BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Keilen Dimone Wiley Houston, TX, Respondent.	DECISION Complaint No. 2011028061001 Dated: February 27, 2015

Respondent converted customer insurance premium payments, and provided false on-the-record testimony to FINRA. Held, findings and sanction affirmed.

Appearances

For the Complainant: Carolyn J. Craig, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Dawn R. Meade, Esq.

Decision

Keilen Dimone Wiley was an insurance agent with Farmers Insurance Group ("Farmers Insurance" or "Farmers") and also registered with Farmers' affiliated broker-dealer, Farmers Financial Solutions, LLC ("Farmers Financial"), for almost 10 years. In March 2011, Wiley collected insurance premium payments from Farmers customers, and instead of remitting the payments to Farmers, he deposited them into his business bank account and used the money to pay personal and business expenses. Wiley was advised by his manager that an internal auditor would be visiting his offices to discuss the payments that he possessed for several weeks. Immediately before his meeting with internal audit, Wiley made a series of deposits into Farmers' bank account. On April 29, 2014, the Hearing Panel majority[1] found that, from March 2011 through April 2011, Wiley converted the insurance premium payments he received from 54

[1] One Panelist dissented from the Hearing Panel majority's findings of violation and sanction. The dissent found that Wiley did not commit conversion. The Hearing Panel majority will be referred to herein as the Hearing Panel.

customers in violation of FINRA rules. Wiley argues that he did not commit conversion because he had the right to determine how to best carry out his business practices and conversion, as the term is defined under Texas state law, requires the perpetrator to refuse to return funds to their rightful owner. We disagree. Wiley committed conversion in violation of FINRA rules when he collected insurance premiums, used them for personal and business expenses, and was not authorized to do so. He also violated FINRA Rules 8210 and 2010 by providing false on-the-record testimony to FINRA.[2] Accordingly, we affirm the Hearing Panel's findings of violation and the sanction of a bar from membership in all capacities it imposed.

I. Background

From April 2002 to June 2011, Wiley was a Farmers insurance agent and also associated with a FINRA member firm, Farmers Financial, as an investment company and variable contracts products representative. On June 7, 2011, Farmers Financial filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reporting its termination of Wiley's registration, which precipitated an investigation by FINRA's Department of Enforcement ("Enforcement"). Wiley is currently not associated with a FINRA member firm.

II. Procedural History

Enforcement filed a two-cause complaint on February 13, 2013. The first cause alleged that Wiley converted customer insurance premium payments for his own use in violation of FINRA Rule 2010. The second cause alleged that Wiley provided false and misleading testimony to FINRA when he denied using the customer payments for personal and business expenses in violation of FINRA Rules 8210 and 2010. After a one-day hearing in Dallas, Texas, the Hearing Panel rendered a decision making the findings and imposing the sanction as described above. This appeal followed.

III. Facts

Farmers Insurance has approximately 14,000 insurance agents that, like Wiley, serve as independent contractors. Since July 1, 2002, Wiley agreed to sell the classes and lines of insurance products underwritten by Farmers Insurance "in accordance with their published rules and manuals." He sold Farmers insurance products under the "doing business as" or "d/b/a" designation of Wiley Insurance Agency and Associates ("WIA & Associates"). To facilitate his business, Wiley had two WIA & Associates accounts at JP Morgan Chase Bank, N.A.—one account that he used for business and personal expenditures, and a merchant banking account that he used primarily to accommodate customers that elected to pay their insurance premiums with a credit card. Wiley also had a $15,000 business line of credit with Bank of America, N.A. in the name of "Wiley Insurance Agency" with an available cash balance of $7,958.13 as of May 7, 2011. During the relevant period, Wiley solely made payments to, but did not withdraw from, his business line of credit.

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

A. Farmers Procedures for Handling Customer Funds

Farmers Insurance established an internal process for its agents to accept and deposit customer payments for their insurance premiums. Per the Agent's Credit Advice or "ACA" Co/Banking User Guide and Fastpath Manual ("ACA Manual"), Farmers agents were required to use the ACA system to report and process the receipt of customer insurance premium payments. The ACA Manual provided step-by-step instructions on the use of the ACA system. It directed Farmers agents to include specific details regarding each payment they received, such as the customer's name, policy identification number, and whether the customer paid the agent by cash, check, credit card or a multiple of these. Once the customer's payment was reported in the ACA system, that customer's insurance premium was deemed "credited" and Farmers would issue a receipt of coverage to the policyholder.

The ACA Manual also instructed Farmers agents to deposit the insurance premium payment into the Farmers "co-banking" account within one business day of receipt.[3]

Both the Farmers ACA Manual and the Farmers Agency Operations Guide addressed the importance of agents making timely deposits. For example, the "ACA-Life Helpful Hints" section of the ACA Manual stated: "The deposit of the collected checks must be made within 24 hours of receipt." Similarly, the Agency Operations Guide stated: "It is each agent's responsibility to remit cash in a timely and accurate manner." It then directed its agents to: "Deposit all cash collections, which balance to the ACA, within one business day after the ACA is closed." The ACA Manual also addressed the commingling of customer funds and stated that it was an unacceptable business practice. It warned its agents that it was "prohibited by law in most states" to collect cash payments from customers, and in lieu of rendering the collected payments directly to Farmers, to pay Farmers with funds from the agent's own personal or business account. The Manual further warned that the practice of commingling funds could trigger internal audits and "lead to disciplinary action, up to and including termination of the agency agreement."

B. Wiley's Use of Customer Funds

From March 11, 2011, through May 5, 2011, Wiley collected $7,703 in Farmers insurance premium payments from customers in the form of cash and checks. Wiley reported the receipt of the payments in the ACA system in accordance with Farmers' procedures, but failed to deposit $6,532.70 of payments collected from 54 different customers into the Farmers co-

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[3] Farmers Insurance had established "co-banking" accounts held at various banks throughout the U.S. for the sole purpose of having its agents make deposits of customer insurance premiums that were collected. Farmers insurance agents were able to make deposits into the co-banking account only; no withdrawals were permitted. The customer's payment was then reconciled with a corresponding report in the ACA system. In the present case, Wiley used the Farmers co-banking account held at Bank of America, N.A.

banking account by the end of the next business day. Instead, Wiley deposited the customers' payments into his WIA & Associates bank account, used the money for personal and business expenses, and continued to do so for several weeks.

During the relevant period, Farmers sent Wiley several notices alerting him of the missing deposits in the co-banking account, all of which he ignored.[4] A Farmers internal audit was triggered by the amount of missing deposits and length of time that had passed. In late April or early May 2011, Daniel Edmonds, a Farmers senior audit consultant, commenced an internal investigation. Edmonds first performed a desk audit where he reviewed the previous eight weeks of ACA receipts, deposits, and reports to confirm the significance of the deposit delays. Wiley's performance manager, Doug Kemery, contacted Wiley to inform him that he was going to visit Wiley's office to discuss the audit and advised Wiley to make sure that he made all deposits into the co-banking account.

On May 11, 2011, Edmonds, accompanied by Kemery, interviewed Wiley at his office to address the payment deficiencies. Just before the office visit, Wiley made lump sum deposits into the co-banking account from his business account: on May 2, 2011, he deposited a WIA & Associates check in the amount of $1,690.64; on May 6, 2011, he deposited another WIA & Associates check for $1,954.52; and on May 9, 2011, he deposited $2,250.94 in cash. On the day of the audit interview, Wiley handed to Edmonds the remaining outstanding balance of $637.70 in the form of cash and money orders to cover the missing deposits.

C. Farmers Internal Audit Interview

During his interview with Edmonds and Kemery, Wiley admitted that he made it a practice of depositing customer payments he received for insurance premiums into his WIA & Associates account instead of the Farmers co-banking account. He also admitted that he would then use the funds to pay for personal and business expenses. At the conclusion of the interview, Edmonds drafted a written statement in Wiley's presence using the notes he took down during the interview to reflect their discussion. Edmonds gave the written statement to Wiley, asked him to review it, and to make any changes that he felt were necessary. Wiley reviewed the written statement and signed the statement with no changes made to it.

Of most significance, Wiley admitted to his use of the customer payments, stating:

> I made it a practice of depositing cash collections into my business account WIA and Associates . . . and then writing a check to Farmers. . . . As time went on, I needed funds for the WIA and Associates bank account and delayed depositing the insureds' cash collections to the company cobanking account by a month or more.

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[4] Wiley testified that he received "Credit Shortage Advice" notifications from Farmers on approximately the 10th and 15th day of each month following his failure to deposit the customer payments into the co-banking account. Among other things, the notices instructed Wiley to "Please deposit promptly."

> . . . While customer collections did end up being used to pay for my personal and business expenses, this was not my intent.

The next business day, Wiley sent a follow-up statement via email to Kemery to further explain his actions. Depicting the situation as an "ACA deposit delay problem," Wiley referred to an array of financial problems he faced that attributed to his delay in depositing the customer payments, including: a bitter divorce, foreclosing on his home, staffing problems, his poor credit, and negative balances in his bank accounts. Wiley then admitted again that he "started using customer payment[s] and repaying Farmers later . . . ." He explained, "I [knew] that would be walking a fine line. It was a risk I was willing to take. Why? Because I had to keep the business going."

D. Wiley's False Testimony to FINRA

On May 10, 2012, almost a year after admitting, in two written statements, to using the customer payments for business and personal expenses, Wiley provided sworn on-the-record testimony before FINRA's Enforcement staff. During his on-the-record interview, he was reminded by the staff that he must answer questions asked of him "fully, accurately, and truthfully." When asked by the staff whether he used customer funds for his own personal and business expenses, Wiley recanted his earlier admissions and answered, "No." He then testified that he had disagreed with the written statement that was drafted by Edmonds. He explained that his previous admissions regarding his use of customer payments were misinterpreted because, in looking at all of his accounts, "the money was always there from the customers' payments that we collected."

IV. Discussion

Based on our independent review of the record and the briefs submitted on appeal, we affirm the Hearing Panel's findings of violation and the sanction it imposed. We first address the Panel's substantive findings of conversion and false testimony. We then address the jurisdiction and procedural arguments that Wiley raised on appeal.

A. Wiley Converted Customer Insurance Premium Payments

The FINRA Sanction Guidelines ("Guidelines") define conversion as the "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."[5] 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." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *42 (Feb. 10, 2012) (quoting *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976)); *Dep't of Enforcement v. Smith*, Complaint No. 2011029152401, 2014 FINRA Discip.

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[5] *See FINRA Sanction Guidelines* 36 & n. 2 (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter "*Guidelines*"].

LEXIS 2, at *12-13 (FINRA NAC Feb. 21, 2014) (citation omitted). The act of conversion violates FINRA Rule 2010 because it "indicates a troubling disregard for basic principles of ethics and honesty." *See Dep't of Enforcement v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *23 (FINRA Bd. of Governors May 9, 2014) (finding that respondent committed conversion in violation of FINRA Rule 2010), *appeal docketed*, SEC Admin. Proceeding No. 3-15916 (June 9, 2014).

We affirm the Hearing Panel's finding that Wiley converted customer insurance premium payments in violation of FINRA Rule 2010. The record sufficiently reflects that, during the relevant period, Wiley accepted money from 54 Farmers customers for the payment of their insurance premiums, and instead of forwarding the payments to Farmers to be applied to their policies, he intentionally deposited the payments into his WIA & Associates account for personal and business use. We agree with the Hearing Panel's finding that Wiley was neither entitled, nor authorized, to hold or use the customers' payments at his discretion. At best, his possession of the customers' payments was transitory, and he was obligated to relinquish any payments he received to Farmers by promptly depositing them into the co-banking account. Wiley failed to do so.

The Hearing Panel did not find credible Wiley's assertion that his practice of depositing customer funds into his WIA & Associates bank account was routine and customary – something he had done for many years. According to Wiley, it was at his discretion to make deposits into the Farmers co-banking account and that his collection of the payments created a debt he then owed to Farmers. We find no evidence in the record to support this claim and have no reason to challenge the Hearing Panel's credibility determination. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *53 (Dec. 10, 2009) (noting that the credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor and that such a determination can only be overcome where the record reflects substantial evidence for doing so). To the contrary, Wiley testified himself that Farmers expected to receive the payments once they were reported in the ACA system, and it was his obligation to remit the payments to Farmers because it was the company providing the insurance coverage.[6]

We also reject Wiley's argument that, as an independent contractor, he was not required to adhere to the payment instructions set forth in his Agent Appointment Agreement or Farmers' published rules and manuals, all of which required the "prompt" depositing of payments that were due to Farmers. The Farmers rules and manuals, which applied to all of its independent agents, indicated that Wiley did not possess exclusive rights to the premium payments. The

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[6] Wiley's testimony regarding Farmers' expectation to receive the customers' payments is further corroborated by the details provided in the daily ACA Closed Summary report. For each payment collected, Farmers agents logged in the ACA System the customer's name, identification number, account/policy type, and method of payment (i.e., whether by cash, check or credit card). This level of detail required for each payment he collected directly contradicts Wiley's contention that the use of the customers' payments was fully at his disposal.

ACA Manual prohibited outright the commingling of customer funds. It also instructed agents: "No matter what kind of schedule is set up in your office, any agent submitting an ACA must deposit all checks and cash reported under his or her ACA within one business day . . . ." Based on this evidence, Wiley should have known that his use of the premium payments for his own purposes was wrong, notwithstanding his independent contractor status.[7]

The record reflects that Wiley used the customer payments that were intended to pay for Farmers insurance premiums for business and personal reasons. His actions were intentional and unauthorized. *Mullins*, 2012 SEC LEXIS 464, at *40-41 (finding that respondent did not act with permission when he intentionally converted funds belonging to another); *Smith*, 2014 FINRA Discip. LEXIS 2, at *13-14 (finding that respondent's exercise of ownership over customer funds for business purposes was intentional and unauthorized). Accordingly, we find that Wiley converted customer insurance premium payments in violation of FINRA Rule 2010.

B. Wiley Provided False and Misleading Testimony to FINRA

We also affirm the Hearing Panel's finding that Wiley provided false and misleading testimony to FINRA during its investigation in violation of FINRA Rules 8210 and 2010. FINRA Rule 8210, among other things, requires associated persons to testify under oath with respect to any matter involved in an investigation or proceeding.[8] A person associated with a member who provides false or misleading information to FINRA during the course of an investigation violates FINRA Rule 8210. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008) (holding that false or misleading information to FINRA is conduct inconsistent with just and equitable principles of trade and therefore violates FINRA Rule 2010).

On May 10, 2012, almost one year after his termination, Wiley testified under oath before Enforcement staff during an on-the-record interview regarding his alleged misconduct. Despite

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[7] We further note that Wiley's independent contractor status was simply a business choice of operation. It does not shield him from his obligations as an associated person under FINRA rules to handle customer funds with propriety. *See* FINRA Rule 0140(a) (providing that FINRA rules "shall apply to all members and persons associated with a member" and that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules"); *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 SEC LEXIS 2216, at *30 (July 2, 2010) (noting that the SEC has long held the view "that the designation of an independent contractor has no relevance for purposes of the securities laws" (internal quotation marks omitted)).

[8] *See* FINRA Rule 8210(a) ("FINRA staff shall have the right to . . . require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally . . . and to testify at a location specified by FINRA staff, under oath or affirmation . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding . . . .").

his written admissions to his firm that he used the premium payments for his own purposes, when asked during his on-the-record interview "Did customer collections end up being used to pay for personal and business expenses?," Wiley plainly replied, "No."

The Hearing Panel found that Wiley answered FINRA's question untruthfully during his on-the-record interview. A de novo review of the record supports the Hearing Panel's findings. Before his interview began, Wiley testified under oath that he understood his obligation to answer all questions asked of him truthfully. He also confirmed that he understood the failure to do so would be a violation of FINRA Rule 8210. His previous written admissions to using the customer funds demonstrate that Wiley provided false information to FINRA on the record. Independent of his admissions, the record evidenced that while Wiley collected over $7,000 in customer premiums, the WIA & Associates bank account to which he deposited the money reflected a daily negative balance during the relevant period, which demonstrated his use of the payments. We are therefore unpersuaded by Wiley's contention that his denial on the record was supposed to mean that "everything was accounted for."

We find that Wiley testified untruthfully at his sworn on-the-record interview with FINRA in violation of Rules 8210 and 2010.

C. Wiley's Jurisdiction Argument

On appeal, Wiley argues that FINRA exceeded its authority to take action against him because this matter involved an insurance business dispute that fell outside of FINRA's jurisdiction. In support of his claim, Wiley cites to FINRA's Code of Arbitration and associated case decisions that reference the insurance business activities exclusion under the Arbitration Code. According to Wiley, the terms of his service agreement with Farmers was a contractual dispute that should have been interpreted under the laws of the State of Texas rather than pursuant to FINRA's arbitration rules.

As an initial matter, FINRA disciplinary proceedings, such as this one, are governed by the Code of Procedure, and not the Code of Arbitration.[9] The matter before us narrowly focuses on whether Wiley committed violations under FINRA rules, and not state law. *But see Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1121 (9th Cir. 2005) (holding that "[FINRA] rules approved by the Securities and Exchange Commission have preemptive force over conflicting state law"). It is undisputed that, during the relevant period, Wiley was an associated person of a FINRA member. As an associated person, Wiley was subject to FINRA rules.

Wiley further argues that his insurance activities were beyond the scope of FINRA's disciplinary authority. His argument, however, has been repeatedly rejected in a long line of case decisions. *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) ("[FINRA]'s disciplinary

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[9] "The Rule 9000 Series is the Code of Procedure and includes proceedings for disciplining a member or person associated with a member . . . ." FINRA Rule 9110.

authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) (finding conduct inconsistent with just and equitable principles of trade and high standards of commercial honor when respondent charged expenses to a co-worker's credit card without authorization); *James A. Goetz*, 53 S.E.C. 472, 478 (1998) (finding conduct inconsistent with just and equitable principles of trade when respondent knowingly received money from his firm's matching gift program for donations that he did not make); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We have consistently held that misconduct not related directly to the securities industry nonetheless may violate Article III, Section 1 of the NASD Rules."); *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *11-14 (NASD NAC Dec. 21, 1994) (finding respondent's forgery constituted unethical business-related conduct in violation of NASD Rule 2110).

Specific to insurance-related misconduct, the facts in the *Ernest A. Cipriani* decision were very similar to Wiley's case. In *Cipriani*, the SEC found that a debit insurance agent and associated person violated Article III, Section 1 of NASD Rules when he converted insurance premium payments that he collected from a customer but failed to promptly deposit with his insurance agency. *See* 51 S.E.C. 1004, 1006 (1994); *see also Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *9 (FINRA NAC Mar. 7, 2008) (finding conversion related to insurance premium payments); *Dep't of Enforcement v. Kendzierski*, Complaint No. C9A980021, 1999 NASD Discip. LEXIS 40, at *7 (NASD NAC Nov. 12, 1999) (finding conversion when respondent deposited a customer's check for an insurance policy into his own personal bank account instead of the customer's account without authorization); *Dist. Bus. Conduct Comm. v. Shegon*, Complaint No. C9A960030, 1997 NASD Discip. LEXIS 66, at *5 (NASD NBCC Nov. 20, 1997) (finding conversion and rejecting respondent's contention that NASD lacked jurisdiction over his insurance-related misconduct); *Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975) (holding that FINRA rules are designed to promote just and equitable principles of trade, and barring an associated person for insurance-related misconduct that did not involve securities).

Controlling precedent abundantly supports our rejection of Wiley's claim that FINRA lacked jurisdiction. While insurance regulation does not fall within FINRA's jurisdiction, Wiley's conduct was unethical and violated FINRA's requirement to observe high standards of commercial honor and just and equitable principles of trade in the conduct of his business. Wiley was appropriately disciplined for his unethical business conduct in accordance with FINRA rules.

D. Wiley's Procedural Arguments

Wiley also raises several procedural arguments on appeal. He argues that the Hearing Panel failed to issue its decision within 60 days as required by FINRA Rule 9268(a); the Panel heard prejudicial testimony from a FINRA investigator in violation of FINRA Rule 9263(a); Enforcement failed to file a statement of qualifications for their expert witness as required in FINRA Rule 9242(a)(5); and the Hearing Panel's findings were not supported by evidence in violation of Section 25 of the Securities Exchange Act of 1934 ("Exchange Act") and FINRA Rule 9266(b). We find that Wiley's claims lack merit and address each argument below.

Wiley argues that the Hearing Panel failed to issue its decision within 60 days as provided in FINRA Rule 9268(a). This rule provision sets forth a date of 60 days by which a written decision of the Hearing Panel should be prepared. Once prepared, a draft decision is revised to reflect the agreement of the Hearing Panel members, or a dissent can be written, if needed. FINRA Rule 9268(a) does not require the Hearing Panel to "issue" its written decision by any particular date.[10] Wiley's hearing took place on July 16, 2013, and after deliberation, the Hearing Panel issued its decision on April 29, 2014. We found no evidence in the record that the Hearing Panel failed to satisfy FINRA Rule 9268(a) when preparing its decision and therefore reject Wiley's claim.

Wiley argues that the Hearing Panel heard testimony from a FINRA investigator on the authenticity of exhibits and other information collected during the investigation that he believed to be irrelevant, immaterial and unduly prejudicial in violation of FINRA Rule 9263(a). Wiley also argues that the Hearing Panel did not admit evidence related to insurance industry standards and practices in the State of Texas.[11] FINRA Rule 9263 relates to the admissibility of evidence. It gives the Hearing Officer broad discretion to accept relevant evidence or reject any evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. *See Dep't of Enforcement v. Dratel*, Complaint No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *93-94 (FINRA NAC May 2, 2014), *appeal docketed*, SEC Admin. Proceeding No. 3-15869 (May 12, 2014).

At Wiley's hearing, the Hearing Panel heard testimony from FINRA investigator Daniel Peso. Peso authenticated an exhibit that he had produced that summarized data from Wiley's bank statements. The exhibit showed that Wiley did not possess the requisite funds across his bank accounts to cure the outstanding balance he owed to Farmers, thus demonstrating that the insurance payments were not only deposited, but actually spent, by Wiley.[12] We find that the

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[10] *See Danel Richard Howard*, SEC Admin. Proceeding No. 3-10392, 2002 SEC LEXIS 3428, at *3-4 (Oct. 23, 2002) (holding that Rule 9268(a) requires the Hearing Officer's preparation of a decision within 60 days and not the issuance of a decision within that period); *Dep't of Mkt. Regulation v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *81 (FINRA NAC Dec. 26, 2013), *aff'd*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558 (Feb. 13, 2015) (noting that FINRA rules do not set a deadline for the issuance of a Hearing Panel's decision).

[11] In excluding Wiley's proposed witnesses, comprised of three former Farmers insurance agents and a former district manager, the Hearing Panel found that Wiley's proffer of the substance and scope of their proposed testimony was "so general that its relevance was unclear." The Panel stated that Wiley would be permitted to present the testimony of the four proposed witnesses "only upon a showing of a more particularized showing that their testimony will be probative and relevant to the issues in this case."

[12] We agree with the Hearing Panel's rejection of Wiley's argument that he had a line of credit that could cover his shortages at any time. Wiley misses the overall point that his

[Footnote continued on next page]

exhibit and Peso's testimony was relevant and material and the Hearing Panel properly admitted it.[13]

We disagree with Wiley's contention that it was necessary for Peso or the Hearing Panel to have broad knowledge of insurance industry standards and practices in order to make a finding of violation. As we previously stated, the main issue for consideration before the Panel was whether Wiley complied with FINRA rules and not state insurance regulations. We also support the Hearing Panel's decision to exclude former Farmers insurance agents and managers as proposed witnesses for that purpose because Wiley did not demonstrate that their proposed testimony on general industry practices would be relevant to Wiley's conversion of customer premium payments under FINRA rules.

Wiley's claims of Section 25 of the Exchange Act and FINRA Rule 9266 violations are misapplied. Section 25 of the Exchange Act addresses persons aggrieved by a final order of the SEC, and FINRA Rule 9266 gives the Hearing Officer the discretion to order the parties to file proposed findings of facts and conclusions of law. Not only are these citations immaterial to the Hearing Panel's findings of violation, Wiley did not provide any evidence to support his claims. We therefore reject them.[14]

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conversion violation entails the unauthorized "use" of customer payments and not the availability of his own funds.

[13] We also reject Wiley's argument that Enforcement failed to file a motion for leave to designate Peso as an expert witness or to provide a witness statement of qualifications pursuant to FINRA Rule 9242(a)(5). Rule 9242(a)(5) gives the Hearing Officer the discretion to order either party to provide certain information prior to a hearing, as it deems appropriate. The designation of an expert or statement of an expert witness' qualifications, however, is not compulsory. Notwithstanding this, it is unclear from the record that Peso was designated to serve as an expert witness. Rather, the record reflects that, at a pre-hearing conference held on July 10, 2013, the Hearing Officer determined that Peso could testify on Enforcement's behalf, if necessary, to authenticate the exhibit he produced, which is what he did.

[14] Wiley also raises an argument that the Exchange Act does not grant self-regulatory organizations the authority to govern the insurance markets and thus FINRA rules were applied in a manner inconsistent with the purposes of Section 15A(b) of the Exchange Act. We have addressed this argument in our discussion on jurisdiction provided above. *See supra* Part IV.C.

E. Manifest Disregard of the Law

Wiley's final claim on appeal is one of manifest disregard of the law. This legal theory, which derives from the Federal Arbitration Act, essentially allows a court to vacate an arbitration award if it finds that the arbitrator was aware of a controlling and well-defined legal principle and failed to follow it when rendering an arbitration award. Wiley argues that the Hearing Panel's decision should be vacated on this common law theory because, according to him, the Hearing Panel knew that his alleged conversion should have been deliberated under Texas state laws yet, it disregarded state law when it interpreted his contract with Farmers Insurance and instead applied "FINRA arbitration rules and standards."

Wiley's tortured application of this legal theory to his case is misguided and plainly wrong. We reiterate that the matter before us involves a disciplinary proceeding under FINRA's Code of Conduct, and not an arbitration proceeding. Even if FINRA applied a standard under its arbitration provisions—which it did not—Wiley's manifest disregard of law theory still fails because there was no arbitration proceeding, no arbitration award to vacate, and no controlling legal principle for FINRA to disregard. Wiley's agency obligations were well defined in his contract with Farmers and called for no interpretation. Equally defined under FINRA rules is Wiley's duty to observe high standards of commercial honor and just and equitable principles of trade.[15] For these reasons, we must reject Wiley's claim.

V. Sanctions

The Hearing Panel barred Wiley from associating with any member firm in all capacities for converting customer insurance premiums in violation of FINRA Rule 2010. In light of Wiley's bar, the Hearing Panel did not impose further sanctions against him for providing false testimony to FINRA in violation of FINRA Rules 8210 and 2010. In assessing sanctions for Wiley's misconduct, we have considered the Guidelines, including the Principal Considerations in Determining Sanctions set forth therein,[16] and find that a bar is the appropriate sanction. We therefore affirm the Hearing Panel's sanction.

A. Conversion

"[C]onversion is generally among the most grave violations committed by a registered representative." *Mullins*, 2012 SEC LEXIS 464, at *73. The Guidelines recommend that a bar is the standard sanction for conversion, regardless of the amount converted.[17] In affirming the Hearing Panel's sanction of a bar, we considered the aggravating factors that were associated with Wiley's misconduct.

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[15] *See Ialeggio*, 52 S.E.C. at 1088 ("[R]egistered persons are expected to adhere to a standard higher than 'what they can get away with.'").

[16] *Guidelines*, at 6-7.

[17] *Guidelines*, at 36.

We find it aggravating that Wiley has yet to recognize the application of FINRA rules to his professional conduct and his obligation to comply with FINRA rules. *See Mullins*, 2012 SEC LEXIS 464, at *80 (holding that respondent's conversion reveals a troubling disregard for fundamental principles of the securities industry; thus, a bar is necessary to deter respondent and others similarly situated from engaging in similar conduct); *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *51 (Dec. 7, 2010) (holding that respondents' continued refusal to acknowledge wrongdoing demonstrates a fundamental misunderstanding of their regulatory obligations or that they hold such obligations in contempt).

We are unpersuaded by his argument that he did nothing wrong in using the customer payments under the state insurance laws, which we found to be an ineffective ploy to evade his obligations under FINRA rules. While we doubt that his actions would be permissible by other industry standards, a violation of another law is not a prerequisite to a FINRA rule violation. *Cf. Benjamin Werner*, 44 S.E.C. 662, 624-625 (1971) (upholding penalties against respondent for conduct inconsistent with just and equitable principles of trade even though such conduct was not held to be unlawful).

Wiley acted with intent.[18] His misconduct was not limited to an isolated incident, but instead became a continuous practice of using customer payments that ultimately impacted 54 Farmers customers over the course of several weeks.[19]

We have considered Wiley's claims of mitigation but find that they lack merit. We do not find credible Wiley's claim that he provided full cooperation during his investigation. To the contrary, Wiley gave false and misleading testimony which impeded FINRA's investigation. *Ortiz*, 2008 SEC LEXIS 2401, at *30-31 (noting that the ability to request and obtain information from its associated persons is crucial to FINRA's performance of its mission).

It is also not mitigating that Wiley eventually paid Farmers. His series of repayments did not happen prior to detection but only after Farmers initiated an internal audit investigation. *See Dep't of Enforcement v. Mullins*, Complaint Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *27 (FINRA NAC Feb. 24, 2011) (repaying money well after discovery of misconduct does not affect the conclusion that respondent converted and misused customer funds), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012). Although Wiley argues that he otherwise had an unblemished disciplinary history, "a lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." *Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (FINRA NAC Dec. 27, 2007), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008).

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18 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

19 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8-9).

The fact that no customers suffered harm also does not weigh against the severity of Wiley's misconduct. *See Dep't of Enforcement v. Jennings*, Complaint No. 2008013864401, 2013 FINRA Discip. LEXIS 18, at *62 (FINRA Hearing Panel Mar. 4, 2013) (noting that customer harm is not a necessary element of a self-regulatory rule violation); *Paratore*, 2008 FINRA Discip. LEXIS 1, at *16 (finding that intentional conversion of insurance premium payments was an egregious abuse of customer trust and confidence).

We considered Wiley's claim that he was undergoing personal and professional stress at the time of his transgression, but find no evidence in the record of particularity to this claim.[20] Even if he was undergoing stress, his circumstances serve as no basis or justification for excusing his misconduct.[21] Wiley betrayed a fundamental bond of trust when he took customers' funds without authorization. We demand that associated persons deal fairly with their customers especially when faced with personal and professional stresses. *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1226 (1994) (finding that respondent's conversion of customer funds could not be justified by his extreme emotional stress and severe financial problems).

Wiley asserts that a permanent bar from the securities industry is an oppressive and unjust sanction. We disagree. Considering all of the facts and circumstances, we find that a bar is the appropriate remedial sanction to deter Wiley and others from engaging in similar wrongdoing and is necessary for the protection of the public interest.

B. <u>False Testimony</u>

We find that Wiley's false testimony during his on-the-record interview was equally egregious. He deliberately provided false and misleading information that was integral to FINRA's investigation. Specifically, Wiley blatantly denied using the customer payments for

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[20] Specifically, the Hearing Panel decision notes three arguments that Wiley raises as mitigating factors, and undergoing personal and professional stress at the time of his transgression, is not one of them. To the contrary, Wiley claimed at the hearing that his use of the customers' payments was his business choice and a practice that he had been engaging in for years. He believed Farmers permitted him to use customer funds, and testified that he "felt entitled" to do so "based upon my business flow out of convenience."

[21] In the very limited circumstances in which stress has served as a mitigating factor, the stress itself was compounded with, or resultant of, some other diagnosed medical condition, which is not evident here. *Cf. Paul David Pack*, 51 S.E.C. 1279, 1283 (1994); *DBCC v. Nelson*, Complaint No. C9A920030, 1996 NASD Discip. LEXIS 17, at *9, 15 (NASD NBCC Mar. 8, 1996). Wiley provides no evidence that his purported stress interfered with his professional duties, including his ability to comply with, and understand his obligations under, FINRA rules. His use of the customer payments does not indicate a stressed-induced lapse of judgment, but instead his conscious decision to continuously use the payments for his business and personal expenses over the course of several weeks: "So as a business owner, it's just doing your due diligence in trying to position yourself to go through hard times. So I felt entitled to [the payments] . . . ."

business and personal use, which was the direct subject of his investigation. His untruthfulness about his use of the premium payments is another example of Wiley's refusal to accept responsibility for his unethical conduct, and reflects strongly on his inability to serve in the securities industry, which depends heavily on the integrity of its participants. *Ortiz*, 2008 SEC LEXIS 2401, at *32 ("Because of the risk of harm to investors and the markets posed by such misconduct, we conclude that the failure to provide truthful responses to requests for information renders the violator presumptively unfit for employment in the securities industry.").

The Guidelines address the failure to respond truthfully as an action impeding regulatory investigations, and a principal consideration is the importance of the information requested as viewed from FINRA's perspective.[22] The SEC has held that providing false information to FINRA during an investigation "'mislead[s] [FINRA] and can conceal wrongdoing' and thereby 'subvert[s]' [FINRA]'s ability to perform its regulatory function and protect the public interest." *Ortiz*, 2008 SEC LEXIS 2401, at *32 (imposing a bar for the failure to provide truthful responses to requests for information); *Michael A. Rooms*, 58 S.E.C. 220, 229 (2005) (noting that providing untruthful responses were more damaging than a refusal to respond to a request for information as they mislead FINRA and can conceal wrongdoing).

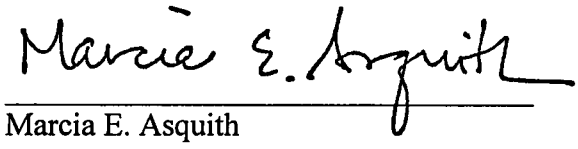
Wiley's untruthful response was "vitally important to FINRA's investigation and [would] support[] the imposition of a bar." *Dep't of Enforcement v. Ortiz*, Complaint No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *44 (FINRA NAC Oct. 10, 2007), *aff'd*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008). In light of Wiley's sanction of a bar for conversion, however, we affirm the Hearing Panel's decision and impose no further sanctions on Wiley for his false testimony.

VI. Conclusion

Accordingly, we affirm the Hearing Panel's findings that Wiley converted customer insurance premiums in violation of FINRA Rule 2010 and failed to respond truthfully to FINRA during his on-the-record testimony in violation of FINRA Rules 8210 and 2010.

Wiley is barred from associating with any member firm in any capacity, and is ordered to pay appeal costs of $1,568.35. The bar imposed in this decision will become effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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22 *Guidelines*, at 33.