BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. David Harari San Antonio, TX, and Sian Harari San Antonio, TX, Respondents.	DECISION Complaint No. 2011025899601 Dated: March 9, 2015

Registered representative provided false information and documentation to FINRA and a FINRA member firm, obtained customer funds by false pretenses and converted those funds, and failed to disclose tax liens on his Form U4. Associated person participated in the creation of false documents supplied to FINRA and a FINRA member firm.

Held, findings affirmed and sanctions modified.

Appearances

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

For the Respondents: Eric A. Pullen, Esq.

Decision

David Harari ("Harari") and Sian Harari ("Sian") (together, the "Hararis") appeal a March 28, 2014 Hearing Panel Decision. The Hearing Panel barred Harari in all capacities for providing false information and documentation to FINRA and a FINRA member firm in

violation of FINRA Rules 8210 and 2010.[1] The Hearing Panel imposed a second bar on Harari for obtaining customer funds by false pretenses and converting those funds in violation of NASD Rule 2110 and FINRA Rule 2010. Finally, the Hearing Panel found that Harari failed to disclose tax liens on his Uniform Application for Securities Industry Registration or Transfer ("Form U4") in violation of NASD IM-1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010, but in light of the bars, did not impose any additional sanctions. The Hearing Panel found that Sian participated in the creation of false documentation that was supplied to FINRA and a FINRA member firm in violation of Rule 2010 and imposed an 18-month suspension in all capacities.[2]

After an independent review of the record, we affirm the Hearing Panel's findings and modify the sanctions to include an order of disgorgement against Harari and to bar Sian in all capacities.

I. Background

Harari entered the securities industry in December 1999 when he joined Ameriprise Financial Services, Inc. ("Ameriprise"), and first registered with FINRA as a general securities representative in February 2000. In July 2002, Harari became a registered investment advisor. Much of Harari's business at Ameriprise involved providing clients with financial planning services for which he charged a flat fee. He also received commissions from the sale of investment products (mostly mutual funds or variable universal life insurance products) to advisory clients.

In July 2002, Harari's wife, Sian, began working with him as an unregistered assistant. Sian's duties included preparing summaries of client meetings, gathering client financial information for entry into Ameriprise templates, typing financial plans, and performing various marketing activities. Sian was actively involved in Harari's business.

In December 2010, after Ameriprise had launched an investigation into potentially unsuitable investments in Harari's customers' accounts, the Hararis left Ameriprise and joined Raymond James & Associates, Inc. ("Raymond James"). They remained at Raymond James until January 2012, when they were permitted to resign. They subsequently associated with

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[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[2] Sian is subject to FINRA's jurisdiction under Article IV, Section 1 of FINRA's By-Laws and FINRA Rule 0140(a). Under Article IV, Section 1 of FINRA's By-Laws, every firm that applies for membership in FINRA must agree to comply with the federal securities laws, and FINRA's By-Laws, rules, orders, directions, decisions and sanctions. FINRA Rule 0140(a) specifies that all FINRA rules "shall apply to all members and persons associated" and that associated persons "shall have the same duties and obligations as a member under the Rules." Thus, as an associated person, Sian is subject to FINRA's jurisdiction and must abide by its rules.

another FINRA member firm for almost a year. Harari and Sian are not currently associated with a FINRA member firm.

II. Procedural History

On April 4, 2013, FINRA's Department of Enforcement ("Enforcement") filed a five-cause complaint against the Hararis. The complaint alleged that Harari submitted false information and documentation to FINRA and a FINRA member firm in violation of FINRA Rules 8210 and 2010, and that Sian assisted in the preparation of this false documentation in violation of FINRA Rule 2010. The complaint also alleged that Harari obtained funds from a customer by false pretenses and converted those funds in violation of NASD Rule 2110 and FINRA Rule 2010. Finally, the complaint alleged that Harari failed to disclose certain tax liens on his Form U4, in violation of NASD IM-1000-1, NASD Rule 2110 and FINRA Rules 1122 and 2010.[3]

In their answer, the Hararis denied the alleged violations of FINRA and NASD rules other than the failure to disclose the tax liens. Harari admitted the existence of the tax liens and that he did not report them on his Form U4, but denied any liability for this failure on the grounds that he did not receive notice of the liens and that he relied on the advice of a tax professional. After a two-day hearing, the Hearing Panel issued a decision finding that the Hararis had violated FINRA and NASD rules. This appeal followed.

III. Facts

A. Harari Becomes JG's Financial Advisor and JG Gives Sian $20,000

In mid-2004, JG contacted Ameriprise seeking a Spanish speaking financial advisor. JG was a recently divorced mother of three, who wanted to invest funds she had been awarded in her divorce. JG eventually became a customer of Harari. Over the next several years, Harari prepared at least two financial plans for JG and sold her various investments, including variable life insurance policies (for her and her children), variable annuities, and mutual funds. JG also became close friends with the Hararis, particularly with Sian. The Hararis and JG socialized frequently. They celebrated holidays and traveled together.

In January 2008, Harari was hospitalized with a serious illness. During this time, Sian expressed her concerns about the Hararis' deteriorating financial condition to JG, and JG gave Sian a $20,000 check dated February 28, 2008. JG testified that the $20,000 was a loan to the Hararis. The Hararis alternately have characterized the $20,000 payment as a gift and as a loan that had been forgiven or "considered repaid."

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[3] The complaint also alleged violations of NASD Rule 2330, FINRA Rule 2150, and Article V, Section 2 of FINRA's By-Laws, but the Hearing Panel made no findings with respect to these allegations.

Harari recovered and returned to work in April 2008. JG did not mention the $20,000 to the Hararis for nearly two years in the belief that the Hararis were experiencing continuing financial difficulties. In March 2010, the Hararis paid for their daughter's wedding. Soon after, JG raised the issue of the return of the $20,000 with the Hararis. JG testified that when she met with Harari to discuss repayment of the loan, he responded that he had repaid her by making money in her Ameriprise account. JG testified that when she told Sian about this conversation, Sian assured her that it had been a misunderstanding and that she would be repaid the $20,000 over time.

In July 2011, JG once again raised with the Hararis repayment of the $20,000 that she loaned to them. JG told Sian that her sister had been diagnosed with cancer and that she needed money to help with medical expenses. On July 8, 2011, the Hararis gave JG a check for $1,000.

B. JG Makes Two Payments of $7,500 to Harari

In addition to commissions on the products sold to JG, JG paid Harari a $7,500 annual financial planning fee for his services as a financial advisor. Each financial planning year began on May 30 and ended on May 29. JG paid financial planning fees directly to Ameriprise by credit card or account transfer for each financial planning year from May 30, 2007, through May 29, 2011.[4] JG also made certain payments to Harari directly. On April 28, 2008, JG gave Harari a check payable to cash for $7,500. In June of 2010, JG gave Harari a check and cash totaling $7,500. Specifically, on June 15, 2010, JG gave Harari a check payable to him for $3,500. On June 21, 2010, she cashed a check payable to herself for $3,000 and gave the cash to Harari. Finally, on June 30, 2010, JG cashed one final check payable to herself for $1,000 and gave the funds to Harari.

At the hearing, JG testified that she made these payments to Harari because he needed funds prior to the time her financial planning fees would otherwise be due and that he promised that he would remit the fee to Ameriprise when it became due. Harari, however, never forwarded the payments to Ameriprise, and JG testified that she did not realize until later that she had paid the fees for 2008 and 2010 to Ameriprise a second time by transfer from her account. During the investigation and in his hearing testimony, Harari denied that the payments to him were for financial planning fees, and testified that they were for repayment of loans he had made to JG or checks he had cashed for her so that she would have cash for trips to Mexico.

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[4] JG made the following payments to Ameriprise for financial planning services: on June 4, 2007, a credit card payment of $7,500 for the year from May 30, 2007, through May 29, 2008; on May 14, 2008, a payment by account transfer of $7,500 for the year from May 30, 2008, through May 29, 2009; on February 24, 2009, a credit card payment of $7,500 for the year from May 30, 2009, through May 29, 2010; and on November 27, 2009, a payment by account transfer of $7,500 for the year from May 30, 2010, through May 29, 2011.

C. Harari Fails to Disclose Tax Liens

When Harari joined Raymond James in January 2011, a routine background check revealed several tax liens totaling more than $200,000. The tax liens were filed on: November 30, 2007, for tax years 2002 through 2005; October 20, 2009, for tax year 2006; June 9, 2009, for tax year 2007; and January 21, 2010, for tax year 2008. Records obtained from the Internal Revenue Service ("IRS") reflect that separate notices of the liens were sent to both Harari and Sian at their home address by certified mail on November 27, 2007, May 19, 2009, and October 6, 2009. In September 2009, the Hararis engaged a tax firm to assist them with their unpaid taxes.

The draft Form U4 that Harari initially submitted to Raymond James did not disclose the liens. After Raymond James discovered the liens through the background check, Harari was instructed to disclose them and did so in a December 22, 2010 Form U4 filing. Prior to joining Raymond James, Harari had submitted four Form U4 amendments on June 18, 2008, July 16, 2008, November 13, 2008, and April 14, 2010. All of these amendments were filed after one or more of the tax lien notices were sent to Harari. Harari, however, checked the "no" box in these filings when asked if he was subject to any liens.

D. The Ameriprise and FINRA Investigations

In December 2010, Harari was suspended by Ameriprise pending an internal review of his customers' accounts for suspected suitability problems. While the review was pending, Harari resigned from Ameriprise and joined Raymond James.

After Harari's resignation, Ameriprise's investigation continued, and a number of his customers, including JG, were contacted. In early 2011, JG spoke with Ameriprise's compliance officer, Matthew King. JG raised the loan she had made to the Hararis and questioned whether the $7,500 she had been paying annually for financial planning fees was excessive. During the course of these discussions, she told Ameriprise about the payments she had made directly to Harari in 2010 for financial planning services.[5] JG testified that it was at this point that she learned that she had paid the 2010 financial planning fees twice. Ameriprise ultimately reimbursed JG $7,500 for the fee paid directly to Harari and also paid her $30,000 to reimburse her for all the fees paid from 2007 through 2009.

On November 30, 2011, Ameriprise amended Harari's Uniform Termination Notice for Securities Industry Registration ("Form U5") to disclose that he was the subject of an internal review for "violating company policy related to commingling of funds and accepting cash payments from a customer." Prompted by this filing, FINRA began an investigation. On December 29, 2011, FINRA sent Harari a letter pursuant to FINRA Rule 8210 requesting information concerning the $20,000 payment JG made to the Hararis in February 2008, the $7,500 in payments JG made to Harari in June 2010, and the tax liens.

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[5] It appears from the record that JG did not recall the 2008 payment to Harari, and resulting double payment for that year, until later in FINRA's investigation.

Upon learning of FINRA's investigation, the Hararis became concerned that Harari would lose his job with Raymond James and contacted JG for help. Sian telephoned JG and arranged a meeting. On January 8, 2012, the Hararis met with JG at a local coffee shop, where the Hararis discussed their concerns and ways JG could help them. Their meeting was cut short when JG needed to leave, but the Hararis met with her again later that day at JG's home. At this meeting, Harari handwrote a draft of a letter which JG typed up and signed (the "JG Letter"). The JG Letter stated that the "loan [she] had made to Mrs. Sian Harari for $20,000 . . . has been fully paid to [her]," and that the $7,500 payment in June 2010 was for "repayment of loans" the Hararis had made to her and "in no way Related [sic] to Ameriprise." During that same meeting, Harari also drafted and signed a handwritten note which stated that he "owe[d] . . . [JG], $19,000."[6]

Sometime during the next couple of days, Sian wrote, signed, and delivered to JG four checks payable to her. The checks were all dated "October __ 2011" and were for $19,000, $5,000, $5,000, and $4,000. During the hearing and in her on-the-record testimony, Sian testified that she wrote these checks to support the statement in the JG Letter that the loan had been repaid should Raymond James ask for proof of the repayment. She initially wrote a check for the entire amount owed—$19,000—and then wrote the smaller checks because she thought they would be more believable given the Hararis' financial condition. Sian explained that the smaller checks did not add up to $19,000 because she had run out of checks. Sian testified that the checks were not meant to be cashed because the Hararis did not have the money to cover them.

On January 9, 2012, Harari provided Raymond James with a copy of the JG Letter, along with a draft of his response to FINRA's Rule 8210 request. On January 19, 2012, Harari submitted his response and the JG Letter to FINRA. In his response to FINRA, Harari wrote that the $20,000 "loan [from JG] was unsolicited and made in good faith to [Sian] while [he] was in a [h]ospital," and that the "loan has been repaid in full." With respect to the $7,500 JG gave him in June 2010, Harari claimed that these payments were for repayment of loans he had made to JG, or checks he had cashed for JG so that she would have cash for trips to Mexico.

On January 17, 2012, Raymond James permitted Harari to resign. Raymond James' Form U5 disclosure indicated that it had "lost confidence in [Harari's] business practice." At the hearing, a Raymond James manager testified that Harari had told Raymond James that the $1,000 payment to JG in July 2011 had been the final payment on a loan that JG had made to Harari. Raymond James was concerned, however, about this payment to a customer. Raymond James's manager also could not understand how the $7,500 JG had given Harari in June 2010 could have been for repayment of loans when the Hararis still owed JG money at that time.

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[6] While Harari drafted and signed it on January 8, 2012, the note was dated December 8, 2012.

On November 15, 2012, both Harari and Sian gave sworn testimony to FINRA at an on-the-record interview pursuant to FINRA Rule 8210. During his testimony, Harari referred to the $20,000 as a loan and admitted that, with the exception of a single $1,000 payment, it had not been repaid. He also claimed that he had repaid it "through services." He denied, however, ever having prepared a draft of the JG Letter. He admitted that the JG Letter was prepared for the purpose of giving it to Raymond James and FINRA, and that he knew it was not accurate when he provided it to Raymond James and FINRA.

In her on-the-record testimony, Sian explained that the checks she had written for JG after the January 8, 2012 meeting were for the purpose of supporting the false statement in the JG Letter that the loan had been repaid. Sian acknowledged that she was present when the JG Letter was written, that she knew it was intended to be given to Raymond James, and that she reviewed Harari's response and the attached the JG Letter before it was submitted to FINRA. Sian characterized the $20,000 payment as a loan in her testimony, but maintained that it had been forgiven. She attributed the inaccuracies in the response to FINRA and the JG Letter to a poor choice of words.

JG subsequently sued the Hararis for repayment of the $19,000 remaining due on the loan. The case was settled when Sian signed a note for $19,000, which was guaranteed by Harari. As of the hearing in this matter, the Hararis had made only two $250 payments pursuant to this note.

IV. Discussion

A. The Hararis Submitted False Information and Documents to FINRA and a FINRA Member Firm

FINRA Rule 8210 requires member firms and associated persons to provide information to FINRA in the course of an investigation. Because FINRA does not have subpoena power, it "must rely on [FINRA] Rule 8210 to obtain information . . . necessary to carry out its investigations and fulfill its regulatory mandate." *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009). It is well settled that "[a]n associated person who provides false or misleading information to [FINRA] in the course of an investigation violates [FINRA] Rule 8210." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008); *see also Dep't of Enforcement v. Walker*, Complaint No. C10970141, 2000 NASD Discip. LEXIS 2, at *26-27 (NASD NAC Apr. 20, 2000) (affirming a violation of FINRA Rule 8210 where an associated person made false statements during on-the-record testimony).

FINRA Rule 2010 is a general ethics rule that requires members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade." An associated person violates FINRA Rule 2010 when he or she violates any other FINRA rule, including FINRA Rule 8210. *Ortiz*, 2008 SEC LEXIS 2401, at *23. Moreover, providing false information to FINRA is an independent violation of FINRA Rule 2010. *Id.* at *23-24. Providing false information to a member firm also violates FINRA Rule 2010. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *16-17 (Feb. 24, 2012). An

associated person can violate FINRA Rule 2010 by participating in the submission of false information to FINRA even where FINRA's Rule 8210 request is not directed to the associated person. *See Michael A. Rooms*, 58 S.E.C. 220, 227 (2005), *aff'd*, 444 F.3d 1208 (10th Cir. 2006) (finding a violation of NASD Rule 2110 where the respondent knew of a FINRA Rule 8210 request directed to another person and obtained false letters from customers for submission to FINRA).

1. The $20,000 Loan

The Hararis concede that the information they provided to FINRA and their firm was false. With respect to the $20,000 loan from JG, it is undisputed that the Hararis only repaid $1,000. Nonetheless, Harari submitted a response to FINRA which falsely claimed that the $20,000 had been fully repaid to JG and attached the JG Letter, which he drafted, to corroborate his response. Harari also supplied the JG Letter to his firm along with a draft of his untruthful response to FINRA. Moreover, Harari testified untruthfully in his on-the-record testimony when he denied having prepared a handwritten draft of the JG Letter. When confronted with this draft at the hearing, he acknowledged that all the writing on it was his except for the date.

Sian admitted in her testimony that she assisted in procuring the false JG Letter, which she knew would be given to her firm. She set up and attended the January 8 meeting with JG. She reviewed Harari's false written submission to FINRA with the JG Letter attached. She also acted to further the deception by providing JG with backdated checks to support the false statement that the $20,000 had been fully repaid.

On appeal, the Hararis ask us to reconsider the severity of their "misguided decision" to provide false information to FINRA, which they characterize as a "mistake." Specifically, they argue that the false information they provided to FINRA concerning the $20,000 payment was not sufficiently serious to warrant a bar because the payment was a gift and not a loan. The Hearing Panel, however, credited JG's testimony that the $20,000 was a loan and we affirm this finding.[7] In any event, no matter what the characterization of the $20,000, Harari admitted that

[7] It is well settled that the "credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome where the record contains substantial evidence for doing so." *John Montelbano*, 56 S.E.C. 76, 89 (2003). The Hararis have not overcome this burden. The record evidence, rather, fully supports the Hearing Panel's finding that the $20,000 was a loan and that JG did not forgive it. The record shows that JG sought repayment of the loan and the Hararis did repay $1,000. JG offered a credible explanation for waiting two years to seek repayment. She testified that she waited because she was aware of the Hararis' continued financial troubles and was prompted to ask for repayment after the Hararis paid for their daughter's wedding. Moreover, the record shows that the Hararis acknowledged that the $20,000 was a loan in several ways. On January 8, 2012, Harari provided JG with a note confirming that he and Sian still owed her $19,000. Later, the Hararis signed a note and guarantee for the $19,000 and made two payments pursuant to this note. The Hararis also often referred to the $20,000 as a loan, including in their on-the-record testimony.

[Footnote continued on next page]

he knowingly provided false information and documents to FINRA and Raymond James claiming that the $20,000 had been repaid when, in fact, it had not been repaid. Harari also gave false testimony at his on-the-record interview when he denied preparing a handwritten draft of the JG Letter. Similarly, Sian admitted her role in obtaining the false letter from her friend, JG, supporting the false letter with the backdated checks, and reviewing the false responses Harari provided to his firm and FINRA.

We likewise reject the Hararis' attempt to excuse their misconduct by claiming that the wording of the JG Letter was JG's idea, and that they did not force JG to sign it. JG admitted that she willingly helped the Hararis based on their previous close friendship. JG's voluntary participation, however, does not excuse the Hararis' misconduct. Harari submitted information and documents to FINRA that he knew were false, and he procured the assistance of a customer in doing so. Moreover, Harari's own written statements in his response to FINRA's Rule 8210 request claiming that the $20,000 had been fully repaid to JG were knowingly false and cannot be blamed on JG.

2. JG's Payments of Fees to Harari

The Hararis also argue that their submission to FINRA was not false with respect to the payments made by JG to Harari in 2010 because these were not payments of financial planning fees. While he could not explain the specific purpose of any single check or cash payment by JG or provide any corroborating evidence, Harari maintains that these were generally repayments of loans he had made to JG or checks he had cashed for her so that she would have cash to take on trips to Mexico. JG testified that these were prepayments of financial planning fees that she paid at Harari's request based on his promise to remit the payments to Ameriprise when they became due.

The Hearing Panel credited JG's testimony with respect to these payments and we find no substantial evidence in the record for reversing this finding. JG testified unequivocally that she never received loans or cash from Harari, and that these were payments of fees. Her testimony was corroborated by the testimony of Ameriprise's compliance manager, who testified that JG only became aware of the double payments in the course of their discussions. The amounts JG gave Harari exactly match the amounts of JG's planning fees. The 2010 payments, moreover, were made at a time when the record shows that JG was seeking repayment of her $20,000 loan to the Hararis. It is not credible that she would repay a purported loan from the Hararis at a time when she was seeking repayment of her loan to them.

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The Hararis' argument that evidence of anything after the initial discussion between Sian and JG about the loan should be excluded as "parole evidence" is baseless. The Hararis cite no authority for this assertion. Moreover, the parole evidence rule applies only where there is a fully integrated written agreement. *See, e.g., Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Center, Inc.*, 993 F.2d 1178, 1182-83 (5th Cir. 1993). As the Hararis assert, there is no written loan agreement in this case.

The Hararis attack JG's credibility, arguing that she was financially motivated to lie about the fees. At the time she testified at the hearing, however, JG had already been compensated for the fees by Ameriprise. The Hararis also argue that JG must have known of the alleged double payment because Ameriprise sent customers a confirmation when fees were paid, yet she made no complaint at the time. JG's receipt of a confirmation letter, however, would not necessarily have alerted her that the fee had been paid twice as she expected that Harari would pay the fee when it became due. The Hearing Panel credited, additionally, her testimony that she did not carefully review her account statements and, therefore, did not realize that the fee had been paid to Ameriprise a second time by account transfer.

We affirm the findings that the payments from JG to Harari in 2008 and 2010 were for prepayment of financial planning fees that Harari promised to remit to Ameriprise when they became due, and that Harari did not forward the fees to Ameriprise. Accordingly, we find that the statements concerning the $7,500 payment in Harari's Rule 8210 response and the JG Letter, which Harari drafted and attached to his response, were false.

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For these reasons, we affirm the findings of the Hearing Panel that Harari provided false information and documentation to FINRA and his firm in violation of FINRA Rules 8210 and 2010, and that Sian participated in the creation of these false documents that she knew would be sent to FINRA and her firm in violation of FINRA Rule 2010.

B. Harari Induced JG to Pay Advisor Fees Directly to Him and Converted Them

NASD Rule 2110 and FINRA Rule 2010 require that members and associated persons observe high standards of commercial honor and just and equitable principles of trade.[8] FINRA's authority to pursue disciplinary actions for violations of these rules encompasses all unethical business-related conduct, whether or not that misconduct involves a security. *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996). Both obtaining funds by false pretenses and conversion violate the fundamental ethical requirements of NASD Rule 2110 and FINRA Rule 2010. *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *42 (Feb. 10, 2012) (holding that conversion is "extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote"); *Dist. Bus. Conduct Comm. v. Kwikkel-Elliot*, Complaint No. C04960004, 1998 NASD Discip. LEXIS 4, at *13, 21 (NASD Jan. 16, 1998) (holding that obtaining funds by false

[8] NASD Rule 2110 applies to the financial planning fees paid in 2008, and FINRA Rule 2010 applies to the 2010 payments. *See CapWest Sec., Inc.*, Exchange Act Release No. 71340, 2014 SEC LEXIS 205, at *3 (Jan. 17, 2014) (stating that "[i]n September 2008, the Commission approved . . . FINRA Rule 2010 which replaced NASD Rule 2110 . . . [and that] [t]he new rule, which became effective December 15, 2008, does not alter, in any material respect, the prior rule").

pretenses violates NASD Rule 2110 and imposing a bar). Conversion is defined as an "intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." *Mullins*, 66373, 2012 SEC LEXIS 464, at *33.

The disposition of this cause of action relies upon our resolution of the testimonial conflicts between Harari and JG. While we conduct a de novo review of the Hearing Panel's decision, we give substantial weight and deference to the Hearing Panel's credibility findings. *See Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000). As discussed above, the Hearing Panel found credible JG's testimony that the $15,000 in payments she made to Harari in 2008 and 2010 were for prepayment of financial planning fees. *See supra* Part IV.A.2. On appeal, Harari points to no evidence in the record to challenge this finding but his own discredited testimony. Harari converted these fees when he did not remit them to Ameriprise as promised and retained them for his own benefit. We, accordingly, affirm the finding that Harari obtained customer funds by false pretenses and converted them in violation of NASD Rule 2110 and FINRA Rule 2010.

C. Harari Failed to Disclose Tax Liens on His Form U4

Article V, Section 2 of FINRA's By-Laws requires associated persons seeking registration with FINRA to provide "reasonable information with respect to the applicant as [FINRA] may require." Moreover, the information provided "shall be kept current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122 and its predecessor, NASD IM-1000-1, provide that no member or associated person shall file with FINRA information "which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing."[9] Such filings are made on the Form U4, which includes a specific question concerning any liens filed against the associated person.[10]

The Form U4 is an important tool used by FINRA to "determine and monitor the fitness of securities professionals who seek initial or continued registration." *Tucker*, 2012 SEC LEXIS 3496, at *26. Truthful answers to Form U4 questions are critical because they "can serve as an early warning mechanism, identifying individuals with troubled pasts or suspect financial histories." *Id.* Moreover, untruthful answers call into question an associated person's ability to comply with regulatory requirements. *Id.*

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[9] FINRA Rule 1122 is applicable to Harari's failure to disclose the liens on or after August 17, 2009. NASD IM-1000-1 is applicable to his failures to disclose before August 17, 2009. *See FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96 (June 2009).

[10] Violations of FINRA Rule 1122 and NASD IM-1000-1 also constitute violations of FINRA Rule 2010 and NASD Rule 2110, and filing a false or misleading Form U4 is also an independent violation of FINRA Rule 2010 and NASD Rule 2110. *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *36-37 (Nov. 9, 2012).

The record shows that Harari's tax liens were filed on November 30, 2007, October 20, 2009, June 9, 2009, and January 21, 2010. Harari, however, did not disclose these liens until December 22, 2010, when his new employer, Raymond James, discovered them as part of a routine background check and directed him to disclose them. This was after Harari had submitted a draft Form U4 to Raymond James in which he responded "no" to the question concerning liens. The record also shows that between the time notice of the first lien was sent and Harari's eventual disclosure of the liens, he filed four amendments to his Form U4. Harari did not disclose the liens in any of these amendments; instead, in each case he checked "no" in response to the question concerning whether he was subject to any lien.

Harari argues that his failure to disclose the liens is excused because he did not receive notice of them, and he relied on advice from tax counsel in not disclosing them. Harari testified that his tax counsel told him the liens "were not liens as such" because his taxes were in a non-collectable status. The Hearing Panel rejected these arguments and we affirm.

Harari admits that he had notice of something he understood to be a lien at least as early as September 2009 when he consulted a tax professional for assistance. This was more than a year prior to his disclosure of the liens on his Form U4. Moreover, we find that Harari was aware of the liens at or around the time they were filed. The record includes IRS documents maintained in the regular course of business that indicate that notices were sent separately to both Harari and Sian at their home address—also Harari's Central Registration Depository ("CRD"®) address—by certified mail for the first three liens.[11]

The IRS documents, which reflect that notices of the liens were mailed to the Hararis in the regular course of business, create a presumption that the notices were received. *See Robert M. Fuller*, 56 S.E.C. 976, 991-92 (2003), *aff'd*, 95 Fed. Appx. 361 (D.C. Cir. 2004). The IRS documents are business records sufficient to establish the mailing. *Rios v. Mansfield*, 21 Vet. App.481, 2007 U.S. App. Vet. Claims LEXIS 1744, at *4 (Nov. 6, 2007). Proof of mailing creates a rebuttable presumption of receipt, and shifts the burden of proof to Harari. *See Wells Fargo Bus. Credit v. Kozloff*, 695 F.2d 940, 944 (5th Cir. 1983). Moreover, the "mere denial of receipt" is not sufficient to rebut the presumption. *Meckel v. Cont. Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985); *see also Rios v. Nicholson*, 490 F.3d 928, 934 (Fed. Cir. 2007) (finding that "mere statement by the government" that a notice had not been received was insufficient to overcome the presumption). The IRS documents are sufficient to show that notices of the liens were mailed to Harari, and Harari has failed to point to evidence in the record other than his own unsupported testimony to overcome the presumption of receipt. Accordingly, we find that Harari had notice of the liens around the time they were filed, yet failed to disclose them on various amendments to his Form U4.

Reliance on counsel is not an applicable defense to Harari's failures to make the required disclosures. First, reliance on counsel is not available as a defense where, as here, intent is not an element of the violation. *See Dep't of Enforcement v. Am. First Associates Corp.*, Complaint

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[11] The fourth lien was filed after Harari retained tax counsel.

No. E1020040926-01, 2008 FINRA Discip. LEXIS 27, at *18 n.20 (FINRA NAC Aug. 15, 2008). Even if it were a defense, however, Harari has not established the required elements. In order to assert a defense of reliance on counsel, a respondent must show that he made a complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *Richard J. Lanigan*, 52 S.E.C. 375, 377 (1995). Even accepting Harari's testimony in the light most favorable to him, he failed to establish that he sought and reasonably relied on advice of counsel that the liens in question were not required to be disclosed under FINRA rules.

For these reasons, we affirm the Hearing Panel's findings that Harari failed to disclose tax liens in violation of NASD IM-1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010.

V. Sanctions

The Hearing Panel barred Harari for providing false information to FINRA and a FINRA member firm. The Hearing Panel also imposed a second bar for obtaining customer funds by false pretenses and converting those funds.[12] For her participation in the creation of false documents provided to FINRA and a FINRA member firm, Sian was suspended from association in all capacities for 18 months. For the reasons set forth below, we affirm the bars imposed on Harari, modify Sian's sanction to a bar in all capacities, and order disgorgement.

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[12] For the Form U4 violations, the Hearing Panel found that a two-month suspension would have been appropriate, but did not impose the sanction in light of the bars. For failure to file a required Form U4 amendment, FINRA's Sanction Guidelines ("Guidelines") recommend a fine of $2,500 to $50,000 and a suspension of five to 30 business days. *See FINRA Sanction Guidelines*, at 69-70 (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. In egregious cases, a longer suspension or bar may be imposed. *Id.* The principal considerations for determining the sanction include the nature and significance of the information that should have been disclosed, whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm, and whether the misconduct resulted in harm to any person. *Id.* at 69. We find that Harari's failure to disclose the liens was egregious. This information was important to Harari's firm and customers, and his violations were repeated and prolonged. Moreover, we find that Harari's claimed reliance on a tax professional is not a mitigating factor. His purported reliance on tax counsel was both unreasonable and inapplicable to his failures to disclose the liens that were filed months before he retained counsel. Under these circumstances, we agree with the Hearing Panel that a two-month suspension would be appropriate, but do not impose this sanction in light of the bars.

A. Providing False Information and Documentation to FINRA and a FINRA member Firm

The Guidelines treat a failure to respond truthfully to a Rule 8210 request as equivalent to a complete failure to respond, and provide that a bar is standard for such violations.[13] *See Guidelines*, at 33; *see also Ortiz*, 2008 SEC LEXIS 2401 at *31-32. The failure to respond truthfully to a FINRA Rule 8210 request is as serious and harmful as a complete failure to respond, and comparable sanctions are appropriate. *See Walker*, 2000 NASD Discip. LEXIS 2, at *31. Truthful responses to FINRA Rule 8210 requests are critical to FINRA's ability to carry out its important regulatory functions. *See Rooms*, 58 S.E.C. at 229. The Guidelines direct adjudicators to consider the importance of the information at issue from FINRA's perspective when imposing sanctions for such a violation.[14]

Harari's responses to FINRA's Rule 8210 requests contained false information and documentation about one of the key issues under investigation—i.e., the status of the $20,000 given to the Hararis by JG. In his written responses, Harari claimed that the $20,000 had been repaid in full when, in fact, only $1,000 had been repaid, and he attached a false letter from his customer supporting this false statement. In his on-the-record testimony, Harari acknowledged this falsehood, but continued to lie by denying that he had prepared a draft of the false letter signed by his customer. Accordingly, Harari provided false and misleading information about key matters in FINRA's investigation.

Harari raises two purportedly mitigating factors specifically applicable to this violation. First, Harari argues that the sanction is mitigated by the fact that he has recognized his wrongdoing and shown remorse for it. However, the Guidelines provide that acknowledgement of wrongdoing is only mitigating if it occurs prior to detection.[15] Harari only admitted that his submissions to FINRA and Raymond James were false after his misconduct was discovered by FINRA. Moreover, Harari's purported acceptance of responsibility is belied by his continuing incredible claims that the $20,000 was a gift and that the financial planning fees were for repayments of loans he made to JG or checks he cashed for her. Harari also continues to blame his customer for his misconduct by claiming that she dictated the language of his submissions to FINRA. Under these circumstances, Harari's acknowledgement of wrongdoing is not a mitigating factor.

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[13] In assessing the appropriate sanctions for the Hararis' misconduct, we apply the Guidelines in place at the time of this decision and consider the specific Guidelines related to each violation. *See id.* at 8. We also consult the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions, which adjudicators consult in every disciplinary case. *See id.* at 2-7.

[14] *Id.* at 33.

[15] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

Harari also cites as mitigating factors his own testimony that the loan was forgiven, JG's supposed lack of credibility, her participation in signing the false letter, and the fact that the Hararis did not force JG to sign the false letter. We reject these arguments. First, as discussed above, the Hearing Panel credited (and we affirm) JG's testimony that the $20,000 was a loan and that she never forgave it. Even if we were to credit Harari's testimony that the loan was forgiven, however, this does not change the fact that the information and documents he provided to FINRA and his firm was false. In addition, it is not in dispute that JG signed the JG Letter to help the Hararis based on her past friendship with them. It is aggravating, however, that the Hararis involved a customer in the creation of a false document meant to support their false statements to FINRA.

We disagree with the Hearing Panel's characterization of Sian's participation in obtaining the false letter from JG as "subordinate." JG was Sian's close friend, and Sian was instrumental in obtaining the JG Letter from JG. Sian arranged the January 8, 2012 meeting with JG and she was present as the JG Letter was written, typed and signed. She reviewed Harari's response to FINRA's Rule 8210 request, and acted alone to further support the false statements in it by writing and providing backdated checks to JG. As discussed above, none of the purportedly mitigating factors apply to Sian's misconduct. We find that Sian intentionally participated in creating and providing false information to FINRA and her firm and that a bar in all capacities is the appropriate sanction.

Accordingly, we affirm the sanction of a bar for Harari and modify the sanction for Sian to impose a bar in all capacities.

B. Obtaining Funds by False Pretenses and Conversion

The Guidelines provide that a bar for conversion is standard regardless of the amount converted.[16] The conversion of customer assets is one of the most serious violations that can be committed by an associated person. Conversion is antithetical to the ethical principles that underpin the self-regulation of securities markets, and it is misconduct that "poses so substantial a risk to investors and/or the market as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy." *Mullins*, 2012 SEC LEXIS 464, at *74.

We find that Harari's conversion of JG's funds was intentional. It is aggravating that Harari abused his close personal relationship with JG. Moreover, as discussed below, none of the supposedly mitigating factors cited by Harari are applicable.

The Guidelines recommend that adjudicators consider a respondent's ill-gotten gain when determining an appropriate remedy, and provide that disgorgement may be appropriate where "the record demonstrates that the respondent obtained a financial benefit from his or her

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[16] *Guidelines*, at 36. We affirm the Hearing Panel's finding that Harari's misconduct in obtaining money from JG by false pretenses and converting it constitutes a single course of conduct and that a single sanction should be assessed under the Guidelines for conversion.

misconduct." *Guidelines*, at 5. The purpose of disgorgement is to prevent unjust enrichment, and it is an appropriate remedy where a respondent has converted customer funds. *See Dep't of Enforcement v. Mission Sec. Corp.*, Complaint No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *48 (FINRA NAC Feb. 24, 2010), *aff'd*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010). Harari converted $15,000 in customer funds for his own benefit, and should not be permitted to retain these ill-gotten gains. Accordingly, we order Harari to pay $15,000 plus prejudgment interest to FINRA as disgorgement.

C. There Are No Applicable Mitigating Factors and Several Aggravating Factors

We reject the numerous supposedly mitigating factors cited by Harari. First, Harari argues that the bars are not appropriate because he cooperated with FINRA during the course of its investigation. While the Guidelines provide that a respondent's "substantial assistance" to FINRA in its investigation can be mitigating, we have repeatedly stated that compliance with FINRA Rule 8210 is the obligation of every registered person, and that substantial assistance requires more than compliance. *Guidelines*, at 7; *see, e.g., Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23, n.22 (Nov. 8, 2006); *Dep't of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *31 n.33 (FINRA NAC Jan. 7, 2011). In any event, as discussed above, Harari did not even fulfill his obligations under FINRA Rule 8210. Instead, he admittedly provided FINRA with false information, documentation and testimony in an effort to conceal his misconduct.

Harari also cites his lack of disciplinary history as a mitigating factor. It has been FINRA's long-standing position, however, that a respondent should not be rewarded for complying with FINRA's rules. *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006); *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 Fed. Appx. 886 (11th Cir. 2011); *Keyes*, 2006 SEC LEXIS 2631, at *23. Accordingly, the absence of disciplinary history is not a mitigating factor. Similarly, the awards and customer appreciation Harari cites are also not mitigating.

Harari claims that the bars imposed are excessive because no customers were harmed by his misconduct. The absence of customer harm, however, is not mitigating, and the lack of customer harm is irrelevant to Harari's FINRA Rule 8210 violations. *See Braff*, 2012 SEC LEXIS 620, at *26, 30. Moreover, contrary to Harari's claims, his conversion of $15,000 harmed JG and is considered an aggravating factor. The fact that Ameriprise made JG whole does not lessen the seriousness of the harm that Harari caused JG.

Harari also argues for mitigation based on certain "factual circumstances." These factual circumstances appear to be the financial, health, and other personal pressures Harari was under at the time of his violations. In general, such factors do not mitigate violations of FINRA rules. *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1226 (1994) (rejecting as mitigating the argument that an associated person who converted customer funds was "under extreme emotional stress as a result of severe financial problems and his parents' and children's ill health"); *William D. Mattes, Sr.*, Complaint No. 2006005936701, 2007 FINRA Discip. LEXIS 9, at *12 (FINRA Hearing Panel Nov. 6, 2007) (stating that "even severe emotional problems have not been held to be sufficient to overcome the presumption that a bar is the appropriate remedy"); *Kwikkel-Elliot*, 1998 NASD

Discip. LEXIS 4, at *14 (finding that "[mis]conduct cannot be excused by the fact that [respondent] may have been under personal and work-related stress"). When such factors have been given some mitigating effect, it is where the respondent has presented evidence that such problems interfered with respondent's ability to comply with FINRA rules. *See Paul David Pack*, 51 S.E.C. 1279, 1283 (1994) (allowing mitigation where the respondent introduced uncontroverted medical evidence that respondent's misconduct was the result of his medical condition, including clinical depression and a chronic sleep disorder); *Dist. Bus. Conduct Comm. v. Nelson*, Complaint No. C9A920030, 1996 NASD Discip. LEXIS 17, at *9, 15 (NASD NBCC Mar. 8, 1996) (finding mitigation of respondent's failure to respond to FINRA's information requests where respondent was hospitalized or bedridden with chronic fatigue syndrome). Harari has not pointed to any evidence in the record of any factors that prevented him from complying with FINRA rules. Indeed, the record supports that Harari understood his obligations under FINRA rules and tried to conceal his misconduct.

Harari argues that considerations concerning whether he attempted to pay restitution and whether he was unjustly enriched should not be considered aggravating factors.[17] We disagree. Harari was unjustly enriched when he converted $15,000 from JG. Harari has never acknowledged this misconduct, much less made restitution to JG. Finally, we find that Harari's conversion of these funds and his submission of false information and documents to FINRA and a FINRA member firm were intentional acts. This is also an aggravating factor.[18]

After considering all these factors, we modify the sanction for Harari's conversion of customer funds to include an order that he pay $15,000 plus prejudgment interest to FINRA as disgorgement of his ill-gotten gains.

VI. Conclusion

We find that Harari provided false information and documents to FINRA and a FINRA member firm in violation of FINRA Rules 8210 and 2010, and that Sian participated in the creation of these false documents in violation of FINRA Rule 2010. For these violations we bar Harari and Sian in all capacities. We further find that Harari obtained customer funds by false pretenses and converted those funds in violation of FINRA Rule 2010 and NASD Rule 2110. For these violations, we impose a separate bar in all capacities against Harari and order him to pay $15,000 plus prejudgment interest to FINRA as disgorgement.[19] We also find that Harari

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[17] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 4 & 11).

[18] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13). We also reject Harari's argument that Principal Considerations Nos. 16 and 18 are mitigating. Principal Consideration No. 16 applies only to member firms and Principal Consideration No. 18 applies to "transactions." Accordingly, neither consideration is relevant here.

[19] The bars are effective as of the date of this decision. Prejudgment interest shall be paid at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). Prejudgment interest will start on April 28, 2008 for

[Footnote continued on next page]

failed to disclose tax liens on his Form U4 in violation of NASD IM-1000-1, NASD Rule 2110, and FINRA Rules 1122 and 2010. Finally, we affirm the Hearing Panel's order that Harari and Sian are jointly and severally liable for hearing costs of $5,817.40, and order them to each pay appeal costs in the amount of $1,000 plus $277.80 for transcript costs.

On behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith
Senior Vice President and Corporate Secretary

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$7,500 of the disgorgement amount, until paid in full, and will start on June 30, 2010 for the remaining $7,500, until paid in full.