and Shultz misled Brookstone when Shultz, at Mielke's direction, wrote identical addenda to their forms in 2009, describing Midwest as being "in the planning stages."

No provision of the Guidelines specifically addresses this particular type of misconduct. Enforcement argues that the most closely comparable Guidelines are those for forgery or falsification of records, which recommend a fine of $5,000 to $100,000, and consideration of suspension of up to two years when mitigating factors are present, and consideration of a bar in egregious cases.[234]

Mielke and Shultz simply assert the forms contained no misstatements.[235]

As set forth above, the Panel finds the forms to be misleading. In Mielke's case, the violations occurred in two successive years, and the Panel finds he acted intentionally to deceive Brookstone. For these reasons, the Panel finds Mielke's violations of NASD Rule 2110 in 2008, and FINRA Rule 2010 in 2009, to be egregious, and that a bar is necessary to deter him and others from similar misconduct.

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[233] Enforcement's Pre-Hearing Br. 41-42.

[234] *Guidelines*, at 37.

[235] Tr. 1254-1255.

As for Shultz, because of the bar the Panel imposed, no further sanction is required for his violations of FINRA Rule 2010. If it were necessary to impose additional sanctions, the Panel would decline to impose a bar because it finds that Shultz's violations, although serious, were not egregious. As noted above, he wrote the misleading addenda relying on the instructions Mielke, his employer, gave him. Shultz was a relative newcomer to working in the securities industry, in contrast to Mielke who had many years of securities industry experience to inform him of the importance of accurately responding to compliance questionnaires. For these reasons, if it were to impose sanctions upon Shultz for these Rule 2010 violations, the Panel would deem a suspension in all capacities for one year and a $10,000 fine appropriate to address Shultz's misrepresentations on his outside business activity form.

E. Misuse of Customer Funds: Shultz

For improper use of funds, the Guidelines recommend a fine of $2,500 to $50,000, consideration of a bar, and, when there is mitigation, consideration of a suspension of six months to two years.[236]

Enforcement recommends a bar, noting that Shultz failed to invest customer funds as the customers intended, and distributed them as profits when Midwest was not entitled to them.[237] Counsel for Shultz argues that Shultz relied on the advice of an accountant, that the misuse stemmed from a miscalculation, and that "[y]ou shouldn't bar someone because there is a miscalculation."[238]

The Panel finds credible Shultz's testimony that he misused the funds by mistake. The Panel does not conclude that Shultz intentionally and knowingly exercised authority over

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[236] *Guidelines*, at 36.

[237] Enforcement's Pre-Hearing Br. 42.

[238] Tr. 1256.

customer funds intending to convert them, although he clearly should have been more attentive to the source of the funds he transferred as "profits." Fortunately, some months later, the accountant discovered the misallocation of funds and corrected it.

Because of the bar, it is unnecessary to impose additional sanctions upon Shultz for his misuse of customer funds. If the Panel found it necessary to sanction Shultz for this violation, it would impose a suspension in all capacities for one year and a $10,000 fine, as appropriately severe sanctions for Shultz's misuse of customer funds, and sufficient to deter Shultz, and others, from similar violations of FINRA Rules 2150 and 2010.

F. Failure to Make Timely Responses to Rule 8210 Requests: Mielke, Gorter, and Shultz

Noting that the Guidelines state that a bar is the standard sanction for failing to respond to Rule 8210 requests,[239] Enforcement contends that the failures of Mielke, Gorter, and Shultz to respond in a timely fashion to the Rule 8210 requests in this case are sufficiently egregious to call for the imposition of a bar upon each.[240] Mielke, Gorter, and Shultz argue that their Rule 8210 violations are "far from egregious," and that there is no evidence of intentional misconduct or of an attempt to delay FINRA's investigation.[241]

Adjudicators conducting a sanctions analysis for Rule 8210 violations must begin by acknowledging the importance of the Rule to FINRA's ability to perform its regulatory responsibilities. It is axiomatic that Rule 8210 is "at the heart of the self-regulatory system for the securities industry."[242] Delay and neglect in responding to Rule 8210 requests for

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[239] *Guidelines*, at 33.

[240] Enforcement's Pre-Hearing Br. 42-43.

[241] Respondents' Pre-Hearing Statement 15-16.

[242] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008).

documents, information, and testimony "undermine the ability of the NASD to conduct investigations and thereby protect the public interest."[243]

1. Mielke

Despite suffering from serious health problems, Mielke provided on-the-record testimony, as Enforcement concedes. As described above, however, his responses to FINRA's Rule 8210 request for documents and information were seriously deficient. In serial piecemeal submissions, Mielke provided incomplete responses. Despite repeated requests, however, he failed to provide information and documents important to the investigation, some of which the staff sought because Mielke indicated they would substantiate his defense that he had informed Brookstone of his sales of the Midwest offering.

As explained above, Mielke initially provided only his tax returns in response to requests that also sought: correspondence concerning Midwest between Brookstone and Midwest's attorney; documentation of his due diligence efforts relating to Midwest; and information showing funds invested, profit allocations, and payments to Midwest investors. Then, for two years, Mielke provided nothing more. Finally, shortly before the hearing, he submitted an e-mail with some additional requested information, but failed to provide numerous and significant records, such as check registers, copies of interest payment checks issued to investors, and information concerning his and Gorter's compensation for selling interests in Midwest. Mielke's asserted reliance on others to respond to the requests, and his claim that his attorney did not inform him that FINRA deemed him not to have complied fully, are not mitigating factors.

[243] *Id.* at *13-14 (quoting *Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996)).

The Guidelines explain that a partial response should result in a bar, unless the respondent can demonstrate that "the information provided substantially complied with all aspects of the request."[244] Mielke cannot do so.

The Principal Considerations in Determining Sanctions applicable to partial and untimely responses to Rule 8210 requests require assessing the importance of the information sought, the number of requests made and the length of time taken before submitting a response, and the validity of the reasons a respondent proffers to explain the failure or delay.[245] The Panel concludes these are aggravating factors in Mielke's case. FINRA requested information central to its investigation. Despite a delay of two years, important information remains undisclosed. Although the Panel recognizes that Mielke had a serious health challenge for a time, it finds his proffered excuses are inadequate.

For these reasons, the Panel concurs with Enforcement's recommendation that a bar is the necessary sanction, proportionate to the egregiousness of Mielke's misconduct, and necessary to deter Mielke, and others, from violating Rules 8210 and 2010 by making such inadequate partial responses to requests for information over so protracted a period.

2. Gorter

As the record shows, Gorter delayed his response to FINRA's request for information for many months. He failed to appear at a scheduled on-the-record interview, and delayed notifying FINRA of his intentional absence two hours after the scheduled commencement of the interview. He finally appeared to provide testimony approximately nine months thereafter, just in time to avoid being mandatorily barred pursuant to Rule 9552. Gorter's conduct supports the conclusion that he intentionally sought to delay FINRA's repeated attempts to obtain from him information

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[244] *Guidelines*, at 33.

[245] *Id.*

essential to the investigation. Gorter's suggestion that his delayed responses should be excused because he consulted with a series of lawyers before obtaining representation is not persuasive.

For these reasons, as in Mielke's case, the Panel finds Gorter's Rule 8210 violations to be egregious, and require a bar to deter him and others from such inappropriate disregard of the paramount importance of providing information in response to Rule 8210 requests.

3. Shultz

Enforcement recommends a bar for Shultz for his untimely response to provide testimony. Shultz argues that the delay was justified and resulted from serious health care considerations for his wife and daughter.[246] Based on the facts established at the hearing, as described above, the Panel finds that Shultz made a deliberate decision to "surrender" his FINRA registrations and ignore the request to testify, and then later changed his mind when he realized that doing so would mean he would have to relinquish his management position with Midwest. As a consequence, Shultz's on-the-record interview occurred shortly before the hearing, well after Enforcement filed the Complaint.

The Panel recognizes that Shultz's family situation posed challenges to his ability to travel to testify, and that when he drove Mielke to his on-the-record interview, Shultz intended to provide testimony after Mielke's interview ended. Ultimately, as noted, Enforcement accommodated Shultz's needs by traveling to a location near him to obtain his testimony.

Considering all of these relevant factors, the Panel finds Shultz's failure to comply in a timely fashion with the Rule 8210 request to be serious. Furthermore, the Panel notes that the Guidelines state that when a respondent does not respond to a Rule 8210 request until after FINRA files a complaint, adjudicators should presume the failure to be a complete failure to

[246] Respondents' Pre-Hearing Statement 16.

respond, for which a bar is standard.[247] For these reasons, the Panel concludes that for his violations of FINRA Rules 8210 and 2010, a bar is required.

IV. Conclusion

Respondent Blair C. Mielke is barred from associating with any FINRA member firm in any capacity for: (i) engaging in private securities transactions, in violation of NASD Rules 3040 and 2110, and FINRA Rule 2010; (ii) making misstatements on compliance questionnaires of a FINRA member firm, in violation of NASD Rule 2110 and FINRA Rule 2010; and (iii) failing to respond timely to a request for information issued pursuant to FINRA Rule 8210, in violation of FINRA Rules 8210 and 2010.

Respondent Thomas J. Gorter is barred from associating with any FINRA member firm in any capacity for: (i) engaging in private securities transactions, in violation of NASD Rules 2110 and 3040, and FINRA Rule 2010; (ii) causing inaccurate entries to be made in the books and records of a FINRA member firm, in violation of NASD Rule3110 and FINRA Rule 2010; and (iii) failing to respond to requests for information and testimony issued pursuant to Rule 8210, in violation of FINRA Rules 8210 and 2010.

Respondent Frederick W. Shultz is barred from associating with any FINRA member firm in any capacity for (i) engaging in private securities transactions, in violation of NASD Rules 3040, 2110, and FINRA Rule 2010; and (ii) for failing to provide timely testimony as requested pursuant to Rule 8210, in violation of FINRA Rules 8210 and 2110.

If this decision becomes FINRA's final disciplinary action, the bars imposed upon Mielke, Gorter, and Shultz shall be effective immediately.

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[247] *Guidelines*, at 33& n.1.

Respondent Michael L. Trier is suspended for 30 business days and is fined $2,500 for engaging in private securities transactions, in violation of NASD Rule 3040 and FINRA Rule 2010.

If this decision becomes FINRA's final disciplinary action, Trier's suspension shall become effective with the opening of business on Monday, November 19, 2012, and shall end at the close of business on Thursday, January 3, 2013. The fine shall be due and payable upon Trier's return to the securities industry.[248]

HEARING PANEL.

Matthew Campbell
Hearing Officer

Copies to:

Blair C. Mielke (*via overnight courier and first-class mail*)
Frederick W. Shultz (*via overnight courier and first-class mail*)
Thomas J. Gorter (*via overnight courier and first-class mail*)
Michael L. Trier (*via overnight courier and first-class mail*)
Dale A. Glanzman, Esq. (*via e-mail and first-class mail*)
Mark P. Dauer, Esq. (*via e-mail*)
David R. Sonnenberg, Esq. (*via e-mail*)

[248] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.