

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL LoSTRACCO
(CRD No. 2953217),

Respondent.

Disciplinary Proceeding
No. 2012031063101

Hearing Officer – DRS

DEFAULT DECISION

November 26, 2013

Respondent is barred from associating with any FINRA member firm in any capacity for: (i) misappropriating funds, in violation of NASD Conduct Rule 2110; and (ii) failing to appear and provide testimony in violation of FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.

Appearances

For the Department of Enforcement, Complainant: Paul M. Schindler, Esq., and Gary A. Carleton, Esq.

For Michael LoStracco, Respondent: no appearance.

DECISION

Michael LoStracco was formerly registered with FINRA and associated as an Investment Company and Variable Contracts Products Representative with FINRA member firm AXA Advisors, LLC (“AXA”) from November 1998 through July 2007. From July 2007 until September 2011, LoStracco was registered in the same capacity with FINRA member firm Cambridge Investment Research, Inc. (“Cambridge”). He was permitted to resign from Cambridge after notifying the firm that he had been indicted on criminal charges alleging misappropriation of funds and preparing false financial statements.

On December 22, 2011, Cambridge filed an amended Uniform Termination Notice for Securities Industry Registration ("Form U5") on LoStracco's behalf. The amended Form U5 disclosed the then-pending felony criminal charges filed against LoStracco. Thereafter, FINRA staff began an investigation into his conduct. Based on its investigation, FINRA staff concluded that LoStracco had misappropriated approximately \$153,000 from two non-FINRA member companies. Also, in connection with the investigation, FINRA staff sent LoStracco a request, pursuant to FINRA Procedural Rule 8210, for an on-the-record interview. He failed, however, to provide the requested testimony.

As a result, the Department of Enforcement filed a Complaint with the Office of Hearing Officers charging LoStracco with misappropriation in violation of NASD Conduct Rule 2110. This Rule requires persons associated with FINRA member firms to observe high standards of commercial honor and just and equitable principles of trade.¹ The Complaint also charges LoStracco with failing to provide testimony in violation of FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010. Rule 8210 grants FINRA staff the right to require a person subject to FINRA's jurisdiction to provide information with respect to any matter involved in an investigation, complaint, examination, or proceeding.

LoStracco did not answer the Complaint. Accordingly, Enforcement filed a motion for entry of a default decision. The motion is supported by the Amended Declaration of Paul M. Schindler² and seven exhibits.³ LoStracco did not respond to the motion. For the reasons discussed below, the Hearing Officer grants Enforcement's motion and bars LoStracco from associating with any FINRA member firm in any capacity.

¹ On December 15, 2008, NASD Rule 2110 was superseded by FINRA Rule 2010. *See* FINRA Regulatory Notice 08-57 (Oct. 2008).

² Hereafter referenced "Decl. ¶ ____".

³ Hereafter referenced "CX-____".

I. Jurisdiction

FINRA has jurisdiction over this proceeding pursuant to Article V, Section 4 of FINRA's By-Laws⁴ because (1) the Complaint was filed within two years after LoStracco's last registration with FINRA terminated,⁵ and (2) the Complaint charges him with misconduct that occurred while he was associated with a FINRA registered firm, and with failing to appear for testimony that FINRA staff requested during the two-year period following the termination of his FINRA registration.

II. Enforcement's Motion for Entry of a Default Decision Is Granted

Enforcement filed the attached Complaint with the Office of Hearing Officers on July 12, 2013. That same day, Enforcement served LoStracco with a copy of the Notice of Complaint and Complaint by first-class certified mail at his last known residential address as reflected in the Central Registration Depository ("CRD Address").⁶ LoStracco did not answer the Complaint by August 9, 2013, the deadline set in the Notice of Complaint.⁷

Accordingly, on August 20, 2013, Enforcement served LoStracco with a copy of the Second Notice of Complaint and Complaint by first-class certified mail at the CRD Address.⁸ Respondent failed to answer the Complaint by August 29, 2013, the deadline contained in the Second Notice of Complaint,⁹ or thereafter.

⁴ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁵ FINRA terminated his last registration effective September 8, 2011. CX-1, at 3. The Complaint was filed on July 12, 2013, less than two years later.

⁶ Decl. ¶ 17; CX-4. At the time, Enforcement lacked actual knowledge that the CRD Address was out of date. Decl. ¶ 18.

⁷ *Id.* ¶¶ 20, 22. On August 8, 2013, LoStracco telephoned Schindler and acknowledged receipt of the Complaint as well as his obligation to respond to it by August 9. *Id.* ¶ 21.

⁸ Decl. ¶ 23; CX-6. On or about August 26, 2013, Enforcement received the return receipt showing signature and delivery of the mailing on August 22, 2013. Decl. ¶ 25; CX-7.

⁹ Decl. ¶¶ 24, 26.

On September 30, 2013, Enforcement filed a motion for entry of default decision with the Office of Hearing Officers. LoStracco did not respond to the motion.

The Hearing Officer concludes that LoStracco received valid constructive service of this proceeding in accordance with the provisions of FINRA Rules 9134(a)(2) and (b)(1),¹⁰ and he therefore defaulted by failing to answer the Complaint. Accordingly, the Hearing Officer grants Enforcement's motion for entry of a default decision.

III. Findings of Fact

The Hearing Officer treats the allegations in the attached Complaint as admitted pursuant to FINRA Rules 9215(f) and 9269(a).

A. Michael LoStracco

LoStracco began his career in the securities industry as an Investment Company and Variable Contracts Representative with the Equitable Life Assurance Society of the United States and AXA on November 10, 1998.¹¹ He remained registered with AXA in that capacity until July 30, 2007.¹² And, from July 25, 2007, until September 8, 2011, he was registered in that capacity with Cambridge.¹³ The day before, on September 7, 2011, he was permitted to resign following his indictment on criminal charges.¹⁴ He has not thereafter been registered or associated with a FINRA-registered firm.¹⁵ On or about June 18, 2012, LoStracco pled *nolo contendere* to two felony charges: criminal conspiracy and theft by failing to make required

¹⁰ The Hearing Officer concludes that LoStracco also received actual notice of the Notice of the Complaint and Complaint, as evidenced by his communication with Enforcement on August 8, 2013. *See* n.7, above.

¹¹ CX-1, 3-4.

¹² *Id.*, 3.

¹³ *Id.*

¹⁴ CX-1, 3; CX-2, 2; CX-3, 2.

¹⁵ CX-1, 3; Decl. ¶ 9.

disposition of funds.¹⁶ On or about March 4, 2013, he was sentenced and, among other things, ordered to make restitution.¹⁷

B. LoStracco Misappropriated Approximately \$153,000 from Two Companies

Between July 2000 and March 2007 (“Relevant Period”), LoStracco was registered with AXA.¹⁸ He was also a certified public accountant who performed accounting services for two related entities, Veneesa Construction Company, Inc. (“Veneesa”) and Mechanical Maintenance Repair Service, Inc. (“Mechanical”).¹⁹ Additionally, he served as the Corporate Secretary and Treasurer of Veneesa.²⁰

During the Relevant Period, LoStracco misappropriated funds from Veneesa and Mechanical by: (1) improperly using \$106,436 from Veneesa’s bank accounts to fund unauthorized salary payments to himself, payments to others for his personal benefit, and payments for additions to his personal residence; (2) improperly using \$31,980 from Mechanical’s bank accounts for his personal benefit; and (3) improperly failing to remit at least \$14,599 in employee 401(k) contributions to Veneesa’s 401(k) plan.²¹ To effectuate his misconduct, LoStracco made, or caused to be made, false financial statements, false reports, and false check entries in connection with Veneesa’s accounts and accounting system.²²

¹⁶ Compl. ¶ 21.

¹⁷ *Id.* ¶ 22

¹⁸ *Id.* ¶¶ 1, 9.

¹⁹ *Id.* ¶ 9.

²⁰ *Id.* ¶ 10.

²¹ *Id.* ¶ 11.

²² *Id.* ¶ 12.

C. LoStracco Failed to Appear for Testimony

After Cambridge filed an amended Form U5 on LoStracco's behalf, FINRA staff began an investigation into his conduct.²³ On May 30, 2013, pursuant to FINRA Procedural Rule 8210, Enforcement served LoStracco with a request that he appear and provide sworn testimony on June 19, 2013, at FINRA's Rockville, Maryland offices.²⁴ The request letter was sent by certified and first-class class mail to LoStracco's CRD Address. The staff knew this was a current address based on conversations they had had with him.²⁵ LoStracco failed to appear and provide sworn testimony on June 19, 2013.²⁶

IV. Conclusions of Law

A. LoStracco Violated NASD Rule 2110 by Misappropriating Funds

During the Relevant Period, LoStracco misappropriated approximately \$153,000 from two companies. LoStracco's conduct constitutes conversion. Conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."²⁷ Conversion violates NASD Rule 2110,²⁸ which requires the observance of "high standards of commercial honor and just and equitable principles of trade." Accordingly, the Hearing Officer concludes that LoStracco violated NASD Rule 2110.²⁹

²³ Decl. ¶ 13.

²⁴ Compl. ¶ 26.

²⁵ *Id.* ¶¶ 27–28. On or about June 1, 2013, the certified mail copy of the request was delivered to LoStracco's CRD Address. The USPS return receipt was signed and returned to Enforcement, evidencing LoStracco's receipt of the Rule 8210 request letter. *Id.* ¶ 29.

²⁶ *Id.* ¶ 30.

²⁷ *FINRA Sanction Guidelines* 36 n.2 (2011), available at www.finra.org/sanctionguidelines.

²⁸ *Dep't of Enforcement v. Patel*, 2001 NASD Discip. LEXIS 42, at *24–25 (NAC May 23, 2001). *See also Dist. Bus. Conduct Comm. v. Vail*, No. C06920051, 1994 NASD Discip. LEXIS 192, at *13 (N.B.C.C. Sept. 22, 1994), *aff'd*, 101 F.3d 37 (5th Cir. 1996) (barred for misappropriation of funds of private political club).

²⁹ *See, also, Eliezer Gurfel*, 54 S.E.C. 56 (1999), *petition denied*, 205 F.3d 400 (D.C. Cir. 2000) (finding broker violated NASD Rule 2110 where evidence demonstrated that applicant signed documents without permission despite his denial of wrongdoing, and where doing so resulted in conversion of funds due his firm).

B. LoStracco Violated FINRA Procedural Rules 8210 and FINRA Conduct Rule 2010 by Failing to Appear for Testimony

FINRA staff tried to take LoStracco's on-the-record testimony, pursuant to FINRA Rule 8210, in connection with an investigation into the misconduct that resulted in the misappropriation charge in this case. The staff sent the Rule 8210 request letter to LoStracco's CRD Address. Therefore, he is deemed to have received it.³⁰

Rule 8210 requires FINRA members and their associated persons to cooperate with FINRA investigations by providing information when requested by FINRA staff. Pursuant to Rule 8210, FINRA may require an associated person "to provide information orally, in writing, or electronically . . . and to testify at a location specified by FINRA staff, under oath or affirmation" in connection with any investigation. The Rule is crucial to FINRA's ability to oversee and regulate member firms and associated persons because FINRA does not have subpoena power. Instead, FINRA must depend on member firms and associated persons to cooperate fully and promptly with requests for information.³¹ A failure to cooperate in an investigation frustrates FINRA's ability to detect misconduct and protect investors and markets.³² It is well established that a violation of the duty to cooperate and provide information pursuant to Rule 8210 also violates Rule 2010.³³ Accordingly, based on his failure to respond to

³⁰ See Rule 8210(d).

³¹ See, e.g., *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (N.A.C. May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD [FINRA's predecessor] lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted). See also *Morton Bruce Erenstein*, 316 Fed. App'x 865, 871, 2008 U.S. App. LEXIS 19746, at *13 (11th Cir. Sept. 16, 2008) ("[I]t is critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations, especially because the NASD lacks subpoena power.").

³² *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *petition for review denied sub nom. Paz Sec. v. SEC*, 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

³³ See *CMG Inst. Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009).

a request for testimony, the Hearing Officer concludes that LoStracco violated FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.

V. Sanctions

A. LoStracco is Barred for Misappropriation

The FINRA Sanction Guidelines recommend a bar for conversion, regardless of the amount converted.³⁴ There are no mitigating circumstances here.³⁵ To the contrary, LoStracco's misappropriation of funds is aggravated by his falsification of documents and records.³⁶ Accordingly, LoStracco is barred for converting approximately \$153,000 in funds from Veneesa and Mechanical. The Guidelines recommend that restitution be ordered if a case involves identifiable customer harm, as this case does.³⁷ Because restitution was already ordered in the criminal case, however, Enforcement does not seek that remedy in this proceeding.³⁸ The Hearing Officer agrees that restitution should not be ordered because it has already been ordered by the state court.

B. LoStracco is Barred for Failing to Appear for Testimony

Under the Guidelines, a bar should be standard if the respondent did not respond in any manner to a Rule 8210 request. If mitigation exists the adjudicator should consider a suspension for up to two years. The Guidelines also suggest a fine of \$25,000 to \$50,000. Additionally, in determining appropriate sanctions, an adjudicator should consider the "[i]mportance of the information requested as viewed from FINRA's perspective."³⁹

³⁴ *Guidelines*, at 36.

³⁵ Decl. ¶ 32.

³⁶ Indeed, fabrication or falsification of records can serve as an independent basis for a Rule 2010 violation and the imposition of sanctions. *See, e.g., Guidelines*, at 37.

³⁷ *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5)

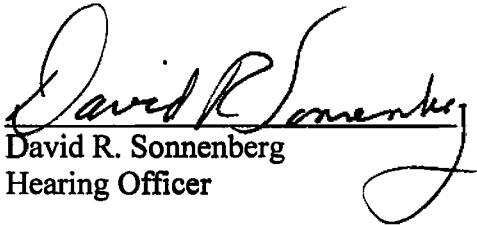
³⁸ Decl. ¶ 30.

³⁹ *Guidelines*, at 33.

Applying the relevant foregoing principles to this case, the Hearing Officer concludes that a bar from associating with any FINRA member firm in all capacities is an appropriately remedial sanction. LoStracco did not respond in any manner to the request for his on-the-record testimony. And, according to Enforcement, the information requested was important—his failure to appear impeded the investigation by, among other things, preventing the staff from questioning him about the misconduct ultimately charged in the Complaint.⁴⁰ Finally, the record does not disclose any mitigating factors that would warrant permitting LoStracco to remain in the securities industry. Accordingly, the Hearing Officer finds that a bar is the appropriate sanction for LoStracco's failure to appear and provide testimony.⁴¹

VI. Order

Michael LoStracco is barred from associating with any member firm in any capacity for conversion, in violation of NASD Conduct Rule 2110, and for failing to provide testimony, in violation of FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.⁴² The bars shall become effective immediately if this Default Decision becomes FINRA's final action in this disciplinary proceeding.


David R. Sonnenberg
Hearing Officer

⁴⁰ Decl. ¶ 34.

⁴¹ In light of the bar, no monetary sanctions are imposed.

Copies to:

Michael LoStracco (via first-class mail and overnight courier)

Paul M. Schindler, Esq. (via first-class and electronic mail)

Gary A. Carleton, Esq. (via electronic mail)

Jeffrey D. Pariser, Esq. (via electronic mail)

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Michael LoStracco (CRD No. 2953217),

Respondent.

**DISCIPLINARY PROCEEDING
No. 2012031063101**

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Between July 2000 and March 2007 (the "Relevant Period"), while registered with a member firm, Respondent Michael LoStracco ("Respondent" or "LoStracco") misappropriated approximately \$153,000 from two non-FINRA member companies, thereby violating NASD Rule 2110.
2. On June 19, 2013, during the two-year period after the date upon which he ceased to be registered with a FINRA member, Respondent failed to appear for on-the-record testimony requested in accordance with FINRA 8210, thereby violating FINRA Rules 8210 and 2010.

RESPONDENT AND JURISDICTION

3. Respondent was registered as an Investment Company & Variable Contracts Products Representative (Series 6) with FINRA-member AXA Advisors, LLC ("AXA") from November 11, 1998 to July 25, 2007. From July 25, 2007 to September 7, 2011, Respondent was registered as an Investment Company & Variable Contracts Products Representative (Series 6) with FINRA-member Cambridge Investment Research, Inc. ("Cambridge").
4. Cambridge terminated Respondent by a Form U5 filed on September 8, 2011.
5. Although Respondent is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Respondent's registration with Cambridge, namely September 8, 2011, and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member and with failing to appear for on-the-record testimony during the two-year period after the date upon which he ceased to be registered or associated with a FINRA member .

FIRST CAUSE OF ACTION

Misappropriation (NASD Rule 2110)

6. The Department realleges and incorporates by reference paragraphs 1 – 5 above.

7. NASD Rule 2110, in effect during the Relevant Period, requires associated persons to observe high standards of commercial honor and just and equitable principles of trade.
8. Misappropriation of funds and the intentional creation of false documents and records are violations of NASD Rule 2110.
9. During the Relevant Period, while he was registered with AXA, Respondent, who was also a certified public accountant, performed accounting services for two related entities: Veneesa Construction Company, Inc. ("Veneesa") and Mechanical Maintenance Repair Service, Inc. ("Mechanical").
10. Respondent was also the corporate Secretary and Treasurer of Veneesa.
11. During the Relevant Period, Respondent misappropriated funds from Veneesa and Mechanical by:
 - a. Improperly using \$106,436 from Veneesa's bank accounts to fund unauthorized salary payments to himself, payments to others for his personal benefit, and payments for additions to his personal residence;
 - b. Improperly using \$31,980 from Mechanical's bank accounts for his personal benefit; and,
 - c. Improperly failing to remit not less than \$14,599 in employee 401K contributions to Veneesa's 401K plan.
12. To effectuate his misconduct, Respondent made, or caused to be made, false financial statements, false reports, and false check entries in connection with Veneesa's accounts and accounting system.

13. For example, on at least 90 occasions during the Relevant Period, LoStracco made false check entries into Veneesa's accounting system and improperly classified costs associated with the addition to his personal residence as legitimate business expenses of Veneesa.
14. During the Relevant Period, LoStracco also failed to record checks in the system payable to himself or others for his benefit -- at times posting those entries as subcontractor expenses.
15. In or about March 2007, the majority owner of Veneesa reported to the police that Respondent and another individual had been taking funds without authorization from the company.
16. In or around March 2009, the Bucks County, Pennsylvania, District Attorney's Office engaged the services of a forensic firm to conduct an independent investigation.
17. On or about June 17, 2011, the forensic firm issued a report which concluded that Respondent had misappropriated funds from Veneesa and Mechanical and had created false documents and records.
18. On or about August 31, 2011, LoStracco was charged by criminal complaint filed in the Court of Common Pleas of Bucks County, PA with six felony counts: theft by unlawful taking, theft by deception by creating a false impression, theft by deception by failing to correct a false impression, receiving stolen property, criminal conspiracy, and theft by failure to make required disposition of funds.
19. On or about September 8, 2011, LoStracco was permitted to resign from Cambridge.
20. On or about December 2, 2011, LoStracco was formally arraigned by the Commonwealth of Pennsylvania for the above-mentioned charges.

21. On or about June 18, 2012, LoStracco pled nolo contendere to two of the felony charges: criminal conspiracy and theft by failing to make required disposition of funds.
22. On or about March 4, 2013, LoStracco was sentenced and, *inter alia*, ordered to make restitution.
23. Because Respondent converted funds that were not his own and created false documents and records, he violated NASD Rule 2110.

SECOND CAUSE OF ACTION

Failing to Appear For Testimony (FINRA Rules 8210 and 2010)

24. The Department realleges and incorporates by reference paragraphs 1 – 23 above.
25. FINRA Rule 8210 requires that persons subject to FINRA's jurisdiction testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested.
26. On May 30, 2013, pursuant to Rule 8210, Enforcement served a request on LoStracco to appear and to provide oral testimony under oath on June 19, 2013 at FINRA's offices in Rockville, Maryland.
27. The request letter was sent by certified mail and first class mail to LoStracco's home address listed in the Central Registration Depository ("CRD") System maintained by FINRA.
28. FINRA staff members also knew the CRD address to be a valid address for Respondent based on communications they had with Respondent.
29. On or about June 1, 2013, the certified mail copy of Enforcement's 8210 request dated May 30, 2013 was delivered to LoStracco's home address. The green return

receipt card was signed and returned to Enforcement, acknowledging LoStracco's receipt of the May 30 letter.

30. LoStracco failed to respond to Enforcement's May 30 request and failed to appear and provide oral testimony under oath on June 19, 2013.

31. By failing to appear and to provide testimony as requested by Enforcement pursuant to Rule 8210, LoStracco violated FINRA Rules 8210 and 2010.

RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed; and,
- C. order that Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330;

FINRA DEPARTMENT OF ENFORCEMENT

Date: July 12, 2013



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