FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RAYMOND THOMAS CLARK (CRD No. 3120696), Respondent.	Disciplinary Proceeding No. 2011027402201 Hearing Officer–DRS **HEARING PANEL DECISION** August 5, 2014

Respondent is: (1) suspended for three months, in all capacities, and fined $6,000 for violating FINRA Rule 2010 by using his personal email account to communicate with a customer; (2) suspended for four months, in all capacities, and fined $10,000 for violating FINRA Rule 2010 by making false statements to his firm; and (3) suspended for two months, in all capacities, and fined $4,000 for violating FINRA Rule 2010 by failing to report a customer complaint to his firm. These suspensions shall run consecutively. Respondent is suspended for an additional three months in all supervisory capacities and ordered to requalify by examination as a general securities representative and general securities principal before again acting in those capacities. The supervisory suspension shall run consecutively, following the termination of Respondent's all-capacities suspensions. Respondent is also ordered to pay costs. The Hearing Officer dissents with respect to sanctions.

Appearances

For the Department of Enforcement, Complainant, Michael J. Newman, Esq., and Aismara J. Abreau, Esq., Woodbridge, New Jersey.

For Raymond Thomas Clark, Respondent, Joseph P. Galda, Esq., J.P. Galda & Co., Landsdale, Pennsylvania.

DECISION

I. Introduction

While registered with a FINRA member firm, Respondent Raymond Thomas Clark used his personal email account to communicate with customer JN about business-related matters

without his firm's knowledge or approval and in violation of its procedures. Additionally, Clark made false statements to his firm concerning those email communications. At the time, Clark knew that the firm would use the information he provided to respond to information requests by FINRA staff concerning a complaint that JN had filed with FINRA about Clark's handling of his account. Finally, in violation of his firm's procedures, Clark failed to report to the firm a complaint he received from JN, accusing him of charging excessive commissions and engaging in the unauthorized use of margin. Based on this conduct, the Department of Enforcement filed a three-cause Complaint[1] charging Clark with violating FINRA Rule 2010.[2] Clark filed an Answer, requested a hearing, and asked that the Complaint be dismissed with prejudice.

Many of the relevant facts are undisputed. Clark conceded the existence of the pertinent emails and other communications and admitted that he made a mistake by communicating with JN by personal email. He contended that he did not frequently use email in his personal and professional life and simply forgot that he had done so when asked about it by his supervisor. Clark also maintained that he did not report JN's complaint to his firm because he did not consider it a complaint. Finally, Clark argued that it was unfair for FINRA to bring charges against him based on his email communications with JN. He asserted that FINRA was aware of his communications with JN when it brought (and settled) another unrelated action against him for using a personal email account to communicate with customers and should have included the present charges relating to JN in that earlier disciplinary proceeding.

[1] Enforcement filed the Complaint on October 17, 2013.

[2] FINRA Rule 2010 requires FINRA members and their associated persons to observe high standards of commercial honor and just and equitable principles of trade in connection with the conduct of their business.

After a hearing on April 1–2, 2014, in New York City, New York, the Hearing Panel[3] finds that Enforcement proved the violations charged in the Complaint and imposes the sanctions set forth herein.

II. Findings of Fact

A. Raymond Thomas Clark

Clark first became registered with FINRA as a general securities representative in September 1998 and became registered as a general securities principal in February 2000.[4] Since then, he has been registered in those same capacities with six member firms, including Dynasty Capital Partners, Inc. ("Dynasty" or the "Firm"), with which he became registered on August 2, 2010, and is currently registered.[5] At all relevant times, Clark was based in Buffalo, New York.[6] From May 2008 until 2011, Clark supervised other brokers[7] and did so at the Firm for several months.[8] Presently, however, he does not supervise anyone.[9] At all relevant times, Clark was supervised by the Firm's president, chief executive officer, and chief compliance officer, Steven Hinkle, who is based in Denver, Colorado.[10]

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[3] The Hearing Panel consisted of a Hearing Officer and a current and a former member of FINRA's District 10 Committee.

[4] CX-1, at 11. *But see* Tr. (Clark) at 30 (testifying that he has been registered since October 1998).

[5] CX-1, at 4. FINRA has jurisdiction over this proceeding pursuant to Article V, Section 2 of FINRA's By-Laws.

[6] Tr. (Clark) at 32; Tr. (Hinkle) at 276. Clark also has an equity interest in the Firm. Tr. (Hinkle) at 327–30.

[7] Tr. (Clark) at 411.

[8] Tr. (Clark) at 412.

[9] Tr. (Hinkle) at 276–77; Tr. (Clark) at 408 (testifying that he is "not an active 24 because I am only in the office by myself").

[10] Tr. (Clark) at 32–33; Tr. (Hinkle) at 270–73, 277–78. At some point during his employment at Dynasty, the Firm placed Clark under heightened supervision as a result of an arbitration that was pending against him and several other complaints. The evidence was conflicting as to when this occurred: either at the time he joined the Firm, according to Clark (Tr. (Clark) at 53–54), or sometime after June 2011, according to Hinkle. Tr. (Hinkle) at 315. The Hearing Panel makes no finding on the issue of when he was placed under heightened supervision.

B. Clark Uses His Personal Email Account to Communicate With a Customer About Business-Related Matters, Contrary to Firm Policy and Procedure

1. The Email Communications Between Clark and JN

JN first became Clark's customer in approximately January 2009, before Clark joined Dynasty.[11] Thereafter, when Clark joined Dynasty at the end of July 2010, JN transferred his account to the Firm,[12] where he remained a customer of Clark's from approximately July 28, 2010, through November 4, 2010.[13] When JN transferred his account to the Firm, Clark sent JN an account transfer form using Clark's personal email account maintained through America Online ("AOL"). As a result, JN obtained Clark's personal email address.[14]

Beginning in October 2010, and continuing over the next five months until March 2011, JN and Clark exchanged 23 emails regarding JN's complaints about Clark's handing of the account.[15] Specifically, JN complained that Clark had overcharged him commissions and had engaged in the unauthorized use of margin. When Clark became registered with the Firm, it provided him with a Firm email address.[16] Nevertheless, throughout the period of their communications, Clark never gave JN that email address.[17] Nor did Clark and JN communicate

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[11] Tr. (Clark) at 48, 370–71; Tr. (JN) at 192–95 (testifying that he became Clark's customer in 2008 or 2009, when Clark was registered at a prior firm).

[12] Tr. (JN) at 192–95; Tr. (Clark) at 47 (testifying that JN was his customer at the Firm). Prior to this, JN had maintained accounts serviced by Clark at two other firms. Compl. ¶ 6; Ans. ¶ 1.

[13] Compl. ¶ 6; Ans. ¶ 1. *See also* CX-5, at 41 (account opening form signed July 28, 2010). *But see* CX-5, at 6 (letter from Hinkle to FINRA staff representing that the account was opened on August 5, 2011, and closed on November 4, 2011. It appears that the year should have read "2010" instead of "2011.").

[14] Tr. (JN) at 205, 198–99, 247–48; CX-4, at 1. Clark initially testified that he did not recall why he sent the form by email. Tr. (Clark) at 373. Later, he testified that he did so because "I was traveling. He [JN] was out of town." Tr. (Clark) at 406.

[15] CX-4, at 5–21; CX-13 (summary exhibit listing 22 emails exchanged between Clark and JN. On that exhibit, the email dated November 8, 2010, at 7:00 a.m., is misidentified as an email from Clark to JN. *See* CX-13, at 2. In fact, JN sent the email to Clark. *See* CX-4, at 10. Additionally, CX-13 references, but does not list, an email Clark sent to JN on November 1, 2010, at 9:36 a.m. *See* CX-13, at 2, and CX-4, at 6). Tr. (Clark) at 47, 72 (testifying that the email communications with JN occurred from October 2010 through approximately March 2011).

[16] Compl. ¶ 16; Ans. ¶ 1.

[17] Tr. (JN) at 206.

through the Firm-issued email address.[18] Instead, Clark and JN conducted their email communications through Clark's personal email account.

In an email JN sent to Clark on November 1, 2010, JN: (1) delineated his various grievances against Clark; (2) accused Clark of continuing to misrepresent the Firm's "fees and focus"; (3) informed Clark that JN was "no longer comfortable nor believe it prudent to allow you access to my money"; and (4) directed Clark to, among other things, sell all the securities in his account, correct commission overcharges, and close the account. JN ended the email with a warning: "Failure to do so on you past [sic] will require further actions on my part."[19] Clark responded that day with two emails agreeing to comply with JN's requests and committing to send him a check.[20] Complying with JN's request, the Firm closed the account a few days later.

Thereafter, JN and Clark continued communicating by email regarding JN's complaints regarding alleged commission overcharges. On November 7, 2010, after the account was closed, JN requested an explanation of "where [his] money was spent"[21] and asked if Clark had found evidence demonstrating that the alleged overcharges were returned to his account.[22] On January 18, 2011, JN emailed Clark complaining that Clark had not responded regarding "the overcharges or the thieft [sic] of my money . . . My states attorney may be interested in pressing charges."[23] Clark responded, assuring JN that he "will handle it," and asked that JN "not threaten

[18] There was no evidence that Clark ever used his Firm email address when communicating by email with JN. CX-8, at 1; Tr. (Hinkle) at 282–83; Tr. (Clark) at 373 (testifying that he did not communicate with JN using the Firm's email account); Tr. (Ruszkowski) at 178. Paul Ruszkowski is a principal examiner in FINRA's Woodbridge, New Jersey office and participated in the investigation that gave rise to this proceeding. Tr. (Ruszkowski) at 135–36.

[19] CX-4, at 6–7.

[20] CX-4, at 6.

[21] CX-4, at 8.

[22] CX-4, at 10.

[23] CX-4, at 11. This was the only time in his career that a customer had ever accused Clark in an email of being a thief. Tr. (Clark) at 102. Also, Clark did not recall any other customer having threatened him in an email with criminal action. Tr. (Clark) at 103.

him."[24] Until March 2011, JN and Clark continued communicating on the subject of commissions and rebates using Clark's personal email account.[25]

Clark never requested that JN stop sending him emails at his personal email address,[26] failed to provide Hinkle with his email communications with JN,[27] and failed to retain them.[28] On April 11, 2011, JN filed a complaint with FINRA,[29] triggering the investigation that led to this disciplinary proceeding.[30]

2. The Firm's Policies and Procedures Governing Email Communications and Clark's False Responses to Firm Compliance Questionnaires

During the period October 2010 through March 2011, when Clark and JN communicated through Clark's personal email account, the Firm's written supervisory procedures ("WSPs") required that its registered representatives use their authorized email address for all Firm-related email communications. The WSPs prohibited the use of any unauthorized email address.[31] The WSPs further required that registered representatives retain all incoming and outgoing email communications in compliance with the Firm's "Electronic Communications Policy" and that they copy all outgoing emails relating to the Firm's business to the representative's designated principal.[32] The Firm's "Electronic Communications Policy" referenced in the WSPs also

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[24] CX-4, at 11.

[25] The last email communication between JN and Clark occurred on March 14, 2011, when JN sent Clark a spreadsheet which JN had prepared reflecting trading activity in his account. Tr. (JN) at 217–18; CX-4, at 20.

[26] Tr. (Clark) at 81.

[27] Tr. (Clark) at 47.

[28] Tr. (Clark) at 48.

[29] Tr. (Ruszkowski) at 172; CX-2, at 1–2; Tr. (JN) at 221.

[30] Tr. (Ruszkowski) at 138, 152; CX-2, at 1–2.

[31] Compl. ¶ 14; Ans. ¶ 1. Any exceptions to this procedure required written approval. Compl. ¶ 14; Ans. ¶ 1; CX-8, at 2. The Firm never granted Clark an exception permitting him to communicate with customers through a personal email account. Tr. (Hinkle) at 284, 298; CX-9, at 1.

[32] Compl. ¶ 14; Ans. ¶ 1; CX-8, at 2.

required the Firm to retain records of its electronic communications.[33] Clark's participation in 23 email communications with JN between October 2010 and March 2011 violated the Firm's policy[34] and WSPs, and prevented the Firm from complying with its email retention policy. At the time Clark engaged in email communications with JN, Clark knew that the Firm's procedures required its representatives to communicate by email only through their authorized email addresses for all Firm-related communications and that they were prohibited from using any unauthorized email address.[35] Clark was aware of these procedures by at least December 14, 2010, the date on which he signed the Firm's "Compliance Diagnostic and Annual Certification," acknowledging that he was aware of the Firm's policies and procedures.[36] On that date, Clark falsely answered "yes" to the question: "Do you use only a single, authorized email address to communicate with customers regarding the firm's business."[37] The next year, on November 9, 2011, he signed another annual certification.[38] Again, Clark answered "yes" to the same question.[39] This response was also false.[40]

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[33] CX-8, at 4.

[34] Tr. (Clark) at 46.

[35] Tr. (Clark) at 45–46.

[36] CX-10, at 2, 4.

[37] CX-10, at 2, 4; Tr. (Clark) at 77–78 (admitting that the answer was false). *See also* Tr. (Hinkle) at 301 (testifying that he considered the response to be false).

[38] CX-10, at 7; Tr. (Clark) at 79–80.

[39] CX-10, at 5.

[40] Tr. (Hinkle) at 301 (testifying that he considered the response false). *See also* Tr. (Hinkle) at 353–54. At the hearing, Clark testified that this answer was truthful because by then he had stopped using his personal email. Tr. (Clark) at 80; Tr. (Clark) at 109 (testifying that he interpreted the question as pertaining to his practices "as of" the day he signed the certification). He acknowledged, however, that during the preceding 12 month period, he had communications with JN via his personal email account. Tr. (Clark) at 81. The Hearing Panel rejected Clark's overly narrow interpretation of the question. Arguably, the question could have been worded to encompass more clearly the entire year. (Compare, for example, a question that specifically asked about practices "in the past 12 months," CX-10, at 6, question 16, with CX-10 at 5, question 8). Nevertheless, the title of the document includes the words "Annual Certification" and the question could not, therefore, reasonably be interpreted as calling for a response limited to the exact moment when the registered representative signed the questionnaire. *See also* Tr. (Hinkle) at 299–300 (testifying that the certification does not just apply to the date signed but, rather, a 12-month period); Tr. (Hinkle) at 345 ("it is for the previous year that they are signing for").

Clark's awareness of proper email usage, and the importance of adhering to the Firm's procedures, was not limited to the knowledge he gained from the Firm's WSPs. Clark had extensive experience in the securities industry, including experience as a securities principal. As a result, he: (1) knew that he was not permitted to use a personal email account to communicate with customers of the Firm;[41] (2) understood that one of the purposes of the prohibition is to enable firms to properly monitor the content of emails sent or received by their registered representatives;[42] (3) understood that by not providing emails to the Firm he prevented it from properly supervising his activities;[43] and (4) knew that firms are required "by law" to retain all emails involving business-related communications for a period of at least three years.[44]

C. Clark's False Statements to His Firm Regarding His Communications with JN

On May 20, 2011, FINRA staff sent an information request to Hinkle pursuant to Rule 8210.[45] The request sought information regarding the complaint that JN filed with FINRA, including copies of all correspondence and email communications between Clark and JN. Between May 20, when Hinkle received the request, and June 2, when he responded to it, Hinkle gave a copy of the request to Clark[46] and spoke to him about the response Hinkle was preparing. Clark provided information to Hinkle in connection with the Firm's response[47] and knew, at the time, that Hinkle would use the information to respond to the FINRA information request.[48]

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[41] Tr. (Clark) at 30–31.

[42] Tr. (Clark) at 31.

[43] Tr. (Clark) at 31.

[44] Tr. (Clark) at 31–32.

[45] Compl. ¶ 24; Ans. ¶ 1; CX-5, at 1–2.

[46] Tr. (Hinkle) at 288.

[47] Tr. (Clark) at 85.

[48] Tr. (Clark) at 91.

During their pre-response discussions, Hinkle asked Clark if he and JN had any email communications using Clark's personal email address.[49] Clark responded that during the period when JN maintained an account at the Firm, he and JN had no such communications. Further, he told Hinkle that he had only one email communication with JN, that it had occurred after the account was closed, and that he had sent it via his BlackBerry[50] through his personal email account.[51] Clark also told Hinkle that before JN closed his account, JN had never questioned the amount of the commissions he was charged, and Clark had not had any conversations with him about such commissions.[52] At the hearing, Clark admitted that there were "discrepancies" in what he had told Hinkle "as to the facts,"[53] and that he had not been truthful with Hinkle,[54] but claimed that it was unintentional.[55]

Clark's responses to Hinkle were false in several respects. First, JN and Clark had communicated by email while JN maintained his account at the Firm. Those communications included the November 1, 2010 email in which JN complained that Clark had overcharged him and had engaged in the unauthorized use of margin.[56]

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[49] Tr. (Clark) at 89.

[50] Tr. (Hinkle) at 289–90. *See also* Tr. (Hinkle) at 361 (in preparing his responses to the FINRA Rule 8210 requests, Hinkle asked Clark if he had ever used his personal email to communicate with JN and Clark told Hinkle that only once did he communicate to JN via his personal email); Tr. (Clark) at 380; Tr. (Clark) at 89–90 (Clark responded that he thought that after JN closed his account, Clark had sent JN one email from his BlackBerry).

[51] Tr. (Hinkle) at 285–87, 290.

[52] Tr. (Hinkle) at 288. Clark did not contradict Hinkle's version of their conversation but, rather, testified that he did not recall whether he told Hinkle that JN only complained about commission charges after the account was closed. Tr. (Clark) at 91–93.

[53] Tr. (Clark) at 76.

[54] Tr. (Clark) at 90 (admitting that he had not responded truthfully to Hinkle).

[55] Tr. (Clark) at 76.

[56] CX-4, at 6–7.

Second, Clark received and responded to more than just one email after JN closed his account. In fact, JN and Clark exchanged at least 18 emails after JN closed his account.[57]

Finally, JN had questioned the commission charges in his account before the account was closed. The email communications before the account was closed reflect JN's concerns about the commissions he had been charged as well as trading on margin.[58] Those emails also reference earlier discussions they had on these subjects.[59]

D. Hinkle Responds to FINRA Requests with False Information Provided to Him by Clark

On June 1, 2011, Hinkle responded by letter ("June 1 letter") to the May 20, 2011 Rule 8210 request and attached a letter he had signed on behalf of the Firm ("June 1 Firm response").[60] Both the June 1 letter and attached June 1 Firm response communicated to FINRA the false information that Clark had given to Hinkle.[61]

On June 3, 2011, after Hinkle responded to the May 20, 2011 request, FINRA staff sent another Rule 8210 request to Hinkle.[62] Upon receiving the June 3 request, Hinkle spoke with

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[57] CX-4, at 4–21.

[58] CX-4, at 5–6.

[59] CX-4, at 5 (JN references telephone discussions regarding "adjustments in trading fees" occurring three weeks before October 20, 2010). JN sent this October 20, 2010 email to Clark after speaking with him about concerns regarding high commissions. Tr. (JN) at 206–08. This was the first email JN sent to Clark on this subject. Tr. (JN) at 207.

[60] CX-5, at 4–9. Hinkle also attached a letter signed by Clark ("May 26 letter"). CX-5, at 10–11.

[61] Among other things, the June 1 letter informed the FINRA staff that during the time JN had an account with the Firm, Clark and JN did not communicate by email, but that after JN closed his account, Clark recalled sending only one email, by BlackBerry, to JN, and that email was in response to an email JN had sent to him. CX-5, at 4. Hinkle's June 1 letter also stated that since joining the Firm, Clark had not received a customer complaint. CX-5, at 5. The June 1 Firm response stated that before JN closed his account, JN never questioned the amount of commissions he was charged and that JN and Clark had never had "any conversation about such commissions." CX-5, at 7, 9. Finally, Clark's May 26 letter communicated false information as well. The May 26 letter stated that JN only complained about commission charges after he had closed his account at the Firm. CX-5, at 10. Enforcement did not charge Clark with falsely responding to the May 20, 2011 Rule 8210 request.

[62] CX-6, at 1–2.

Clark.[63] He asked Clark, again, whether he and JN had any email communications while the account was open, whether any communications occurred via personal email, and whether JN had expressed complaints or had discussions about commissions while the account was open.[64] Once again, Clark told Hinkle that the answer to each of those questions was "no," except for the one email he said occurred after the account was closed.[65] On June 20, 2011, Hinkle responded to FINRA and included another letter signed by him ("June 16 letter").[66] Hinkle's June 16 letter contained the false information Clark had provided to him.[67]

Clark never disclosed to Hinkle the full extent of his email communications with JN. Shortly after Clark provided investigative testimony to the FINRA staff, he told Hinkle that there were more emails than he had first disclosed to him,[68] and that there might be approximately six or ten emails.[69] Hinkle only learned that JN and Clark had exchanged more than 20 emails when he read the Complaint filed in this disciplinary proceeding.[70]

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[63] Tr. (Hinkle) at 302.

[64] Tr. (Hinkle) at 302–03.

[65] Tr. (Hinkle) at 303.

[66] CX-6, at 4–5. Hinkle also enclosed another letter signed by Clark ("June 10 letter"). CX-6, at 6; Tr. (Clark) at 94–95.

[67] Hinkle's June 16 letter again stated that according to Clark, while the account was open, he and JN had not corresponded and that JN had not complained about the commissions he was charged. The letter further stated that the first written communication between them was not until February. Additionally, Clark's June 10 letter included a response to a specific request seeking "[t]he dates and times of all written and/or electronic correspondence sent to and/or received from [JN]." CX-6, at 6, Clark's June 10 letter responding to the May 20 8210 request, CX-6, at 1. Clark responded that he did not recall any other correspondence to JN in addition to what he had already provided. CX-6, at 6. Clark did not mention in his June 10 letter that he and JN had numerous email communications. At the hearing, Clark testified that "when I wrote this I didn't recollect any of those [emails]." Tr. (Clark), at 95–97, 102. Enforcement did not charge Clark with responding falsely to the June 3, 2011 FINRA Rule 8210 request.

[68] Tr. (Hinkle) at 292.

[69] Tr. (Hinkle) at 292.

[70] Tr. (Hinkle) at 291–92.

E. Clark Fails to Report JN's Complaint to His Firm, in Violation of Firm Procedures

Dynasty's WSPs required that registered representatives bring "[c]ustomer grievances, verbal or written, . . . to the immediate attention of a designated principal. Under no circumstances are registered representatives to answer or settle any complaint directly with clients."[71] The WSPs defined a "complaint" as "any written statement, by a client or any person acting on behalf of a client, which alleges a grievance against the firm or anyone in connection with the solicitation or execution of any securities transaction or the disposition of securities or the funds of that client."[72] Additionally, the WSPs required the Firm to "maintain a file containing all written complaints made by its customers . . . at its main office and other Offices of Supervisory Jurisdiction, as well as copies of all [Firm] responses to complaints."[73]

Based on his experience before joining Dynasty, Clark knew that he was required to report customer complaints to his member firm immediately.[74] Also, at the time he communicated with JN about JN's concerns regarding margin and commission overcharges, Clark was aware of the Firm's customer complaint reporting procedures.[75] Nevertheless, he failed to report JN's complaints to the Firm. Specifically, Clark never reported JN's complaint about the use of margin to Hinkle,[76] even though Clark was aware of JN's concerns by no later than October 20, 2010, when JN sent him an email complaining about margin and commission

[71] Compl. ¶ 34; Ans. ¶ 1; CX-7, at 13. CX-7, the written supervisory procedures, became effective in June 2011. Nevertheless, Clark understood that prior to June 2011, the Firm's procedures obligated him to report to the Firm any customer complaints or grievances. Tr. (Clark) at 114–15. *See also* Tr. (Hinkle) at 297 (testifying that the customer complaint provisions in CX-7, at 12–13, were in effect during both 2010 and 2011).

[72] CX-7, at 12–13.

[73] CX-7, at 12.

[74] Tr. (Clark) at 51, 55. That experience included two customer complaints and two customer arbitrations. One of the customer complaints led to one of the arbitrations. One of the arbitrations also included an allegation of unauthorized use of margin. CX-1; Tr. (Clark) at 52–55.

[75] Tr. (Clark) at 56; CX-7 at 12–13.

[76] Tr. (Clark) at 59–60.

overcharges.[77] Additionally, the email JN sent to Clark on November 1, 2010, at 9:05 a.m., was a customer complaint that Clark should have reported to the Firm, but did not report.[78]

Further, Clark understood that the January 18, 2011 email JN sent to him at 7:37 a.m.[79] reflected that JN was very upset with him.[80] At that point, because JN had accused him of being a thief, Clark viewed JN as having expressed a complaint against him.[81] Still, Clark did not report the January 18, 2011 email to Hinkle as a complaint. On that date, however, Clark reported to Hinkle that the previous night JN had left him (Clark) a threatening phone message.[82]

Clark also provided a false answer on the Firm's "Compliance Diagnostic and Annual Certification." On December 14, 2010, Clark falsely answered "no" to the question: "Have you in the past 12 months: Received any written complaints from customers or been the subject of any other grievances or actions requiring regulatory reporting."[83]

In sum, the emails between Clark and JN constituted a customer complaint that Clark should have reported to Hinkle.[84] Clark, however, never reported JN's complaint.[85] As a result,

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[77] Tr. (Clark) at 59–62; CX-4, at 5.

[78] CX-4, at 6–7; Tr. (Clark) at 64 (admitting he should have reported the November 1 email to the Firm). *See also* Tr. (Hinkle) at 354–55 (testifying that while not all of the emails constituted a customer complaint, Clark should have reported the November 1 email to Hinkle). Explaining why he did not report JN's concerns, Clark testified that he "didn't consider it a complaint . . . he was saying I overcharged him. I explained that I didn't and I figured we would talk about it." Tr. (Clark) at 57.

[79] CX-4, at 11.

[80] Tr. (Clark) at 66.

[81] Tr. (Clark) at 380.

[82] Tr. (Clark) at 66–67, 70; Tr. (Hinkle) at 340–41.

[83] CX-10, at 3; Tr. (Clark) at 79 (admitting that the answer was false). Enforcement did not charge Clark in connection with this false response. However, the Hearing Panel considered the response in connection with determining sanctions.

[84] Tr. (Hinkle) at 298–99.

[85] Tr. (Hinkle) at 299 (testifying that the emails constituted a customer complaint and that Clark never reported it to him). Although Clark did not report JN's complaint, there is some evidence that Clark and Hinkle had discussions in November and January about JN's concerns regarding commission overcharges. With respect to possible discussions in November, Clark's testimony was vague. Tr. (Clark) at 380–81 (testifying that when the account was closed in November, he "may or may not have brought up something about the commission fees because I didn't

Clark violated his Firm's WSPs by not reporting JN's complaint about commission overcharges and the use of margin in his account.

III. Conclusions of Law

A. Clark Violated FINRA Rule 2010 by Using His Personal Email Account to Communicate with a Customer (First Cause of Action)

NASD Rule 3010(d) includes several provisions regarding the supervision of incoming and outgoing correspondence. Among those provisions, Rule 3010(d)(2) requires firms to:

> develop written procedures . . . for the review of incoming and outgoing written (i.e., non-electronic) and electronic correspondence with the public relating to its investment banking or securities business to properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures.

Additionally, NASD Rule 3010(d)(3) requires firms to retain such correspondence, as does Rule 17a-4(b)(4) under the Securities Exchange Act of 1934 ("Exchange Act").

FINRA Rule 2010 is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade."[86] By using his personal email account to communicate with JN regarding Firm business, and by not providing the Firm with copies of that correspondence, Clark circumvented and violated the Firm's procedures. This activity was inconsistent with high standards of commercial honor and

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think it was pertinent."); Tr. (Clark) at 57–59 (testifying that in late November he telephoned Hinkle and spoke with him about JN. And, while he did not believe he used the word "complaint [during that call]. . . . I said that he said that I charged him too much in commissions."). For his part, Hinkle did not recall any conversations regarding JN between the time JN opened his account until January 2010. In January, JN telephoned Hinkle to complain that he had not been able to reach Clark, that his commissions had increased since he opened an account, and that his commission charges contravened an agreement he had with Clark. Tr. (Hinkle) at 332–34. Hinkle then spoke with Clark, telling him that he needed to resolve the matter with JN and, if he could not do so, he needed to notify Hinkle. Hinkle never heard anything more about JN until May 20, when he received FINRA's Rule 8210 request. Tr. (Hinkle) at 336–37. There is no evidence that Clark apprised Hinkle of the email exchanges or the severity of JN's accusations contained in them. Nor did he ever report back to Hinkle that JN's concerns remained unresolved. The Hearing Panel therefore finds that whatever Clark may have said to Hinkle in November and January, or thereafter, about JN's concerns regarding commission charges, his disclosure was incomplete, at best, and likely came at Hinkle's prompting.

[86] *Dep't of Enforcement v. Zaragoza*, No. E8A2002109804, 2008 FINRA Discip. LEXIS 28, at *27 n.21 (NAC Aug. 20, 1998) (quoting *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (citation omitted)).

just and equitable principles of trade and therefore violated Rule 2010.[87] Also, by communicating with JN through his personal email account, Clark prevented the Firm from discharging its obligations under NASD Rule 3010(d) and the Exchange Act. Causing a firm to violate its record-keeping obligations is a violation of FINRA Rule 2010.[88] Accordingly, Clark violated FINRA Rule 2010.[89]

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[87] *See Zaragoza*, 2008 FINRA Discip. LEXIS 28, at *25–27 (affirming Hearing Panel's finding that respondent's "failure to submit at least 10 pieces of email correspondence to his [f]irm for review and approval is activity inconsistent with high standards of commercial honor and just and equitable principles of trade, which is a violation of Rule 2110") (Effective December 15, 2008, FINRA Rule 2010 superseded NASD Rule 2110. The language of the rule remains unchanged. *See* SR-FINRA-2008-028, Exchange Act Rel. No. 58643, 2008 SEC LEXIS 2279 (Sept. 25, 2008)). *Cf. Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13–14 (NAC Apr. 23, 2010) (holding that Skiba's failure to submit accurate and complete information on a variable annuity application and structuring variable annuity transactions so that they would not appear to be replacements, in circumvention of the Firm's variable annuity procedures, violated NASD Rule 2110); *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *65–66 (NAC Oct. 1, 2013) (affirming finding that Pierce falsified firm records and failed to follow firm procedures with respect to seven customers' annuity transactions and that he actively concealed from his firm seven annuity switches, in violation of NASD Rules 2110 and 3110); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8 (NAC May 7, 2003) (noting that respondent violated his firm's policy against borrowing from customers and tried to conceal his violation by misrepresenting to his firm that he had not borrowed from customers, in violation of the ethical standard under NASD Rule 2110).

[88] *See James S. Pritula*, 53 S.E.C. 968, 976–77 (1998) (financial and operations principal's failure to maintain accurate trial balances and firm books and records caused firm's net capital and recordkeeping violations, in violation of NASD Rule 2110). *See also Dep't of Enforcement v. Taylor*, No. 20070094468, 2011 FINRA Discip. LEXIS 17, at *15 (NAC Aug. 5, 2011) (Associated persons who cause their firms to violate an SEC rule "can be held liable under NASD Rule 2110."); *Robert Tretiak*, Exchange Act Rel. No. 47534, 2003 SEC LEXIS 653, at *32 (Mar. 19, 2003) (affirming finding that respondent violated Rule 2110 by causing a violation of an SEC rule); *Dep't of Enforcement v. Respondent*, No. C01040001, 2005 NASD Discip. LEXIS 47, at *19 (NAC Sept. 6, 2005) ("As the person responsible for the Respondent Firm's violations, the Respondent violated NASD Conduct Rule 2110"); *Robert Tretiak*, 2003 SEC LEXIS 653, at *32 (affirming finding that respondent violated Rule 2110 by causing a violation of an SEC rule).

[89] The First Cause of Action also alleged that Clark falsely certified on the December 14, 2010 questionnaire that he used a single, authorized email. Compl. ¶ 21. However, the Hearing Panel does not find that Clark violated Rule 2010 by virtue of this false response (or the November 9, 2011 false response to the same question). The title of the First Cause of Action —"Use of Personal Email Account"—does not reference the December 14 certification and thus it is unclear whether Enforcement intended to charge Respondent with violating Rule 2010 by virtue of that false response. Nevertheless, making false statements to a firm violates Rule 2010. *See Dep't of Enforcement v. Hardin*, No. E072004072501, 2007 NASD Discip. LEXIS 24, at *10–11 (NAC July 27, 2007) ("[T]he SEC has consistently construed [the predecessor to Rule 2010] broadly to apply to all business-related misconduct, including misrepresentations made to a member firm by a registered representative.") (citing *James A. Goetz*, 53 S.E.C. 472, 477–78 (1998)). *See also Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8–10 (NAC May 7, 2003); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *22–23 (Aug. 22, 2008) (finding that petitioner violated [the predecessor to Rule 2010] by submitting false information to his member firm because such conduct reflected negatively on his ability to comply with regulatory requirements fundamental to the securities industry). Therefore, the Hearing Panel considered the false questionnaire responses regarding email usage as aggravating circumstances in imposing sanctions. *See* pages 22–23.

B. Clark Violated FINRA Rule 2010 by Making False Statements to His Firm (Second Cause of Action)

Clark made false statements to Hinkle regarding his communications with JN, and false statements by an associated person to his member firm violate FINRA Rule 2010.[90] Accordingly, Clark violated FINRA Rule 2010. Additionally, Clark knew that Hinkle would use the information he provided to respond to FINRA's Rule 8210 requests. Providing false and misleading information to FINRA in the course of an investigation also violates FINRA Rule 2010.[91] Clark did not directly provide the false information to FINRA. But by providing false information to Hinkle, knowing that Hinkle would provide that information to FINRA, Clark nonetheless violated Rule 2010.[92]

C. Clark Violated FINRA Rule 2010 by Failing to Report a Customer Complaint to His Firm (Third Cause of Action)

The Complaint charges Clark with violating Rule 2010 by violating the Firm's procedures requiring that registered persons report customer grievances to a designated principal. A respondent violates Rule 2010 when he engages in misconduct that reflects on his ability to comply with regulatory requirements fundamental to the securities business and to fulfill his

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[90] *See* footnote 89.

[91] *Dep't of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *33 n.26 (NAC Oct. 10, 2007), *aff'd*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008) (finding a violation of NASD Rule 2110, the predecessor to FINRA Rule 2010).

[92] Although Enforcement did not charge Clark with violating Rule 8210, it is instructive that the NAC has held that "[i]n those instances when FINRA staff does not direct a request for information to a specific associated person, an individual may nevertheless violate NASD Rule 8210 when he is aware that the false information is being provided by the member firm to FINRA in response to a request for information issued pursuant to NASD Rule 8210." *Dep't of Enforcement v. Palmeri*, No. 2007010580702, 2013 FINRA Discip. LEXIS 2, at *12 n.6 (NAC Feb. 15, 2013) (citing *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, at *11 (Apr. 1, 2005)) ("Liability under [Rule 8210] may possibly extend to associated persons of a firm who are aware of an 8210 request directed to the firm and seek to falsify or impede the firm's response."), *aff'd*, 444 F.3d 1208 (10th Cir. 2006). Violating Rule 8210 also constitutes a violation of Rule 2010. *See CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009); *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *22 n.9 (NAC Feb. 25, 2014) ("A violation of FINRA rules, such as FINRA Rule 8210, 'constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of . . . [FINRA] Rule 2010.'").

obligations in handling other people's money.[93] Failing "to follow firm procedures, particularly those designed to protect customers," is conduct "not consistent with the high standards of commercial honor and just and equitable principle of trade required by FINRA Rule 2010."[94]

The Firm's procedures governing the reporting of customer grievances were important and designed to protect both the public and the Firm. At the hearing, Hinkle explained the importance of the Firm's complaint-reporting policy: "Customer complaints are issues that can lead to more serious problems, like arbitrations, regulatory issues. . . .[W]e need to look at whether [JN] is just complaining that he lost money or that there were violations of FINRA rules and regulations. We need to see those so we can properly investigate and respond."[95] Hinkle further explained that FINRA rules require firms to report complaints to FINRA. Thus, complaints can also raise potential FINRA reporting issues as well and the need to update a registered representative's Form U4.[96]

Moreover, Clark's failure to disclose JN's grievance reflected negatively on his ability to "abide by his firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public."[97] By failing to comply with his complaint-reporting

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[93] *Goetz*, 53 S.E.C. 477.

[94] *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 19, at *7 (NAC Jan. 11, 2013) (citing *Skiba*, 2010 FINRA Discip. LEXIS 6, at *13). *See also Thomas W. Heath*, 2009 SEC LEXIS 14, at 18 & n.21 ("we have looked to internal firm compliance policies to inform our determination of whether applicants' conduct, like Heath's, violated the professional standards of ethics covered by the J&E Rule") (citing *Dan Adlai Druz*, 52 S.E.C. 416, 425 (1995)) (finding that respondent violated the just and equitable principles of trade rule by settling customer complaints without notifying the legal department when such action violated firm policy), *aff'd*, 103 F.3d 112 (D.C. Cir. 1996) (Table) and *Thomas P. Garrity*, 48 S.E.C. 880, 884 (1987) (finding that failure to adhere to limits on trading of options under the firm's compliance policy violated just and equitable principles of trade).

[95] Tr. (Hinkle) at 295.

[96] Tr. (Hinkle) at 296. *See* FINRA Rule 4530 (superseding NASD Rule 3070).

[97] *Davenport*, 2003 NASD Discip. LEXIS 4, at *10 (respondent violated NASD Rule 2110 by "misrepresenting to his firm that he had not borrowed from customers in violation of the firm's policy."). *See also Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at *30 (NAC Feb. 24, 2011) (citing *Davenport*, 2003 NASD Discip. LEXIS 4, at *9–10 ("A registered representative's failure to disclose material information to his firm violates NASD Rule 2110, and calls into question the registered representative's 'ability to

obligations, Clark prevented the Firm from learning timely about JN's grievance and potential misconduct by Clark and promptly addressing JN's accusations. Finally, Clark undermined the Firm's compliance with its obligation to maintain all written customer complaints. This conduct was plainly unethical. Accordingly, Clark's violation of Firm procedures violated FINRA Rule 2010.

IV. Sanctions

As a threshold matter, in imposing sanctions in this case, the Hearing Panel considered the General Principles Applicable to All Sanctions Determinations ("General Principles"). Among those General Principles are the following: "Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry." Additionally, "[t]he overall purposes of FINRA's disciplinary process and FINRA's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public." The General Principles further state that "[t]oward this end, Adjudicators should design sanctions that are significant enough to prevent and discourage misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices."[98]

Finally, the General Principles direct a hearing panel to "consider a respondent's disciplinary history in determining sanctions," and, specifically, to "consider imposing more severe sanctions when a respondent's disciplinary history includes (a) past misconduct similar to

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comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public.'").

[98] *Sanction Guidelines* ("*Guidelines*"), General Principle No. 1, at 2.

that at issue; or (b) past misconduct that evidences disregard for regulatory requirements, investor protection or commercial integrity."[99]

Clark has a prior disciplinary history for conduct similar to that charged in this case. On November 15, 2011, Enforcement filed a complaint charging him with causing his prior firm to violate record keeping rules.[100] By Order dated September 10, 2012, FINRA accepted Clark's Offer of Settlement ("Offer") resolving that disciplinary action. Without admitting or denying the allegations, Clark agreed to a $5,000 fine and a two-month suspension from associating with any member firm in any capacity.[101] In the Offer, Clark consented to findings that, among other things, he used a personal email account for business-related communications with customers without his employing member firm's knowledge or approval and, as a result, circumvented supervisory review of those communications, causing his firm to fail to preserve required records.

During the investigation that led to that prior disciplinary proceeding, Clark gave an on-the-record interview to FINRA staff. At the interview,[102] and later during the hearing in this case,[103] Clark admitted to having used his personal email account to communicate with a

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

[100] CX-12, at 1–8 (alleging a violation of NASD Conduct Rules 3110 and 2110); Tr. (Ruszkowski) at 149. Clark never informed Hinkle of the investigation that led to the institution of the prior proceeding, including the fact that he had appeared for an on-the-record interview and had received a Rule 8210 request. Tr. (Clark) at 396–97. Hinkle only learned of that investigation when, in November 2011, FINRA filed its disciplinary action pertaining to that earlier misconduct. Tr. (Hinkle) at 307–09; 313–15.

[101] CX-12, at 14–21.

[102] During the on-the-record interview conducted on November 11, 2009, CX-14, in connection with Clark's prior disciplinary matter, FINRA staff questioned Clark about his email communications with a customer (not JN), Tr. (Clark) at 124; Tr. (Ruszkowski) at 150. Clark admitted to the staff that he had made a mistake by communicating with that customer through personal email. Tr. (Clark) at 74, 132; Tr. (Ruszkowski) at 150. By no later than his on-the-record testimony during that investigation, Clark understood that he was not permitted to use personal email for firm or business-related matters. Tr. (Clark) at 419. Ten months after FINRA staff questioned Clark at that on-the-record interview, he and JN began communicating through Clark's personal email account.

[103] At the hearing, Clark testified that during the period June 2007 through July 2008, he engaged in improper email communications with a customer (not JN) through his personal email account. Tr. (Clark) at 34, 71–74.

customer (not JN). Accordingly, the Hearing Panel considered Clark's prior disciplinary history, including his admission of prior similar wrongdoing as an aggravating factor in assessing sanctions.

A. Clark is Suspended for Three Months, in All Capacities, and Fined $6,000 for Violating FINRA Rule 2010—Using Personal Email Account to Communicate with a Customer (First Cause of Action)

FINRA has not established a sanction guideline for unapproved use of a personal email account for business-related communications. In the absence of a specific guideline, the Hearing Panel considered the Guidelines for recordkeeping violations[104] as well as the General Principles and the Principal Considerations in Determining Sanctions ("Principal Considerations").

The Guideline for recordkeeping violations recommends a fine of $1,000 to $10,000 and, in egregious cases, a fine of $10,000 to $100,000.[105] The Guideline also recommends that the Hearing Panel consider a suspension for up to 30 business days and a lengthier suspension of up to two years or a bar in egregious cases. Finally, the Guideline lists as a Principal Consideration the nature and materiality of the inaccurate or missing information.

Applying this Guideline, as well as the General Principles and the Principal Considerations, the Hearing Panel found the following six considerations especially relevant and aggravating. First, Clark engaged in numerous acts and a pattern of misconduct over an extended period of time.[106] Clark exchanged emails with JN in each of the five months from October 2010 until March 2011, totaling 23 emails, 12 of which Clark sent to JN. Also, given Clark's prior

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[104] *See Zaragoza*, 2008 FINRA Discip. LEXIS 28, at *31–32 (affirming application by the Hearing Panel of recordkeeping Guidelines for respondent's failure to submit to firm for review and approval email correspondence to customer using personal email account rather than firm account).

[105] *Guidelines*, at 29. This Guideline applies to violations of FINRA Rule 2010, NASD Rule 3110, SEC Rules 17a-3 and 17a-4, and MSRB Rules G-8 and G-15.

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

disciplinary history, his misconduct involving JN was not an isolated instance of using a personal email account to communicate with a firm customer.

Second, the subject of these emails was important, namely, JN's assertions that Clark had charged him excessive commissions and engaged in the unauthorized use of margin.

Third, Clark concealed from the Firm his use of personal email to communicate with JN,[107] thereby enabling him to evade Firm monitoring of his communications with a customer. He did not provide the Firm with copies of his communications and falsely represented on two Firm annual compliance questionnaires that he used only a single, Firm-authorized, email address. His "inaccurate Firm questionnaires prevented the Firm from monitoring [his] relationship with [JN]."[108] Furthermore, he responded falsely to questions asked by Hinkle in connection with the Firm's responses to two Rule 8210 requests issued by FINRA staff.

Fourth, Clark injured the Firm by preventing it from complying with its document retention procedures and the Exchange Act's provisions governing retention of correspondence.[109]

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[107] *Guidelines*, Principal Consideration No. 10 ("Whether the respondent attempted to conceal his or her misconduct or lull into inactivity, mislead, deceive or intimidate . . . the member firm with which he or she is/was associated"). By failing to provide the Firm with copies of his communications, by responding falsely to questionnaires, and by making misrepresentations to Hinkle, Clark concealed his violative conduct. With respect to the certifications, the evidence showed that Clark likely felt time pressure to complete and return them quickly to Hinkle. Tr. (Clark) at 105–08. Accordingly, Clark's false certifications appeared to the Hearing Panel as careless, i.e., negligent, rather than intentional acts of concealment. By contrast, given Clark's awareness of proper email usage, and the importance of adhering to the Firm's procedures (as discussed above at page 8), the Hearing Panel finds that Clark acted recklessly when he failed to send copies of the emails to the Firm. Likewise, and for the reasons discussed below at pages 24–25, Clark's misrepresentations to Hinkle, which had the effect of concealing his email communications with JN, were also reckless.

[108] *Mullins*, 2011 FINRA Discip. LEXIS 61, at *67. The Hearing Panel also took into account that the Order in Clark's prior disciplinary action made findings that he evaded firm procedures when completing a "Monthly Branch Report." He answered "no" to a question about whether he had used a firm-approved email vendor "for the purposes of conducting investment business." In filling out that report, "he did not indicate in any manner that he used or was using a personal email account held with or at an unapproved vendor to communicate with any customer, or authorized representative of a customer, about investment matters." CX-12, at 17–18.

[109] *See Guidelines*, Principal Consideration No. 11 ("With respect to other parties, including . . . the member firm with which an individual respondent is associated, . . . (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury").

Fifth, while Clark claimed that he had been merely careless in his email usage,[110] the Hearing Panel finds otherwise. He engaged in the email communications with JN while under FINRA investigation for using a personal email account to communicate with other customers.[111] Less than one year after providing an on-the-record interview to the staff in connection with that prior investigation, he engaged in the violative email communications with JN. As a result of that ongoing investigation, coupled with his industry experience and admitted awareness of his Firm's procedures governing email communications with customers, as well as his failure to take steps to stop JN from sending emails to his personal account, Clark's conduct was not merely negligent. Rather, it constituted "'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it.'"[112] Accordingly, Clark's misconduct was reckless, and this is an aggravating factor in assessing sanctions.[113]

Sixth, Clark signed false questionnaire responses certifying that he used a single, authorized email address to communicate with customers regarding the Firm's business. At the time Clark signed the December 14, 2010 certification, he and JN had exchanged approximately 12 emails through Clark's personal email account—the last one occurring less than one month

[110] Tr. (Clark) at 75 (testifying that he had been "careless twice," referring to using personal email to communicate with both JN and one of the customers identified in his prior disciplinary action).

[111] *Cf. Guidelines*, Principal Consideration No. 15 ("Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA . . . that the conduct violated FINRA rules or applicable securities laws or regulations").

[112] *Dep't of Enforcement v. CapWest Securities, Inc.*, No. 2007010158001, 2013 FINRA Discip. LEXIS 4, at *35 (NAC Feb. 25, 2013).

[113] *Guidelines*, Principal Consideration No. 13 ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence").

before Clark signed the certification. He also repeated the false response, one year later, on the November 9, 2011 certification. This conduct was unethical.[114]

The Hearing Panel also considered, but rejects, Clark's defenses and mitigation arguments. Clark argued that FINRA was aware of his email communications with JN at the time it brought the prior disciplinary proceeding against him and when it later accepted his Offer and settled that proceeding. As a result, Clark asserts that it was unfair for Enforcement not to have included in that prior action the allegations that form the basis for the present disciplinary action. This defense is meritless. Enforcement's decision not to include these charges in the earlier complaint did not excuse his misconduct or preclude Enforcement from including it later in another disciplinary action. "FINRA disciplinary proceedings are treated as an 'exercise of prosecutorial discretion,' and, as such, 'are given wide latitude.'"[115] Moreover, it is clear from the Order that the settlement of the prior disciplinary action encompassed only the allegations in that disciplinary complaint.[116]

Finally, Clark argued in mitigation that he did not initiate the communications with JN, but merely responded—at times quickly and with short emails—to the emails JN sent to him. The Hearing Panel accords this argument little weight for the following reason: at no time did Clark, when responding to JN's emails, ever instruct JN to communicate with him via his Firm email account. Instead, Clark continued to send JN emails through his personal email account. In so doing, Clark impliedly represented to JN that it was permissible for them to communicate through Clark's personal account, thereby encouraging JN to keep sending Clark emails to that account.

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[114] *See* footnote 89.

[115] *Dep't of Enforcement v. Croton*, No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *22 (NAC Dec. 17, 2010) (quoting *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993)).

[116] *See* CX-12, at 14.

Based on these considerations, the Hearing Panel finds that Clark's violations were serious, but not egregious.[117] To deter Clark from repeating this violative conduct, especially in view of his prior disciplinary history for similar conduct, and to deter others from engaging in similar violations, the Hearing Panel suspends Clark in all capacities for three months and fines him $6,000 for violating FINRA Rule 2010 by using his personal email account to communicate with a customer.

B. Clark is Suspended for Four Months, In All Capacities, and Fined $10,000 for Violating FINRA Rule 2010—False Statements (Second Cause of Action)

In determining sanctions for Clark's misrepresentations to his Firm regarding his use of a personal email account, the Hearing Panel consulted the Guidelines for misrepresentations or material omissions.[118] For intentional or reckless misrepresentations or omissions, the Guidelines recommend a fine of $10,000 to $100,000 and a suspension in any or all capacities or functions of ten business days to two years or, in egregious cases, consideration of a bar.

The Hearing Panel finds that Clark's misrepresentations to Hinkle were made recklessly. He made his first misrepresentations to Hinkle in May 2011, only two months after he and JN had stopped their five-month, 23-email, exchange. Moreover, JN's emails were acrimonious and accusatory, and included the assertion that Clark was a thief. One email threatened to refer the matter to a criminal prosecutor. Clark, however, claimed that he did not recall the emails with JN because he rarely used email as a means of communication in either his professional or private life.[119] But even if he did not recall them—and the Hearing Panel makes no finding on this

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[117] For example, the communications at issue in this case pertain to one customer and there was no evidence that Clark made it a practice to use personal email as his regular method of communicating with customers.

[118] *Guidelines*, at 88. This Guideline applies to misrepresentations by a registered representative to his member firm. *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *94 (NAC October 1, 2013).

[119] Clark claimed that email was a small part of his personal and business life, that he communicated with his clients by phone, and "I guess it got jumbled in the communications I was having with [JN] and the e-mail and the phone."

issue—his failure to remember them was inexcusable, given their number, nature, and proximity in time to his misrepresentations.

The Hearing Panel considered additional factors as well. First, the subject of the misrepresentations was important. It related to Clark's use of a personal email account to carry on numerous exchanges with a customer relating to a grievance, contravening the Firm's policy and procedures.

Second, the context in which Clark made his misrepresentations was an aggravating factor. Clark knew that Hinkle would use the information he provided when drafting the Firm's responses to Rule 8210 requests (and, indeed, Hinkle incorporated the false information into the Firm's responses). Nevertheless, Clark responded falsely to Hinkle in connection with two Rule 8210 requests, several weeks apart, and appears to have taken no steps to ensure the accuracy of the information he provided.[120] These false responses had the effect of concealing from FINRA staff the true circumstances regarding Clark's communications with JN.[121]

Finally, these misrepresentations concealed from the Firm that Clark had violated Firm procedures regarding record retention and the reporting of customer complaints. The misrepresentations concealed, as well, that his conduct had prevented the Firm from complying

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Tr. (Clark) at 384. *See also* Tr. (Clark) at 405 (testifying that email is a small part of his business and "very rarely used it for it to be [a] significant part of my personal life or business"); Tr. (Clark) at 373–74 (testifying that he communicated with all his clients by telephone and not by email); Tr. (Hinkle) at 293 (testifying that Clark told him that he did not disclose the emails earlier because he did not remember them). During the investigation, Clark produced to the staff a lengthy list of customers' email addresses from the AOL account (CX-11, at 21–81). However, the record does not reflect email communications between Clark and other customers from that account.

[120] For example, there is no evidence that before he falsely responded to Hinkle's questions in connection with the initial Rule 8210 request Clark ever checked his records, or that he re-considered the accuracy of his responses afterward. Indeed, when Hinkle questioned Clark in connection with the second Rule 8210 request, Clark did not correct his earlier misrepresentations. Instead, he reiterated them.

[121] *Guidelines*, Principal Consideration No. 12 ("Whether the respondent . . . attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA").

with its recordkeeping obligations (under its own procedures and under the Exchange Act).[122] Based on these considerations, the Hearing Panel finds Clark's violation to be serious. The majority of the Hearing Panel suspends Clark for four months, in all capacities, and fines him $10,000 for violating FINRA Rule 2010 by making false statements to the Firm.[123]

C. Clark is Suspended for Two Months, in All Capacities, and Fined $4,000 for Violating FINRA Rule 2010—Failing to Report Customer Complaint (Third Cause of Action)

The Guidelines do not contain a specific guideline for failing to report a customer complaint to a firm. Because this violation involves the failure to disclose a fact to the Firm that Clark had a duty to disclose, the Hearing Panel looked to the misrepresentations and omissions guideline for guidance, as well as to the General and Principal Considerations.

First and foremost, JN's complaint was serious: he alleged commission overcharges and the unauthorized use of margin. Yet, despite emails from JN accusing him of wrongdoing, Clark did not report them to Hinkle. Additionally, based on the seriousness of JN's complaints, coupled with Clark's history of prior customer complaints and his admitted awareness of his complaint-reporting obligations, the Hearing Panel concludes that Clark's failure to report JN's complaint was reckless.[124]

The Hearing Panel also considered the importance of the Firm's complaint-reporting procedures and the impact on the Firm of Clark's failure to report JN's complaint. As discussed above, customer complaints can have serious ramifications for a firm. They can lead to the

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[122] *Guidelines*, Principal Consideration No. 11, *see also* footnote 109 above.

[123] The Hearing Officer dissents with respect to the length of the suspension. Given the seriousness of the misconduct, the Hearing Officer would impose a suspension of seven months.

[124] As discussed above on page 13, while Clark did not report JN's emails to the Firm, he did tell Hinkle about the threatening call he received from JN. Thus, the evidence did not establish that Clark sought to conceal JN's complaint because had he sought to do so, it is unlikely that he would have brought the threat to Hinkle's attention. Additionally, there was some evidence that Clark and Hinkle had discussions in November and January about JN's concerns regarding commission overcharges. *See* footnote 85, above. The Hearing Panel took these circumstances into account in assessing sanctions.

institution of legal or arbitration proceedings and can trigger regulatory reporting obligations. By failing to report JN's complaint, Clark impeded the Firm's ability to address promptly JN's concerns and to timely evaluate the effect, if any, of the complaint on the Firm's regulatory reporting duties.

Finally, the Hearing Panel considered Clark's false questionnaire response on December 14, 2010, that he had not received any written complaints or grievances.[125]

Taking all of these considerations into account, the Hearing Panel suspends Clark for two months, in all capacities, and fines him $4,000 for violating FINRA Rule 2010 by failing to report a customer complaint to the Firm.

D. Clark is Suspended for Three Months in All Supervisory Capacities and Ordered to Requalify by Examination as a General Securities Representative and General Securities Principal

The charges in this case arose from Clark's email communications with JN. While the causes of action are interrelated, Clark made his misrepresentations to the Firm two months after the email communications ceased, and the failure to report a customer complaint is a distinctly different violation than communicating with a customer through a personal email account. Therefore, the Hearing Panel concludes that it was appropriate to impose a separate sanction for each cause of action.[126]

Nevertheless, the Hearing Panel discerned a troubling common thread running through these violations. Clark's conduct demonstrated a lack of appreciation of certain fundamental

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[125] *See* page 13.

[126] *See Dep't of Enforcement v. Smith*, No. 2011029152401, 2014 FINRA Discip. LEXIS 2, at *17 (NAC Feb. 21, 2014) (reversing hearing panel's imposition of unitary sanction for conversion and subsequent misrepresentations and omissions where there was a "temporal gap" between the conversion and the other violative conduct). *But see Dep't of Enforcement v. Fox & Co. Invs., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NAC Feb. 24, 2005) (stating that "[w]here multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve [FINRA's] remedial goals") (citation omitted), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005). Here, the violations arose from emails, but not from "a single underlying problem."

obligations imposed on registered representatives, namely, obligations relating to email communications with a customer, customer complaint reporting, record retention, and providing accurate information to a firm for use in responding to a Rule 8210 request.

Worse, Clark's failure to report timely and accurately about his dealings with JN, and his false responses on Firm questionnaires, reflect a general lack of candor in dealing with his member firm. This conduct "reflects directly on [his] ability to abide by [his] firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public."[127]

Both the Securities and Exchange Commission[128] and the National Adjudicatory Council[129] have stressed the need for supervisors to act decisively and vigilantly to detect and prevent violations of the securities laws when indications of irregularity are brought to their attention." At the time of his misconduct, Clark had been a general securities principal for over ten years and had previously exercised supervisory responsibility at the Firm (and elsewhere). Although Clark was not charged in this case with a supervisory failure, the majority of the Hearing Panel concludes that his misconduct reflects negatively upon his ability to react vigorously, as a supervisor, to indications of irregularity. Accordingly, the Hearing Panel majority finds that he is unfit to exercise supervisory responsibility immediately upon re-association with a member firm. Therefore, to impress upon the Clark and others similarly situated the importance of supervisory responsibility, the Hearing Panel majority concludes that he should first be subject to supervision as a registered representative for a period of time before

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[127] *Mullins*, 2011 FINRA Discip. LEXIS 61, at *67 (quoting *Davenport,* 2003 NASD Discip. LEXIS 4, at *10).

[128] *George J. Kolar*, Exchange Act Rel. 46127, 2002 SEC LEXIS 1647, at *11 (June 26, 2002); *Quest Capital Strategies, Inc.*, Exchange Act Rel. No. 44935, 2001 SEC LEXIS 2147, at *13–14 (Oct. 15, 2001).

[129] *Dep't of Enforcement v. Midas Securities*, No. 2005000075703, 2011 FINRA Discip. LEXIS 62, at *23 n.19 (NAC Mar. 3, 2011).

again being in a position to supervise others. Hence, the majority of the Hearing Panel concludes[130] that Clark should be suspended for an additional three months in all supervisory capacities following the termination of his all-capacities suspensions.[131]

Finally, the Guidelines suggest that adjudicators order a respondent to requalify where his "actions have demonstrated a lack of familiarity with the rules and laws governing the securities industry."[132] By his actions, Clark has demonstrated that he does not appreciate fully the importance of the rules and laws governing the securities industry, and therefore "would benefit from focusing" on them.[133] Accordingly, based on his repeated flouting of FINRA Rules, the Hearing Panel requires Clark to requalify by examination as a general securities representative[134] and the majority of the Hearing Panel requires that he requalify by examination as a general securities principal before again acting in capacities requiring those qualifications.[135]

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[130] The Hearing Officer dissents from the majority's imposition of a supervisory suspension. Clark was neither charged with a supervisory violation, nor did he engage in the violative conduct while acting as a supervisor. Indeed, at the time of the misconduct, Clark was not exercising any supervisory responsibilities. The Hearing Officer concludes that suspending Clark in all capacities is appropriately remedial in this case (although, as discussed in footnote 123, the Hearing Officer would impose a longer suspension for Clark's false statements). Accordingly, the Hearing Officer would not impose an additional supervisory suspension.

[131] *Cf. Dep't of Enforcement v. Bullock*, No. 2005003437102, 2009 FINRA Discip. LEXIS 18, at *52–53 (OHO Apr. 17, 2009) (imposing a consecutive all principal capacities suspension following an all capacities suspension and ordering the respondent to requalify as a principal because he "demonstrated a lack of appreciation for the importance of knowledge of FINRA's rules, as well as a lack of familiarity with applicable rules. Until Respondent demonstrates a greater familiarity with applicable rules, he should not function as a principal."), *modified*, 2011 FINRA Discip. LEXIS 14 (NAC May 6, 2011).

[132] *Guidelines*, at 5 (General Principle No. 7). *See also Leonard John Ialeggio*, 53 S.E.C. 601, 604 (1998) (affirming requalification requirement as a "reasoned means of reeducating [respondent] about his regulatory responsibilities to both his customers and his employer.").

[133] *Dep't of Enforcement v. Cuozzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at *30 (NAC Feb. 27, 2007) (adding requirement that respondent requalify by examination as a general securities representative before re-entering the industry).

[134] *Dep't of Enforcement v. Ng*, No. 2009019369302, 2013 FINRA Discip. LEXIS 6, at *30 n.22 (NAC Apr. 24, 2013) (explaining that "[h]ad we not suspended Ng for two years, a period of time that will require him to requalify as a general securities representative, we would have ordered requalification nonetheless based on his repeated flouting of FINRA Rules").

[135] For the reasons set forth in footnote 130, the Hearing Officer also dissents from the majority's imposition of a requirement that Clark requalify by examination as a general securities principal before again acting in capacities requiring that qualification.

V. Order

Clark is: (1) suspended for three months, in all capacities, and fined $6,000 for violating FINRA Rule 2010 by using his personal email account to communicate with a customer; (2) suspended for four months, in all capacities, and fined $10,000 for violating FINRA Rule 2010 by making false statements to his Firm; and (3) suspended for two months, in all capacities and fined $4,000 for violating FINRA Rule 2010 by failing to report a customer complaint to his Firm. These suspensions shall run consecutively.

Clark is suspended for an additional three months in all supervisory capacities, and ordered to requalify by examination as a general securities representative and general securities principal before again acting in those capacities. This suspension shall run consecutively, following the termination of his all capacities suspensions.

If this decision becomes FINRA's final disciplinary action, the suspensions in all capacities shall become effective with the opening of business on October 6, 2014, and end on July 5, 2015. The supervisory suspension shall become effective with the opening of business on July 6, 2015, and end at the close of business on October 5, 2015.

Finally, Clark is ordered to pay the costs of the hearing in the amount of $ 4,397.87, which includes a $750 administrative fee and the cost of the hearing transcript. The fines and

assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[136]

David R. Sonnenberg
Hearing Officer
For the Hearing Panel[137]

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

[137] With respect to those sanctions with which the Hearing Officer dissents, the Hearing Officer has signed this Hearing Panel Decision on behalf of the Hearing Panel majority.