FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN ALLAN WALDOCK, JR. (CRD No. 2995364), Respondent.	Disciplinary Proceeding No. 2012031142101 Hearing Officer—RLP **HEARING PANEL DECISION** May 8, 2014

For converting client property in violation of FINRA Rule 2010, Respondent John Allan Waldock, Jr. is barred from associating with any FINRA member firm in any capacity.

Appearances

Seema Chawla, Esq., Kansas City, MO, and Dean M. Jeske, Esq., Chicago, IL, for the Department of Enforcement.

Jeffrey A. Ziesman, Esq., Kansas City, MO, for Respondent John Allan Waldock, Jr.

DECISION

I. Introduction

On January 24, 2012, Lazard Middle Market LLC ("LMM") filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reporting that John Allan Waldock, Jr. had been terminated following an internal review indicating that he had made personal use of retail gift cards (belonging to LMM client Sundance Holdings Group, LLC) that had been provided to LMM for business purposes.[1] A FINRA investigation ensued[2] and on July 9, 2013,

[1] Complainant's Exhibit ("CX")-14, at 1, 2, 5; CX-3, at 2-3.

[2] Hearing Transcript ("Tr.") 150-151 (Burns).

FINRA's Department of Enforcement filed the complaint initiating this proceeding. The complaint alleged that, by making personal use of the gift cards, Waldock converted Sundance's property, in violation of FINRA Rule 2010. Waldock filed an answer on August 23, 2013, admitting many of the complaint's factual allegations, but denying that he converted client property, and asserting several affirmative defenses.[3]

Although Waldock urges the Hearing Panel to conclude that he did not convert, but merely misused, the gift cards, we find that he engaged in conversion. We conclude that he intended to permanently deprive Sundance of at least 22 $100 gift cards when, without permission or authorization, he took those cards from an empty cubicle near his office at LMM intending to use them to purchase Sundance merchandise as gifts for his family members. When he used the cards as he intended, he did, in fact, permanently deprive Sundance of its property.

Waldock maintains that because he "self-corrected" (by returning merchandise and cancelling one of his orders), accepted responsibility for his wrongdoing, and expressed remorse, among other things, a sanction less than a bar is appropriate even if the Panel finds him liable for conversion. After careful consideration, however, we reject Waldock's claims of mitigation. "'[T]he securities business is one in which opportunities for dishonesty recur constantly.'"[4] In our judgment, Waldock has demonstrated by his misconduct that his future participation in the securities industry would pose an unacceptable risk of harm to customers and the markets and, therefore, a bar is warranted.

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[3] After he left LMM, Waldock was briefly associated with another FINRA-registered broker-dealer but that association ended in October 2012. Stipulations ("Stip.") 2. Although Waldock is not currently registered through or associated with any FINRA member firm, FINRA retains jurisdiction over this proceeding pursuant to Article V, § 4 of FINRA's By-Laws because the complaint: (i) was filed within two years of termination of his association with a FINRA member firm; and (ii) charges him with misconduct committed while he was registered with a FINRA member.

[4] *Justin F. Ficken*, Exchange Act Rel. No. 58802, 2008 SEC LEXIS 3047, at *9 & n.21 (Oct. 17, 2008) (quoting *Richard C. Spangler, Inc.*, 46 S.E.C. 238, 252 (1976)).

II. Findings of Fact

A. After Six Years in the Securities Industry, Waldock Joins LMM in 2008 and Rises to the Level of Director by 2011.

Waldock entered the securities industry in June 2002. In 2003, he joined an investment banking firm that was acquired by LMM's parent in 2007. Thereafter, in 2008, Waldock became associated with LMM and registered through the firm both as a general securities representative and a general securities principal.[5] LMM is an investment banking firm dealing primarily with middle-market transactions ranging in value from $50 million to $500 million. The firm focuses on sell side mergers and acquisitions, typically involving privately held companies.[6] By 2011, Waldock had become a director in the firm's Industrial Products Group, which advised clients in certain industrial sectors on mergers, acquisitions, and other strategic transactions.[7]

B. In 2011, Sundance Retains LMM to Provide Investment Banking Services in Connection with a Potential Sale of the Company and Provides LMM with Gift Cards to Include in Mailings to Potential Counterparties.

In the fall of 2011, Sundance retained LMM to provide investment banking services in connection with a potential sale of the company.[8] Sundance is a retailer that offers high-end clothing, handmade jewelry, accessories, and home decor products to shoppers. In addition to utilizing traditional outlets like catalogs and retail stores, Sundance sells its merchandise through a website.[9] Waldock had no involvement in the Sundance engagement. He was not a member of the engagement team, he did not work on any aspect of the engagement, and he did not

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[5] Stip. 1; Tr. 110, 141-142 (Cozine); CX-24, at 10:2-4, 11:19-24 (Waldock).

[6] Stip. 5; Tr. 58, 140-141 (Cozine), 153 (Burns).

[7] Tr. 215 (Waldock); CX-24, at 13:17-25, 15:2-11 (Waldock); *see* Stip. 1.

[8] Stip. 6; CX-3, at 2; Tr. 59 (Cozine), 153 (Burns).

[9] Stip. 7; *see* Tr. 59 (Cozine).

participate in any meetings concerning the engagement. Indeed, he was not involved in any aspect of the business relationship between LMM and Sundance.[10]

As an initial step toward a sale, Sundance and LMM developed a list of potential counterparties (*e.g.*, retailers, investment bankers, and private equity firms) for LMM to approach. Thereafter, Sundance asked LMM to coordinate mailings to individuals associated with those potential counterparties, hoping to "tease" their interest.[11] The initial round of mailings was sent from LMM's Minneapolis office in November to individuals associated with most of the identified potential counterparties. Each mailing contained: (1) a cover letter from LMM introducing Sundance and expressing holiday wishes; (2) Sundance catalogs to familiarize the recipient with Sundance's product offerings and marketing style; and (3) a $100 Sundance gift card that would expire on December 23, 2011.[12] Sundance provided more than 300 gift cards to LMM for the mailings.[13]

After the initial mailings were completed in November, LMM kept all of the remaining gift cards (between 50 and 100) in a box atop the desk of an unoccupied cubicle in an open area on the 47th floor of its Minneapolis office.[14] LMM intended to (and did) mail some of the remaining cards, together with the other materials, to additional potential counterparties in December.[15]

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[10] Stip. 8; Tr. 157, 166 (Burns); CX-24, at 35:9-16 (Waldock); CX-26, at 43:22-44:2 (Cozine).

[11] CX-3, at 2-3; Tr. 153-154 (Burns); *see* Tr. 59 (Cozine).

[12] CX-3, at 3; CX-4; CX-27, at 43-50; *see* Stip. 9; Tr. 61-62, 95-96, 142-144 (Cozine), 154-156 (Burns).

[13] CX-27, at 43-50; CX-26, at 96:15-97:4 (Cozine); *see* Stip. 10; CX-3, at 3; Tr. 62 (Cozine).

[14] Stip. 11; Tr. 62-63, 73 (Cozine), 157 (Burns).

[15] CX-3, at 3; Tr. 74, 143-144 (Cozine).

C. Waldock Takes More than Twenty-Two Gift Cards and Places Three Orders for Sundance Merchandise.

Waldock's office was near the cubicle with the gift cards.[16] Sometime during the second or third week of December, after noticing the cards, Waldock asked other persons who worked near the cubicle what the cards were for and was told that "the primary mailing had gone and that these were the balance of the cards." According to Waldock, these persons did not know what would be done with the remaining cards.[17]

On December 19, 2011,[18] without authorization, Waldock took 22 or more of the cards from the cubicle and put them in his office.[19] At the time he took the cards, Waldock was aware that they expired on December 23 and that Sundance intended that they be used to market the company. Indeed, Waldock testified that, when he took the cards, he was considering giving them to representatives of persons who might have had an interest in acquiring Sundance.[20] During FINRA's investigation, he also testified that when he took the cards he "thought about using them personally" for Christmas gifts and agreed that his "lapse in judgment" started when he "took the cards with the intent to use them personally."[21] By contrast, at the hearing, he testified that when he took the cards he "hadn't determined what [his] intentions were," that his

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[16] Tr. 63 (Cozine); *see* Stip. 11.

[17] Tr. 218-220 (Waldock).

[18] Waldock testified that he took the cards on December 18 or 19. *E.g.*, Tr. 221 (Waldock). However, he also testified that the office was open when he took the cards and that he did not think he worked on Sunday, December 18. Tr. 221, 327 (Waldock). Accordingly, we find, as Waldock ultimately testified, that he took the cards on December 19. Tr. 327 (Waldock).

[19] Tr. 86, 88, 97-98 (Cozine), 221-222, 265-266 (Waldock); *see* Stips. 12, 15, 17, 19.

[20] Tr. 221-222, 225, 275, 277-278 (Waldock).

[21] CX-24, at 102:12-103:5, 108:21-109:5 (Waldock); *see* Tr. 184-185 (Burns), 277 (Waldock).

intent was "unclear," and that "there wasn't a lot of specific purpose" in his taking (and using) the cards.[22]

We conclude that, as Waldock admitted in his investigative testimony, he took the cards intending to use them to purchase last-minute Christmas presents for his family. The remainder of his testimony, particularly his assertion that his intent was unclear and that he acted without purpose, is belied by the fact that on December 21—only two days after he took the gift cards—Waldock placed the first of three separate orders for Sundance merchandise through the Sundance retail website, using the cards to pay for those orders.[23] Each time he placed an order, he acted deliberately, purchasing specific items he intended to give to specific family members. Each time he ordered, moreover, he purchased more merchandise than the last time, ultimately using more than a dozen cards to purchase his third order for more than $1,300 worth of merchandise on the evening the cards were to expire, as follows.[24]

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[22] Tr. 210, 224, 244 (Waldock). He further testified that he did not decide to use the cards for Christmas gift-giving until it was "getting nearer and nearer to Christmas" and that, even after placing his first order for women's boots, he did not believe he was taking Sundance's property because he "still wasn't sure what [he] was going to do with the items." Tr. 224, 226-227 (Waldock). This testimony is unbelievable given the timeframe involved, the deliberation it took to place the first order, and the fact that Waldock ordered more merchandise two days later.

[23] *See* Stip. 13; Tr. 225 (Waldock).

[24] In addition to the factors described in text, the following circumstances undercut Waldock's assertions about his lack of purpose and his intent to use the cards for business purposes and instead support a conclusion that he took the cards intending to use them for personal shopping: (1) that he took 22 or more cards; (2) that before the cards expired, he used 22 of them; (3) that, when he took the cards, he had no confirmed meetings with any representatives of potential counterparties and, in fact, he did not attend such meetings before the cards expired (Tr. 268-270 (Waldock)); (4) that he never notified persons in charge of the engagement team that he had taken the cards (Stip. 30); (5) that he never identified potential counterparties to the engagement team (Tr. 270-271 (Waldock)); and (6) that he never told the engagement team (or anyone else) that he intended to use gift cards to attract potential counterparties (*see* Tr. 94-95 (Cozine)).

Waldock's first order, for L-Pajar Buzz Boots ($185) and L-Sorel Tofino Boots ($140), amounted to $351.95, including taxes and shipping.[25] Waldock intended that these women's boots would be gifts for his wife and sister, and he paid for them with four Sundance gift cards.[26] To accomplish this, he entered the 16-digit number of each card he chose to use.[27] He had the order shipped to his home address.[28]

Waldock placed a second order on December 23, 2011, for the following items: Vintage Buffalo Nickel Cuff Links ($70), a Swiss Army Original Watch ($295), a Jasper Knife ($18), and a Love Beyond the Moon Keyring ($48).[29] Again, Waldock intended to give these items as gifts. For example, he planned to give the watch to one of his brothers-in-law.[30] The order totaled $457.95, including tax, and Waldock paid for it with five of the Sundance gift cards he

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[25] Stip. 14; Tr. 227, 278 (Waldock); CX-7, at 2; *see* CX-21, at 4. Exhibits CX-7 and CX-16 are duplicates and, for purposes of this decision, any reference to CX-7 includes a reference to CX-16. While Waldock objected to the admission of CX-7 as hearsay, hearsay is admissible in FINRA proceedings, particularly when, as here, factors establishing its reliability and probative value are present. *John Montelbano*, 56 S.E.C. 76, 89-90 (2003) (citing *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992)); *Dep't of Enforcement v. Sears*, No. C07050042, 2007 FINRA Discip. LEXIS 1, at *13-14 (NAC Sept. 24, 2007), *aff'd in part*, *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008). Exhibit CX-7 is an email chain among Sundance employees and LMM co-CEO David Solomon setting forth, as pertinent, information about Waldock's orders, including order numbers, item numbers, item descriptions, offer prices, gift cards used, shipping and billing addresses, and credit cards entered. It also includes a statement concerning returns as of January 3, 2012. The information was generated by Sundance employees in response to inquiries LMM made in the course of its investigation of Waldock's activities (described *infra* pp. 11-12). *See* Tr. 67 (Cozine). LMM considered the information dependable, and relied on it in conducting its investigation. Tr. 75-77 (Cozine); *see* Tr. 67 (Cozine). Moreover, there is no evidence that the Sundance employees who generated this information were biased, and the pertinent information is corroborated by other evidence, including other emails, Waldock's own testimony, and the stipulations of the parties. Indeed, in his on-the-record testimony Waldock specifically stated that information in CX-7 "look[ed] right" (CX-24, at 90:18-91:15 (Waldock)) and, at the hearing, he confirmed that he had ordered items identified in CX-7 (Tr. 227, 238-239 (Waldock)). Accordingly, while Waldock did not have the opportunity to cross-examine any of the persons who authored the emails and there was no evidence that those persons were not available to testify, the Hearing Panel has relied on the pertinent information in this email in making its findings. For the same reasons, the Hearing Panel has relied on the information set forth at pages 3-4 of CX-21 (concerning order and gift card numbers, order, cancellation, and return dates, product descriptions, and item cost) despite Waldock's objection. The Hearing Panel has given no weight to any other statements or information in CX-7 or CX-21 other than those specified above.

[26] Stip. 15; Tr. 228-229, 278 (Waldock); CX-24, at 53:5-54:2 (Waldock).

[27] CX-21, at 3; Tr. 160-161 (Burns); *see* Tr. 284 (Waldock).

[28] Stip. 15; CX-7, at 1; *see* Tr. 226-227 (Waldock).

[29] Stip. 16; CX-7, at 2; CX-21, at 3, 4; Tr. 179 (Burns), 232-233 (Waldock).

[30] Tr. 234, 313 (Waldock).

had taken, entering the 16-digit number of each card he used. Waldock directed that this order be shipped to his parents' address.[31]

Waldock placed the first two orders from his office computer. After he placed the second order and was leaving work on December 23, however, Waldock took the remaining gift cards home with him.[32] Then, from his home computer, he placed his third order for the following items: Mini/Multi Toolkit ($88), Sting Jacket ($198), Sunrise Watch ($278), Chambray Shirt ($88), Frye Jayden Boots ($298), Sentinel Box ($48), Austrian Windproof Lighter ($15), Leather Clad Atlas ($48), and Red-Bezel Swiss Army Watch ($400). This order totaled $1,461, excluding taxes and shipping costs.[33] Waldock purchased these items as gifts for his extended family. The watches, for example, were intended for his brothers-in-law.[34]

Waldock keyed in the 16-digit card numbers of 13 Sundance gift cards to pay for $1,300 of the order and provided credit card information to pay for the balance due.[35] Waldock directed that the order be shipped to his parents' address.[36]

D. Waldock Returns the Merchandise from the First Two Orders and Cancels the Third Order.

Waldock received the merchandise from his first order within two days of placing it.[37] The second order, shipped to Waldock's parents' address, was not delivered because Waldock's parents were traveling and had put a hold on their mail.[38] Waldock has variously stated that he

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[31] Stip. 17; CX-7, at 1, 2; CX-21, at 3; Tr. 235 (Waldock).

[32] Tr. 225, 232, 238 (Waldock).

[33] Stip. 18; CX-7, at 2-3; CX-21, at 3-4; Tr. 238-239, 241 (Waldock).

[34] Tr. 283, 313 (Waldock); *see* Tr. 198 (Burns).

[35] Stip. 19; CX-7, at 1; CX-21, at 3; Tr. 239, 284, 286-287 (Waldock).

[36] Stip. 19; CX-7, at 1; Tr. 235 (Waldock).

[37] Tr. 227, 278-279 (Waldock); *see* Stip. 21.

[38] Tr. 235-236, 306-307 (Waldock); *see* Stip. 22.

retrieved this shipment at the Post Office on either December 26 or 27, sometime between December 28 and January 1, or sometime before January 1.[39] The third order was never shipped.[40]

According to Waldock, he never gave any merchandise to his family members.[41] Instead, he testified that on December 24, he decided to "self-correct"—to return the items that had been shipped and to cancel the third order or return it on receipt.[42] He testified accordingly that, by January 1, he had mailed the first order back to Sundance. He further testified that, when he retrieved the second order, he opened the box, pulled out the return label, affixed the label to the package, and handed the resealed package to a Postal Service employee.[43]

While it is undisputed that Waldock returned the merchandise from the first two orders to Sundance,[44] we do not credit his testimony that he did so in December 2011. Instead, we conclude that Waldock returned the second order after January 3—the day he met with LMM's chief compliance officer and others and learned that LMM was investigating his use of the gift cards, as set forth below. As to the first order, there is insufficient evidence to determine when Waldock undertook to return it.

We arrive at these conclusions for the following reasons. First, as set forth above, Waldock's testimony about these returns has been inconsistent and imprecise. Second, Waldock

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[39] Tr. 236-237; *See* RX-17, at 58:12-59:6 (Waldock); *compare* CX-31, at 1; *compare* Tr. 293-294 (Waldock).

[40] Stip. 26.

[41] Tr. 228-229 (Waldock). Waldock testified that his family gave gifts over an extended period from December 24 through December 27. Tr. 228 (Waldock).

[42] Tr. 231, 240-241, 243-244 (Waldock).

[43] Tr. 228-230, 236-237, 293-294 (Waldock); *see* CX-31, at 1-2; Tr. 174 (Burns); CX-24, at 77:5-23 (Waldock).

[44] Stip. 27. Waldock used Sundance's prepaid return labels to ship the returns. Stip. 27; Tr. 230, 237 (Waldock); CX-31, at 2.

has not produced any evidence that corroborates his testimony.[45] He has no records of the returns and, as he acknowledged, he did not undertake to track them.[46] Third, and by way of contrast, Sundance records indicate that, as of January 3, no items from the first two orders had been returned, and that Sundance did not process his returns until January 25, 2012 (first order), and January 26, 2012 (second order).[47] Most significantly, "smart label" tracking information showed that the second order was not mailed back to Sundance until January 6 or 7.[48]

As for the third order, it is undisputed that, on December 29, Waldock made two calls to Sundance about the order.[49] However, Waldock's testimony about why he made the first call, what he was told during the call, and his reaction to what he was told has been both elusive and implausible. Waldock testified that he called to determine the status of the third order so that he could "self-correct" by cancelling the order or returning it as soon as possible after receipt. When the Sundance representative told him that the order was in process and had not shipped, however, Waldock terminated the call.[50] Then, after several hours elapsed and on further reflection, thinking "maybe [he could] get in front of this and just cancel it before it actually goes

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[45] As explained *infra* n. 58, the notes and testimony of other persons who participated in the January 3 meeting provide no meaningful support for Waldock's assertions about the timing of returns.

[46] *E.g.*, Tr. 293-294 (Waldock); CX-24, at 95:5-9, 95:14-18, 121:21-23 (Waldock); *see* Tr. 176, 178 (Burns).

[47] CX-7, at 2; CX-21, at 3.

[48] CX-22, at 1; Tr. 99-101 (Cozine), 177-178 (Burns). Although Waldock objects to CX-22 as hearsay, the Hearing Panel has determined to rely on the information it imparts about when the second order was mailed and processed because that information bears indicia of reliability sufficient to obviate any fairness concerns. *See supra* n. 25. In CX-22, a Sundance employee states that the return entered the tracking system on January 9, 2012—1 to 2 days after it would have been placed in the United States Postal Service mail stream. January 8 was a Sunday, so the return would have been mailed on January 6 or 7.

[49] Stip. 23. Although Waldock testified that he made the second call on December 30 (Tr. 244), he also acknowledged making the second call on December 29 (Tr. 296). We conclude, as the parties have stipulated, that Waldock made both the first and second calls on December 29.

[50] Tr. 231, 240, 243-244, 295-296 (Waldock); *see* Stip. 24.

out," he called Sundance back and cancelled the order.[51] On its face, this testimony is implausible. If Waldock were truly interested in "self-correcting" he would have cancelled the order immediately. In the Panel's view, Waldock's testimony does not support a finding that he made these calls to "self-correct" his misconduct.

E. LMM Investigates Waldock's Use of the Gift Cards and Terminates His Employment.

On December 24, 2011, Sundance Chief Financial Officer NH emailed David Solomon, co-CEO of LMM, informing him that Sundance believed that "someone by the name of John Waldock" had attempted to redeem 16 of the gift cards Sundance had provided to LMM. NH stated that he had not anticipated that "we would be giving any one person . . . that many complimentary cards" and, therefore, he had "put this on hold until further notification." Solomon, going a step further, requested that Sundance put a hold on "any Lazard cards."[52] In a follow-up email, NH informed Solomon more specifically that Waldock had used more than 20 cards to pay for three separate orders and that, although the first two orders had already been shipped, Sundance had placed a hold on the third order.[53]

After LMM received NH's December 24 email, LMM's in-house legal counsel and chief compliance officer, Kirk Cozine, and LMM's outside legal counsel began an internal investigation of the matter.[54] Based on that investigation, LMM ultimately concluded that

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[51] Tr. 244 (Waldock); *see* Tr. 296 (Waldock); Stip. 25. In arriving at our findings concerning the December 29 call, the Hearing Panel has afforded no weight to CX-5, including the statement that Waldock was "told by a customer service representative that [the third order] was on hold," as it is multiple level hearsay about a matter subject to substantial contest.

[52] CX-15; *see* Tr. 65-66 (Cozine). Exhibit CX-15 contains, as pertinent, email correspondence between NH and Solomon. The correspondence also was copied to Cozine. *See* CX-6; Tr. 68-69, 73 (Cozine). Waldock objected to these exhibits on hearsay grounds. The Panel has not considered CX-15 or CX-6 for the truth of the matters asserted but instead as communications that led to LMM's investigation of Waldock's activities. *See infra* n. 54

[53] CX-6.

[54] CX-3, at 2; CX-26, at 54:25-55:16, 56:6-57:20 (Cozine); *see* Tr. 56, 72-73 (Cozine).

Waldock "had made personal use of retail gift cards that had been provided to the firm for business purposes."[55]

On January 3, 2012, Waldock was called into a meeting with LMM's head of human resources, LMM's outside counsel, and Cozine.[56] During the meeting, the parties discussed Waldock's use of the Sundance gift cards.[57] Waldock admitted to using the gift cards, apologized, stated that he realized that his conduct had been inappropriate, and volunteered that he had "self-corrected" his "mistake."[58] At the end of the meeting, Waldock was told that LMM needed time to further investigate the matter, and that he would be placed on administrative leave, effective immediately.[59] Prior to the January 3 meeting, Waldock did not report his misconduct to LMM, even though, as he acknowledged, he was "conscious of the fact that [he] had a self-reporting obligation" and had considered self-reporting.[60]

After the meeting, Waldock emailed Solomon and Cozine, among others, apologizing for his behavior, expressing remorse, and reiterating that he had "proactively undo[ne] and self-

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[55] CX-14, at 5; Tr. 104 (Cozine).

[56] Stip. 28; Tr. 92-93 (Cozine), 246-248 (Waldock). Cozine did not contact Waldock about the investigation prior to the meeting and he was not aware of anyone else having done so. In fact, Cozine instructed the persons involved in the investigation not to discuss it with Waldock before the meeting. Tr. 115 (Cozine); RX-14, at 64:12-22, 65:1-11, 65:22-66:8.

[57] Stip. 29; Tr. 93 (Cozine), 248 (Waldock).

[58] Tr. 93-94, 115 (Cozine), 248 (Waldock); RX-18. The record concerning what Waldock said about his "self-correction" is unclear. Cozine testified that it was consistent with his recollection that Waldock mentioned at the meeting that he had cancelled an order. As for the returns, however, Cozine testified that he assumed that "self-correction" meant returning merchandise that had been received, but he could not remember if Waldock had mentioned any returns. Tr. 94 (Cozine). Exhibit RX-18, notes of outside counsel summarizing the meeting, state that Waldock said that he had "cancelled the orders" and that he "had called to return [an] order" that had shipped. Waldock claims that the notes are "very high-level summary notes that . . . don't fully reflect the conversation." Tr. 316 (Waldock). We conclude that neither Cozine's testimony nor the notes corroborate Waldock's contention that he effected returns before January 3.

[59] Stip. 29; Tr. 97 (Cozine).

[60] Tr. 298-301, 306, 335 (Waldock); CX-24, at 86:8-87:3 (Waldock); *see* Tr. 94-95 (Cozine); Stip. 30.

correct[ed]" his "mistake."[61] LMM nevertheless discharged Waldock on January 13, 2012.[62] In the Form U5 notifying FINRA of the termination, the firm stated: "Mr. Waldock was a highly regarded investment banker and colleague since 2003. He was terminated based on a lapse of judgment regarding the use of retail gift cards."[63] The filing also reflected that, at the time of the termination, Waldock was under internal review, and ultimately had been discharged, for "wrongful taking of property."[64]

III. Waldock Converted Sundance's Property.

As the NAC has recognized, conversion is the "wrongful exercise of dominion over the personal property of another."[65] FINRA's Sanction Guidelines similarly define conversion as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[66] Thus, when a person intentionally takes and uses another person's property for his own benefit, he engages in conversion. Here, it is undisputed that, without authorization, Waldock intentionally took the Sundance gift cards and exercised ownership over them by using them to purchase merchandise to give as gifts to his family members. Waldock's conduct constituted conversion.[67]

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[61] CX-8; Tr. 250-251 (Waldock).

[62] Stip. 32; Tr. 98 (Cozine), 252 (Waldock).

[63] Stip. 33; CX-14, at 2; Tr. 109 (Cozine). Cozine explained that that the description of Waldock as a "highly regarded investment banker and colleague" referred to the view Waldock's colleagues had of his performance as an investment banker and of him as a co-worker. Tr. 128-129 (Cozine).

[64] CX-14, at 3, 4; Tr. 103-104 (Cozine).

[65] *E.g.*, *Dep't of Enforcement v. Paratore*, No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *10 (NAC Mar. 7, 2008).

[66] *See* FINRA Sanction Guidelines at 36; *see Dep't of Enforcement v. Kaplan*, No. 20070077587, 2008 FINRA Discip. LEXIS 22, at *11, n.14 (OHO June 20, 2008).

[67] Waldock argues that FINRA examiner Burns' referring to Waldock's misconduct as "improper use" signifies the true nature of Waldock's wrongdoing. The argument is fallacious. As the examiner testified, he did not use the words as a term of art. Tr. 182, 183 (Burns). Similarly, in light of other evidence, neither LMM's description of Waldock's misconduct as a "lapse of judgment regarding the use of retail gift cards" nor its characterization of Waldock as "highly regarded" is evidence that conversion did not occur. Although LMM used this language in the Form U5, the firm also represented that Waldock engaged in "wrongful taking of property." *See* CX-14, at 3, 4.

Given that the most recent NAC decision reaffirms the foregoing standard of liability,[68] the Hearing Panel rejects Waldock's contention that, to show conversion, Enforcement must establish that he intended to permanently deprive Sundance of its cards.[69] But even if such an intent were an element of conversion, Waldock had that intent here. Waldock took Sundance's gift cards intending to use them to purchase last-minute Christmas presents for his family. Just two days later, Waldock began using cards as he had intended and, as time went on, his use escalated to the point that he ultimately redeemed more than 20 cards to purchase 15 items, some worth hundreds of dollars. These actions establish that Waldock intended to and did permanently deprive Sundance of its property—gift cards, including their value, that Sundance intended would be given to potential counterparties.

Waldock contends that the following asserted facts demonstrate a lack of intent to permanently deprive Sundance of its cards and their value: that he took some, but not all, of the gift cards from the cubicle; that he lacked clarity about what he would do with the cards when he took them; that he did not use the cards immediately; that he took the cards during the workday, put the cards on his desk, and left them there with his door open; that he used his office computer to place his first two orders; that he paid for his first order using only four cards; and that he

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[68] *Dep't of Enforcement v. Smith*, No. 2011029152401, 2014 FINRA Discip. LEXIS 2 (NAC Feb. 21, 2014).

[69] Waldock bases his argument on earlier NAC precedent stating that "[i]mproper use rises to the level of conversion when the associated person intends permanently to deprive the customer of the use of his funds or securities." *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS __, at * __ (NAC Dec. 31, 2013), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p421733.pdf (quotations omitted); *Dep't of Enforcement v. Mullins*, Nos. 20070094345 and 20070111775, 2011 FINRA Discip. LEXIS 61, at *21-22 (NAC Feb. 24, 2011), *aff'd*, *John Edward Mullins*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012); *Dep't of Enforcement v. Mission Sec. Corp.*, No. 2006003738501, 2010 FINRA Discip. LEXIS 1, at *17 (NAC Feb. 24, 2010), *aff'd*, *Mission Sec. Corp.*, Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053 (Dec. 7, 2010). We note that it does not appear that, in any of these cases, the parties squarely placed in issue the legal question of whether evidence of an intent to permanently deprive is required to prove conversion and only *Tucker* grounds its conversion finding on an express determination that the respondent intended to permanently deprive the customer of the property.

"self-corrected" by not giving any items as gifts and instead returning the items he had received and cancelling the order for the rest.

As set forth in our factual findings, however, we have a different view of the record and, in each instance where we disagree with Waldock's assertions, our findings support a conclusion that he acted with the intent he asserts is required. For example, we have found that Waldock took the cards intending to use them to buy Christmas gifts for his extended family. We have further found that Waldock began using the cards for personal purposes just two days after he took them, a timeframe we consider short if not immediate. Both of these findings—regarding his intent when he took the cards and his use of the cards—demonstrate that he intended to permanently deprive Sundance of its property.

Furthermore, those instances where the record may accord with Waldock's factual assertions do not undercut a conclusion that he acted with the intent to permanently deprive. For example, that cards may have remained in the box after Waldock took 22 is beside the point. Had he stolen and used just one gift card we would find, on this record, that he had an intent to permanently deprive Sundance of that card. Similarly, that he used only four cards on the first order does not demonstrate that he lacked an intent to permanently deprive Sundance of property. Instead, in light of the entire record, his use of those four cards confirms that he had that intent. In addition, while Waldock may have placed two orders from his office computer and may not have attempted to physically conceal cards, that does not, on this record, demonstrate that Waldock intended to return cards or that he had not formulated an intent about what he would do with them.

Finally, we reject Waldock's assertion that his self-correction shows that he lacked the intent to permanently deprive. As our factual findings demonstrate, Waldock has failed to

produce competent evidence of voluntary and timely returns and cancellation.[70] Even had he done so, however, he would not have demonstrated that, when he took and used the cards, he lacked an intent to permanently deprive Sundance of property. Instead, in light of the evidence that he did have that intent, self-correction would merely have signified a course-correcting change of heart—something that might be a mitigating factor pertinent to our sanctions assessment but that would not negate liability.

As the SEC has stated, "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."[71] Based on the foregoing, the Hearing Panel concludes that Waldock converted Sundance gift cards in violation of FINRA Rule 2010.

IV. Sanctions

The Sanction Guidelines provide that a bar is standard in cases of conversion "regardless of amount converted."[72] Waldock argues that a bar is inappropriate in this case because: (1) his misconduct represented a one-time lapse of judgment that took place over only a few days;[73] (2) he "self-corrected" his misconduct;[74] (3) he is remorseful and has acknowledged his wrongdoing and accepted responsibility for it;[75] (4) his misconduct did not result in harm to

[70] Waldock bore the burden of producing evidence to support his claimed self-correction. *See Kirlin Sec.*, Exchange Act Rel. No. 61135, 2009 SEC LEXIS 4168, at *64, n.87 (Dec. 10, 2009).

[71] *Mullins*, 2012 SEC LEXIS 464, at *42 (citations and quotations omitted).

[72] *See* Sanction Guidelines at 36.

[73] *See* Sanction Guidelines at 6 (Principal Considerations 8, 9).

[74] *See* Sanction Guidelines at 6 (Principal Consideration 4).

[75] *See* Sanction Guidelines at 6 (Principal Consideration 2).

Sundance, a sophisticated customer;[76] and (5) he was disciplined by his firm for the same misconduct prior to regulatory detection.[77] We address these contentions seriatim.

First, although Waldock's misconduct took place over a limited period of time, the imminent expiration of the cards necessitated that the misconduct be short lived. Moreover, we are not persuaded that Waldock's misconduct was a one-time lapse of judgment.[78] Instead, as our factual findings detail, when Waldock took the cards from the cubicle, and each time he placed an order, Waldock intentionally acted in derogation of Sundance's ownership rights.

Second, we reject Waldock's claim that self-correction should mitigate the seriousness of his misconduct. Had Waldock voluntarily and reasonably attempted to remedy his misconduct prior to detection, such "self-correction" might have been mitigating. But here, Waldock's uncertain, uncorroborated, and at times evasive and implausible testimony does not support a finding that his returns and cancellation were done reasonably and voluntarily before he became aware that his misconduct was detected. To the contrary, Waldock's failure to self-report his misconduct to LMM before January 3, discussed in more detail below, renders any "self-correction" so incomplete as to be unreasonable and, together with other evidence (regarding his return of the second order), strongly supports a conclusion that his "self-correction" was not voluntary.

More significantly, Waldock's returns and cancellation could not have remedied his misconduct. Waldock converted—stole—gift cards that, as he knew, had near-term expiration and were intended for persons who might be interested in acquiring Sundance. Waldock put the

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[76] *See* Sanction Guidelines at 6, 7 (Principal Considerations 11, 19).

[77] *See* Sanction Guidelines at 7 (Principal Consideration 14).

[78] For the reasons stated *supra* n. 67, LMM's description of Waldock's misconduct as a "lapse of judgment" does not undermine our determination.

cards to a different—personal—use. Thus, by his actions, Waldock ensured that he could not restore the status quo ante.

Third, Waldock's remorse and acknowledgment of wrongdoing, expressed for the first time after LMM notified him that it was investigating his personal use of Sundance gift cards, came too late to be mitigating. Waldock did not report that he had taken and used the gift cards until LMM management called him to account on January 3. Indeed, as he admitted, although he knew he had a self-reporting obligation and even considered self-reporting, he decided not to.[79] Fourth, it is well established that lack of customer harm is not mitigating.[80] Furthermore, that Sundance is a "sophisticated" institution did not give Waldock a license to steal.[81]

Finally, we do not understand the D.C. Circuit's decision in *Saad v. SEC* to establish that something less than a bar is the appropriate sanction in this case.[82] *Saad* involved a petitioner who had raised before the SEC as a potentially mitigating factor his firm's "disciplining" him by terminating his employment. Observing that the Sanction Guidelines include as a Principal Consideration whether a respondent's employer "disciplined the respondent for the same misconduct at issue prior to regulatory detection"[83] and emphasizing that the SEC had failed to

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[79] For this reason, although post-detection acknowledgement of wrongdoing and remorse can be mitigating in the appropriate case (*see, e.g.*, *Dep't of Enforcement v. McCartney*, No. 2010023719601, 2012 FINRA Discip. LEXIS 60 (NAC Dec. 10, 2012)), we do not consider it mitigating in this case.

[80] *Dep't of Enforcement v. Tomlinson*, No. 2009017527501, 2014 FINRA Discip. LEXIS 4, at *25, n.12 (NAC Mar. 5, 2014). One former colleague of Waldock's, at relevant times a co-CEO of LMM, executed an affidavit attesting to his: "very high professional opinion" of Waldock; "complete[] trust" in Waldock "to deal with clients in a fair and truthful manner"; surprise when he learned about Waldock's "incident regarding the Sundance gift cards"; belief that the conduct was "completely out-of-character" for Waldock; and view that Waldock's "character and talents are a benefit to the industry." RX-19; *see also* Tr. 257 (Waldock). This character testimony is not mitigating. *Dep't of Enforcement v. Winters*, No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *15-16 (NAC July 30, 2009) (supervisor's opinion of respondent's character was not germane to sanctions determination). Similarly, while Waldock was held in high esteem at LMM, the nature of his misconduct here, not his skill as an investment banker, is what determines his fitness to remain in the industry.

[81] *Cf., e.g.*, *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *50 (NAC Feb. 12, 2007).

[82] *Saad v. SEC*, 718 F.3d 904 (D.C. Cir. 2013).

[83] Sanction Guidelines at 7 (Principal Consideration 14).

address that potentially mitigating factor, the court implemented the well-established principle of judicial review that bound it to reverse administrative action that fails to consider an important aspect of a matter. The court thus remanded the case to the SEC for its consideration of all potentially mitigating factors that might militate against a bar but specifically stated that it was taking "no position on the proper outcome of [the] case."[84] We see nothing in the *Saad* decision or in the SEC's order remanding the matter to the NAC (to permit FINRA to determine in the first instance whether Saad's termination was mitigating) that would require the imposition of a sanction less than a bar, notwithstanding the respondent's termination from a *specific employment*, in a case, such as this, where a bar is necessary to vindicate the *broader public interest*.[85]

Waldock converted at least 22 client-owned gift cards with a value of at least $2,200. Conversion is generally "among the most grave violations committed by a registered representative."[86] In the absence of mitigation and particularly considering that Waldock was not forthcoming when he testified during the hearing about his purpose in taking the cards and his asserted self-correction, a bar is the appropriate remedy for Waldock's misconduct.[87]

V. Conclusion

Waldock is barred from associating with any FINRA member firm in any capacity for converting customer property in violation of FINRA Rule 2010.

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[84] *Saad*, 718 F.3d at 914.

[85] As a general matter, disciplinary sanctions are considered to be independent of a firm's determination to terminate a respondent and no credit is given for termination. *Dep't of Enforcement v. Prout*, C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NAC Dec. 18, 2000). Particularly where, as here, a respondent shows himself to be unfit to continue to participate in the industry as a whole, termination of a particular employment cannot be mitigating. To the extent that Waldock argues that the job loss and other economic hardships he encountered are mitigating, precedent teaches that when, as in this case, a bar is called for to protect the public, such hardships are not mitigating. *E.g.*, *Conrad P. Seghers*, Investment Advisers Act Rel. No. 2656, 2007 SEC LEXIS 2238, at *36 (Sept. 26, 2007).

[86] *Mullins*, 2012 SEC LEXIS 464, at *73.

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

In addition, Waldock is ordered to pay costs in the amount of $3,621.95, which includes the hearing transcript costs and an administrative fee of $750. These 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.

If this decision becomes FINRA's final disciplinary action, Waldock's bar shall become effective immediately.

HEARING PANEL.

Rada Lynn Potts

Rada Lynn Potts
Hearing Officer

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