BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. David O. Braeger Milwaukee, WI, Respondent.	DECISION Complaint No. 2015045456401 Dated: December 16, 2019

Registered representative misused and converted customer funds and made material misrepresentations and omissions to customers. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Suzanne H. Bertolett, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Michael F. Torphy, Esq.

Decision

Respondent David O. Braeger appeals a December 27, 2017 Extended Hearing Panel ("Hearing Panel") Decision. The Hearing Panel found that Braeger misused and converted funds that had been given to him by his customers for investment, in violation of NASD Rule 2330(a) and FINRA Rules 2150(a) and 2010. The Hearing Panel also found that Braeger made numerous oral and written misrepresentations of material facts to these customers about the value and status of their investment, and the reasons they could not recover their investment, in violation of FINRA Rule 2010. The Hearing Panel imposed a separate bar in all capacities for each of Braeger's violations.

After an independent review of the record, we affirm the Hearing Panel's findings of violations and the sanctions that it imposed.

I. Background

A. Braeger

Braeger joined the securities industry in 1991. Braeger has been associated with 15 FINRA members and was last registered with a FINRA member in July 2014. From October 2008 through January 2012, Braeger was associated with Newport Coast Securities, Inc. ("Newport"), where he was registered as a general securities representative and principal.[1] When he joined Newport, Braeger continued to work out of his business office in Mequon, Wisconsin. In 2010, Braeger moved to California to head Newport's office. He stayed in California until he left Newport in January 2012.

Braeger testified that, in 2008, prior to joining Newport, he created CMF, a small commodity futures investment trading fund. Braeger testified that CMF was organized as a fund under the rules of the National Futures Association, and that the fund pooled a number of small investments to create the equivalent of a mutual fund for commodity futures trading. Braeger testified that he and a colleague, TA, were CMF's managers and that MF Global served as CMF's clearing agent. Braeger testified that he selected the advisers who traded CMF and that CMF had four to five investors. Braeger produced no records related to CMF during this proceeding.

Braeger testified that Newport was eager to hire him in part because of its desire to acquire CMF, and that once he joined Newport, CMF became the Rubicon Capital Appreciation Fund ("Rubicon"), a Regulation D offering.[2] Braeger testified that certain CMF investors were "folded" into Rubicon, but he was vague about how this happened and which CMF investors invested in Rubicon. Newport, which acted as the placement agent for Rubicon, had no record of CMF investors investing in Rubicon.

B. Rubicon

In December 2008, shortly after joining Newport, Braeger filed articles of organization for Rubicon with the state of Wisconsin. The filing identified Braeger as the registered agent, organizer, and drafter of the articles of organization. The address for Rubicon was identified as Braeger's business office in Mequon, Wisconsin.

---

[1] When Braeger first joined Newport, it was known as Grant Bettingen, Inc. For ease of reference, we refer to the firm as Newport throughout.

[2] Regulation D of the Securities Act of 1933 provides a number of exemptions that allow certain issuers to offer and sell their securities without having to register the offering with the SEC when certain requirements are met. *See* www.sec.gov/fast-answers/answers-regdhtm.html.

Braeger served as Rubicon's managing member through his ownership of a Wisconsin limited liability company called Ceres Investment Management, LLC ("Ceres"). Braeger owned 51% of Ceres and TA owned the remainder. Rubicon's operating agreement listed Braeger's business address in Mequon as the address for Ceres. As Rubicon's managing member, Braeger was responsible for managing all of Rubicon's business, including making all investment and operational decisions.

C. Rubicon's Private Offering

In December 2008, Braeger began working on Rubicon's private offering. Braeger and his attorney, BB, worked on the private placement memorandum ("PPM"). Representatives of Newport, which was to be the placement agent for the offering, also reviewed and commented on drafts of the PPM.

Initially, Braeger intended to use Wells Fargo Bank as the escrow agent for the offering. Braeger testified that he did all of his banking at the Wells Fargo branch in Mequon, Wisconsin, including the banking for his businesses, and portrayed himself as a well-known and important customer of that branch. That plan changed, however, because Newport did all of its banking at CommerceWest Bank and had no accounts at Wells Fargo. Accordingly, in mid-January 2009, the PPM was amended to name CommerceWest as the escrow agent for Rubicon. CommerceWest would hold Rubicon subscription funds in escrow until a minimum threshold was met, after which the funds would be invested with commodity traders selected by Braeger.

In February 2009, Braeger completed and signed account opening documents with MF Global, which was to act as Rubicon's clearing agent. In Rubicon's account application, Braeger indicated that Rubicon had a banking relationship with Wells Fargo at the Mequon branch. Braeger indicated that Rubicon had both a checking and escrow account at Wells Fargo. While Rubicon had not yet had an offering, Braeger also indicated that Rubicon had four investors and $125,000 under management, presumably held in the Wells Fargo accounts Braeger identified.

On March 5, 2009, Braeger signed the account opening documents for Rubicon's escrow account at CommerceWest. Braeger and TA were listed as the individuals authorized to confirm large transactions in the account. The account opening documentation identified Braeger and TA as the members of Rubicon, and Braeger as the only managing member. Braeger submitted signature cards to CommerceWest for the escrow account. Rubicon opened two accounts at CommerceWest—a general account and an escrow account. All Rubicon customer checks were to be deposited into the escrow account.

The final Rubicon PPM was dated March 19, 2009 (the "Rubicon PPM"). The Rubicon PPM provided that checks for investment in Rubicon should be made payable to CommerceWest as Rubicon's escrow agent, and delivered to Newport along with the customer's completed and executed subscription agreement. The Rubicon PPM authorized Braeger to break escrow once the minimum amount of subscription funds had been raised. It also included a one-page exhibit, which instructed investors to make checks payable to CommerceWest as the escrow agent for Rubicon and to send the checks to Newport's office in Newport Beach, California.

On March 31, 2009, Braeger signed on behalf of Rubicon the escrow agreement with CommerceWest. The escrow agreement provided that Rubicon appointed CommerceWest as the escrow agent to receive and collect subscription funds for Rubicon's offering. The escrow agreement also provided that checks for investment in Rubicon would be made payable to "CommerceWest Bank, N.A., as escrow agent for Rubicon Capital Appreciation Fund." The agreement further provided that three people were authorized to confirm funds transfers for the escrow account—Braeger, TA, and SKS, a Newport employee responsible for processing private placement investments. The escrow agreement also provided that documentation of investor deposits would be sent to Rubicon to enable discrepancies to be identified, and that monthly accountings would be provided by the bank.

D. SE and TH Invest in Rubicon

In 2009, SE and TH, a recently married couple, were consolidating their finances. SE was a physician and TH was an airline pilot, and they lived in Racine, Wisconsin. The couple had experienced losses in the stock market downturn and were, as TH stated, "open to" alternative investments. They also had certificates of deposit that were maturing, and SE was particularly interested in purchasing an annuity. TH's investment experience was limited to participating in his employer-sponsored 401(k). SE's investment experience was mostly in mutual funds and a few stocks. Neither SE nor TH had ever invested in a private placement.

In early June 2009, SE attended an investment presentation Braeger gave to a group of physicians. Braeger discussed Rubicon during this presentation. After discussing it with TH, SE contacted Braeger by telephone. SE, TH, and Braeger subsequently met at Braeger's Mequon office to discuss investment options. During that meeting, SE and TH indicated that they had about $150,000 to invest and Braeger made some recommendations, including investing $30,000 in Rubicon. SE and TH did not commit to anything during this meeting.

On July 20, 2009, Braeger met with SE and TH at their home in Racine, Wisconsin, located about an hour from Braeger's office. The meeting occurred in the late afternoon before dinner. They spent at least two hours talking and completing investment paperwork. SE and TH agreed to invest $30,000 in Rubicon and $20,000 in a brokerage account. Braeger recommended both of these investments. They also discussed an investment in an annuity, for which Braeger recommended they consult TA, who specialized in annuities.[3]

TH and SE filled out a subscription agreement for Rubicon and documents to open the brokerage account. SE wrote a $20,000 check for the brokerage account, and a $30,000 check payable to Rubicon. SE followed Braeger's instruction to make the Rubicon check payable to "Rubicon Capital Appreciation Fund, LLC." The couple gave both checks and the completed documents to Braeger.

---

[3] On July 29, 2009, SE and TH met with Braeger and TA at the couple's home to invest in the annuity. The couple invested $100,000 in an annuity. SE and TH also later made two other private placement investments totaling $50,000 on Braeger's recommendation.

The record contains a copy of the PPM and subscription agreement that Braeger gave to SE and TH. Braeger gave the couple a copy of the Rubicon PPM dated March 19, 2009, which contained the instructions that checks be made payable to "CommerceWest Bank as Escrow Agent for Rubicon Capital Appreciation Fund" and that checks be sent to Newport in California. The subscription agreement the couple completed, however, differed from the agreements completed by every other Rubicon investor in two important ways. First, the subscription agreement said checks should be made payable to "Rubicon Capital Appreciation Fund, LLC" and made no mention of the escrow agent. Second, the subscription agreement provided that the agreement and check could be sent to Newport in California *or* to Braeger's office in Mequon, Wisconsin. Both Braeger and SKS testified that the subscription agreement was a Newport template that could be accessed by anyone and information specific to the offering inserted. The subscription agreement was then typically stapled into the PPM, which was printed in a booklet form.

E. Braeger Breaks Escrow, but SE and TH's Funds Are Never Invested in Rubicon

In August 2009, Braeger broke escrow and issued a settlement closing statement for Rubicon's CommerceWest escrow account. Braeger signed a wire transfer for $248,674.78 to MF Global for investment with the commodity advisers he had selected. Braeger also had $13,090 sent to Newport for expenses.

It is undisputed that SE and TH's $30,000 investment was not included in this amount. While the couple's check for the brokerage account was received by Newport and the brokerage account was opened for them, Newport has no record of the couple's Rubicon check or subscription agreement, and they were not included on Newport's blotter of Rubicon investors. Newport's blotter reflects that there were seven Rubicon investors, including two Newport registered representatives, but not SE or TH. SE and TH, however, did not know that their funds were not invested in Rubicon until years later.

F. Braeger Liquidates and Dissolves Rubicon

About a year after trading in Rubicon started, the two Newport registered representatives that had invested in Rubicon decided to liquidate their investments because Rubicon had not performed as well as they had expected. Because Rubicon was small and the registered representatives' investments amounted to about 20% of Rubicon, Braeger decided to close the fund. Rubicon was liquidated and the seven Rubicon investors were paid back. Newport prepared a letter officially notifying the seven investors that Rubicon was closing. Braeger printed and signed each letter and returned them to Newport to send to the investors. These letters did not include one for SE and TH.

By the end of July 2010, Rubicon's MF Global accounts had a zero balance. Braeger was responsible for apportioning Rubicon proceeds among the Rubicon investors and arranged to have checks printed for the Rubicon investors. TH and SE were not among the Rubicon investors who were notified of the fund's closure or to whom funds were returned.

On October 21, 2010, Braeger filed articles of dissolution for Rubicon with the state of Wisconsin. The articles of dissolution identified Braeger as the drafter of the documents, and listed his office address in Mequon as the address to which an acknowledgement copy would be sent.

G. Braeger Makes Numerous Misrepresentations and Omissions to His Customers About Their Investment

Over the course of more than five years, Braeger made numerous written and oral misrepresentations to SE and TH about their purported Rubicon investment. Braeger also omitted to disclose to the couple that Rubicon had been closed, liquidated, and dissolved.

1. False Statements Before Rubicon Is Closed

On August 25, 2009, TH and SE received what purported to be the first quarterly statement for their Rubicon investment. The report was in the form of a letter from KA, Braeger's accountant. The letter represented that TH and SE had invested $30,000 in Rubicon and that $1,800 had been paid as a broker commission, leaving a net amount invested of $28,200. The letter indicated that as of July 31, 2009, SE and TH's investment was valued at $29,160.29 and represented 5.72% of Rubicon. The letter cautioned that KA had not reviewed or audited documents from MF Global or "bank statements from Commerce Bank and Wells Fargo." The letter directed TH and SE to contact Braeger's assistant with any corrections to personal information, without identifying her position as Braeger's assistant.

In January 2010, SE and TH received what purported to be a second quarterly statement for Rubicon. This time, the statement came in the form of a letter from Braeger, with KA's letter attached. The statement represented that SE and TH's Rubicon investment was worth $30,138.15 as of January 11, 2010, and that their investment represented 6.02% of Rubicon. As before, KA explained that he had not reviewed or audited MF Global statements or CommerceWest or Wells Fargo bank statements and directed questions to Braeger's assistant, without identifying her relationship to Braeger.[4]

In April 2010, SE and TH received a third and final statement purporting to reflect their investment in Rubicon. Again, the statement consisted of a cover letter from Braeger and a letter from KA. The statement claimed that SE and TH's investment was worth $31,843.36 as of April 16, 2010, and was 6.02% of Rubicon. Again, KA noted that he did not audit or review any

---

[4] The January 2010 statement also included a print out from Autumn Gold for Rubicon. Braeger described Autumn Gold as a service similar to Morningstar, but for commodity funds. Braeger explained that Autumn Gold monitors the performance of funds who pay annually for such coverage. The reports are available online until a contract ends.

documents from MF Global, CommerceWest, or Wells Fargo, and referred questions to Braeger's assistant.[5]

In the spring of 2010, Braeger also provided SE and TH with a Schedule K-1 for their purported Rubicon investment to file with their taxes.

2. False Statements After Rubicon Is Closed

Approximately six to eight months after receiving the April 2010 quarterly statement, SE realized that the statements had stopped coming. When she asked Braeger about this, he told her that he had moved to California and was looking for a new accountant to prepare the statements. Braeger did not tell her that he had closed and liquidated Rubicon back in July 2010. Instead, he referred her to Autumn Gold for information on Rubicon. SE testified that she was able to see information about Rubicon on Autumn Gold once or twice, but then it disappeared. When she asked Braeger about this, he claimed the report was not accessible online because Rubicon was a private investment.

Despite the fact that Braeger closed, liquidated, and dissolved Rubicon in 2010, he provided SE and TH with Schedules K-1 for 2011, 2012, and 2013. SE and TH testified that they had difficulty obtaining Schedules K-1 from Braeger and often had to file extensions for their taxes. The Schedules K-1 for 2011, 2012, and 2013 all represented that SE and TH's investment was valued at $25,496 and that they held 33.3% of Rubicon. In addition, the Schedules K-1 for 2010 and 2011 characterized their investment as "individual passive." In 2012, that characterization was changed to "individual active."

3. Braeger Makes Additional Numerous False and Misleading Representations to SE and TH

SE and TH testified that Braeger never told them Rubicon had closed and he led them to believe their funds were invested in Rubicon. When they had trouble obtaining a Schedule K-1 in 2012, Braeger blamed the trouble on MF Global's bankruptcy filing.[6] At first, Braeger told them that because of the bankruptcy, they did not need the Schedule K-1 to file their taxes. When the couple's accountant insisted that they did, Braeger provided one. Braeger told SE and TH that while their investment was tied up in the bankruptcy, they would eventually recover their investment. Braeger also claimed that their investment was insured and that, as a last resort, he would ultimately be responsible for returning their funds.

---

[5] An Autumn Gold printout was also included with the statement.

[6] MF Global filed for bankruptcy in autumn of 2011, more than a year after Rubicon had been closed and liquidated, and after the proceeds from the Rubicon accounts had been distributed to investors. Accordingly, the MF Global bankruptcy had no effect whatsoever on Rubicon. Braeger's representations to the couple were false.

In 2012, SE and TH were attempting to refinance the mortgage on a rental property they owned. SE and TH testified that their mortgage broker identified that they held 33.33% of Rubicon—something they had not noticed before. Their mortgage broker raised concerns that their ownership of Rubicon exposed SE and TH to potential liability, and requested that they provide copies of the corporate tax returns for Rubicon. At first, Braeger told the couple they did not need corporate tax returns. When the couple insisted and put Braeger in touch with their mortgage broker, Braeger eventually provided what purported to be a 2011 corporate tax return for Rubicon, which Braeger had signed. When TH and SE asked about the increase in their percentage of ownership and change in their investment status, Braeger claimed that other investors had "written off" Rubicon as a tax loss and urged the couple to do the same. With respect to the change from being passive to active investors as reflected on the Schedule K-1, Braeger claimed this was simply a "clerical error."[7]

SE and TH testified that, in 2013, Braeger was difficult to reach, and they once again had difficulty obtaining a Rubicon Schedule K-1 for their taxes. When they did reach Braeger, he again blamed MF Global's bankruptcy for the difficulty in getting their money back. Braeger also complained to the couple that he had to pay for the Schedule K-1 out of his own pocket.

In early 2014, Braeger told SE and TH that they were among the creditors not getting repaid in MF Global's bankruptcy and, accordingly, their investment had been lost. Braeger never provided the couple with any documentation concerning the bankruptcy, or their alleged loss.

H. TH and SE Learn that Rubicon Was Closed and that Their Funds Were Never Invested in Rubicon

In the spring of 2014, TH and SE were once again having difficulty getting from Braeger the Rubicon Schedule K-1 they needed for their tax filing. The couple contacted TA for assistance. TA told the couple that Rubicon had closed in the middle of 2010 and that all investors had been paid back. A few minutes after their conversation with TA ended, Braeger called them. Braeger had apparently spoken with TA and was angry. Braeger threatened to sue TH and SE for defamation of character. Braeger also insisted Rubicon had never closed. He claimed Newport had taken over the fund and that, while he had tried to liquidate the fund, he was unable to do so because Rubicon was tied up in the MF Global bankruptcy.

The next day, TH, SE, and Braeger spoke again. During this and in subsequent conversations, Braeger blamed Newport for the loss of the couple's investment. Braeger claimed that Newport had been running Rubicon and that he needed to get more information from Newport to determine what happened to the couple's funds. Braeger said he would ask his attorney to follow up with Newport. Throughout 2014, Braeger continued to tell the couple that he was attempting to obtain additional information from Newport.

---

[7] SE and TH were ultimately denied refinancing on the rental property.

The couple decided to call TA again, but TA contradicted his previous statements and also blamed Newport for the loss of the couple's funds. The couple then decided to contact Newport. The couple had a telephone number for CM, another Newport registered representative. CM previously had contacted the couple about their brokerage account after Braeger had left the firm. CM checked Newport's records and told them that Rubicon had been liquidated in mid-2010 and all investors had been repaid. CM also told the couple that they were not listed as Rubicon investors on the firm's blotter.

m

TH and SE did not know until 2014 that they were never invested in Rubicon. After learning this, TH and SE requested from their bank a copy of the check SE had written for Rubicon. The check had been endorsed by Braeger, marked "for deposit only," and was deposited in a Wells Fargo bank account. The check was deposited on July 21, 2009—the day after Braeger met with SE and TH—and cleared on July 22, 2009. The bank stamp on the copy of the check is illegible and Wells Fargo could not identify in which specific account the check was deposited.

n

I. Braeger Sues TH and SE for Defamation and Ultimately Pays Them a Settlement

In early 2015, the couple was applying for a construction loan to build a new home. They worried that their Rubicon investment would prevent them from securing the loan as it had with their previous refinancing. In January 2015, the couple contacted Braeger and demanded that he either repay them for the Rubicon investment or provide documentation that it had been lost. They told Braeger that if he did not comply, they would file a complaint with FINRA.

While Braeger admitted no wrong-doing, he agreed to repay the couple. He told the couple that his attorney would prepare the appropriate settlement paperwork. Instead of settlement paperwork, however, in March 2015, the couple received the first of four letters from Braeger's attorney threatening to sue them for defamation.

TH and SE retained an attorney to defend them. Their attorney advised them to file a complaint with FINRA and explained that there was a deadline for making a claim related to their Rubicon investment. SE testified that, when she learned this, she suspected that Braeger had been stalling over the last few months until the deadline had passed.

On May 4, 2015, FINRA received a complaint filed by TH and SE about their Rubicon investment, attaching copies of the PPM they had received and the subscription agreement they signed. The same day, FINRA received a complaint filed by Braeger complaining about Newport and its supposed unwillingness to provide information about the couple's Rubicon investment.

On May 29, 2015, Braeger filed a defamation lawsuit against TH and SE. In July 2015, Braeger's lawyer sent a letter offering to resolve the lawsuit if the couple would agree not to complain to FINRA. Braeger was unaware that they had already complained to FINRA in May.

On September 25, 2015, Braeger filed an amended defamation complaint against SE and TH. In his amended complaint, Braeger claimed that he had sent the couple's subscription

agreement to Newport and that he "concurrently" sent their check to "a third party escrow/trust called Rubicon Capital Appreciation Fund." The complaint made no mention of CommerceWest, the true escrow agent for Rubicon.

The defamation case was ultimately settled in January 2017. During the settlement negotiations, Braeger sought agreement from SE and TH that they would not testify in a FINRA proceeding. The couple refused. Braeger paid SE and TH $20,000 in settlement of his defamation claim, without admitting liability, in exchange for their agreement not to countersue him. TH and SE testified that they incurred $12,000 in attorneys' fees defending against Braeger's suit.

II. Procedural History

On July 20, 2016, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint against Braeger. Enforcement alleged that, instead of depositing the couple's $30,000 check with Rubicon's escrow agent and investing it in Rubicon as SE and TH intended, Braeger caused the check to be deposited elsewhere and never invested the funds. Enforcement further alleged that, in order to conceal his misuse and conversion of the customer funds, Braeger embarked on a years-long series of written and oral misrepresentations and omissions to the customers concerning their investment. The complaint alleged that Braeger omitted to disclose to the customers that Rubicon had been closed and liquidated. Instead, Braeger made written and oral misrepresentations, including that: (1) the couple was invested in Rubicon; (2) Rubicon was open and performing fairly, when in fact it had been closed and liquidated; and (3) the couple's Rubicon investment was tied up and lost in Rubicon's clearing firm's bankruptcy proceeding.

Specifically, cause one alleged that Braeger improperly used and converted the couple's $30,000, in violation of NASD Rule 2330 and FINRA Rules 2150 and 2010.[8] Cause two alleged that, for a period of more than four years, Braeger made numerous written and oral material misrepresentations and omissions to these customers concerning their investment, in violation of FINRA Rule 2010. Braeger filed an answer, denying that he engaged in the alleged misconduct.

In September 2017, the Hearing Panel conducted a seven-day hearing, at which nine witnesses testified and more than 170 exhibits were received in evidence. Both SE and TH testified at the hearing. In a December 27, 2017 decision, the Hearing Panel found that Braeger misused and converted his customers' funds. Specifically, the Hearing Panel found that, rather than sending their subscription agreement and check to Newport, Braeger deposited their funds in a Rubicon Wells Fargo account that Braeger controlled, and that he never invested the funds in Rubicon. For this misconduct, the Hearing Panel imposed a bar in all capacities. The Hearing Panel also found that, for a period of more than five years, Braeger made numerous written and oral material misrepresentations to SE and TH about the value and status of their investment and

---

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

the reasons why they could not recover their funds. For this misconduct, the Hearing Panel imposed a separate bar in all capacities.

This appeal followed.

III. Discussion

A. The Hearing Panel's Credibility Findings Are Abundantly Supported by the Record, and Braeger Has Failed to Establish Substantial Evidence for Overturning These Findings

The Hearing Panel made lengthy and detailed credibility findings concerning Braeger's testimony and that of other hearing witnesses. The Hearing Panel found that "almost none of Braeger's testimony was credible." The Hearing Panel described Braeger as "repeatedly evasive and inconsistent" and found that many of his assertions were "virtually impossible to be true" or "contradicted by other evidence." Accordingly, the Hearing Panel concluded that it did "not accept Braeger's testimony without corroboration."

On appeal, Braeger argues that the Hearing Panel's credibility findings concerning his testimony demonstrate the Hearing Panel's bias against him. We disagree. First, the Hearing Panel's credibility findings are supported by abundant evidence in the record, and Braeger has not pointed to any evidence, much less substantial evidence, for overturning these findings. *See Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999) (explaining that "[c]redibility determinations by the fact finder are entitled to substantial deference and can be overcome only where the record contains substantial evidence for doing so"), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000). To the contrary, as discussed in detail below (*infra* Parts III.B and C), Braeger's testimony was repeatedly inconsistent with and contradicted by other evidence.

Second, Braeger's claim of bias by the Hearing Panel has no basis. Braeger points to the credibility findings made by the Hearing Panel and what he characterizes as "disdain" in the language of the decision. As the factfinders, however, it is the Hearing Panel's responsibility to make credibility determinations, and such determinations are often based on observations of a witness's demeanor. *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *45 n.35 (May 27, 2011) (stating that an initial fact finder's credibility determination is entitled to considerable weight and deference *because* it is based on hearing a witness's testimony and observing his demeanor). Moreover, bias is not established based simply on the particular language in a decision. *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *76-77 (Sept. 28, 2017) (rejecting a claim of bias based, in part, on the language used in the Hearing Panel's decision, when the decision was based on the evidence). To the contrary, bias "is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case." *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). Here, the Hearing Panel's decision is abundantly supported by the evidence in the record and there is no indication, or even any claim by Braeger, that the Hearing Panel was influenced by anything outside of the record.

The Hearing Panel found TH's and SE's testimony was credible. The Hearing Panel noted that their testimony was consistent with the documentary evidence in the record. Moreover, TH and SE had nothing to gain financially from this proceeding, as they had already reached a settlement with Braeger and Enforcement did not seek restitution in this proceeding. Braeger has not pointed to any basis for overturning these credibility findings.

B. Braeger Misused and Converted His Customers' Funds

It is undisputed that TH and SE's funds were not invested in Rubicon as they intended. NASD Rule 2330(a) and FINRA Rule 2150(a) provide that associated persons shall not make improper use of a customer's securities or funds.[9] Here, Braeger misused SE and TH's funds by not investing them in the manner in which they were intended to be applied. *See Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NASD NAC May 23, 2001).

Conversion is defined as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012). It is well settled that conversion violates FINRA Rule 2010.[10] *See Dep't of Enforcement v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *7 (FINRA Bd. of Governors May 9, 2014), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015). We agree with the Hearing Panel's findings that Braeger converted TH and SE's $30,000 check. The evidence demonstrates that Braeger had a Rubicon account at Wells Fargo that he controlled and that, rather than invest SE and TH's funds in Rubicon as intended, he converted those funds by depositing their check in the Wells Fargo account.

Braeger denies that he controlled a Rubicon Wells Fargo account. The record, however, shows that Braeger opened and controlled an account for Rubicon at Wells Fargo. Braeger acknowledged that he originally intended for Rubicon's escrow account to be opened at the Wells Fargo branch in Mequon, Wisconsin, where Braeger did his other personal and business banking. Moreover, Braeger represented in the MF Global account opening documents that Rubicon had accounts at Wells Fargo (after he knew that the escrow account would be at CommerceWest) and Braeger's accountant referred to Wells Fargo bank account statements in the quarterly statements that Braeger sent to SE and TH. In addition, Wells Fargo responded to FINRA's Rule 8210 request that Rubicon had an account ending in 8511 that was associated with Braeger. Finally, when Rubicon was liquidated, Braeger directed MF Global to wire the proceeds to a Rubicon account at Wells Fargo ending in 8511.

---

[9] FINRA Rule 2150(a) replaced NASD Rule 2330(a), effective December 14, 2009, without substantive change. FINRA rules are applicable to associated persons pursuant to FINRA Rule 0140.

[10] FINRA Rule 2010 requires associated persons to conduct their business in accordance with "high standards of commercial honor and just and equitable principles of trade."

The record also shows that Braeger directed SE and TH to make the check for their July 20, 2009 investment payable to Rubicon. By the end of March 2009, however, Braeger knew that investments in Rubicon were to be deposited in an escrow account at CommerceWest. The Rubicon PPM had been finalized and Braeger himself had signed the escrow agreement and account application for the CommerceWest escrow account. Nonetheless, when he met with SE and TH at their home on July 20, 2009, he directed them to make their check payable to Rubicon. Braeger gave SE and TH a subscription agreement which differed from the one signed by the seven actual Rubicon investors in that it (1) directed investors to make investment checks payable to Rubicon, rather than CommerceWest as its escrow agent; and (2) directed investors to send checks to Braeger's office or to Newport's California office. This subscription agreement was inconsistent with the Rubicon PPM. Braeger acknowledged that the subscription agreement was a template into which details of the offering were inserted and which was then stapled into the printed PPM. Accordingly, Braeger could easily alter the subscription agreement and insert it into the PPM.

In addition, Braeger endorsed SE and TH's check and marked it with the restrictive legend, "for deposit only." This would have been unnecessary if Braeger intended to send the check to Newport for deposit in the CommerceWest escrow account, as he was required to do. His endorsement of the check is consistent, however, with what he actually did—i.e., deposit the check in a Wells Fargo Bank account on July 21, 2009, the day after it was written. Newport has no record of TH and SE's investment in Rubicon. Newport, in addition, has no record of the subscription agreement, check, or a control number for the PPM Braeger gave the couple. The couple, moreover, are not listed on Newport's blotter of Rubicon investors.

Braeger also never told SE and TH when Rubicon closed. He signed letters sent to the seven actual Rubicon investors and arranged for checks distributing the proceeds to these investors. SE and TH were not among these. With just seven investors, Rubicon was relatively small and it would have been obvious to Braeger that SE and TH were not among those being repaid.

Finally, Braeger made numerous false statements and misrepresentations to SE and TH over the course of several years about the value and status of their purported Rubicon investment and the reasons why they could not recoup their money. This continued even long after Braeger had closed, liquidated, and dissolved Rubicon. After TH and SE discovered that they had never been invested in Rubicon, Braeger continued to make misrepresentations to them, sued them for defamation and attempted to get them to agree not to complain to FINRA and, later, not testify in a FINRA proceeding, in connection with settling that lawsuit. Braeger's misrepresentations only make sense if he were attempting to conceal his conversion and lull his customers into inaction.

The evidence shows that Braeger, intentionally and without authorization, converted SE and TH's funds by depositing them in a Rubicon Well Fargo account that he controlled, rather than investing the funds as intended. Braeger's conversion of his customers' funds violated FINRA Rule 2010. *See Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *14-15 (FINRA NAC Dec. 29, 2015) (finding that registered representative converted customer funds where, rather than investing the funds as intended, he

used them for his own purposes), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

C. Braeger Made Numerous Written and Oral Misrepresentations of Material Fact to His Customers, and Omitted Telling Them that Rubicon Had Been Closed and Dissolved

The numerous written and oral misrepresentations and omissions of material fact Braeger made to SE and TH both further support the conclusion that he converted their funds and are also an independent violation of FINRA Rule 2010. Rule 2010 is a broad ethical rule that applies to all unethical business-related conduct. *See Olson*, 2014 FINRA Discip. LEXIS 7, at *7. We have held that making material misrepresentation and omissions to customers is unethical conduct which violates FINRA Rule 2010. *See Dep't of Enforcement v. James E. Rooney, Jr.*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *80-81 (FINRA NAC July 23, 2015). A misstated or omitted fact is material if a reasonable investor would have viewed the fact as having altered the "total mix" of information available to her. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Similarly, the standard for determining whether there is a duty to disclose an omitted fact is whether a reasonable investor would consider the information significant. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). We find that Braeger made material misrepresentations and omissions to his customers.

For years, Braeger led SE and TH to believe their funds were invested in Rubicon when they were not. He provided them with three false quarterly statements purporting to reflect their investment in Rubicon. Because Newport had no record of TH and SE's investment, the information in the statements prepared by KA could only have come from Braeger. When he closed, liquidated, and dissolved Rubicon, Braeger did not tell the couple and instead gave them a false explanation for why the statements had stopped.[11] When they were unable to access

---

[11] Braeger denied dissolving Rubicon and claimed his signature was forged on the articles of dissolution. He claimed he did not know that Rubicon had been dissolved until he saw the articles of dissolution during discovery in this proceeding. The Hearing Panel rejected Braeger's claims and we agree. The Hearing Panel found that the articles of dissolution appeared authentic and that the signature matched other documents Braeger signed. Moreover, the document provides that a stamped and acknowledged copy would be sent to Braeger's Mequon office. Accordingly, Braeger would have known in 2010 if the document had been forged. Moreover, there is nothing to suggest who or why anyone would falsely sign a document dissolving Rubicon, and if they were to do so, why they would list Braeger's address as the place to send an acknowledgement copy. Finally, we agree with the Hearing Panel that it is not credible that Braeger would not have investigated a forgery of legal documents for an entity he controlled, as Braeger claims he did not on advice from counsel. In short, we agree that Braeger must deny knowing of the dissolution of Rubicon in 2010, because if he admits that he did know, it would be the equivalent of admitting that he provided TH and SE with false Rubicon Schedules K-1 for the years after Rubicon was dissolved.

[Footnote continued on next page]

information about Rubicon on Autumn Gold, he gave them another false explanation, claiming the report was unavailable because Rubicon was a "private" investment, when in fact the fund no longer existed and the contract for reports had likely expired.

Braeger also gave the couple four false Schedules K-1 purporting to reflect their Rubicon investment. Braeger provided three of these for tax years after he had closed, liquated, and dissolved Rubicon. The couple reported this false information concerning Rubicon in their tax filings.

Braeger also made various other material misrepresentations to the couple. On multiple occasions, Braeger falsely told SE and TH that their Rubicon investment was "tied up" in the MF Global bankruptcy, even though the bankruptcy was filed more than a year after Rubicon had been dissolved. In urging the couple to take a tax loss for their Rubicon investment, and in explaining the changes in their purported percentage of ownership in Rubicon, Braeger falsely claimed that other Rubicon investors had "written off" their Rubicon investment. In fact, all of the actual Rubicon investors had been repaid. Braeger later changed his explanation as to why the couple could not recover their funds, falsely blaming Newport and claiming he needed information from Newport to find out what happened to their money. Finally, when the couple learned that they had never been invested in Rubicon, Braeger falsely promised to repay the couple their money and claimed his attorney was preparing settlement documents, lulling his customers into not pursuing their claims against him. Instead, Braeger sued the couple for defamation.

We find that Braeger had a duty to tell TH and SE that Rubicon had been closed, liquidated, and dissolved and that this fact was material. We also find that the numerous other written and oral misrepresentations—i.e., concerning the status and value of their Rubicon investment and the reasons they could not recover their investment—by Braeger were material. *See Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *32-33 (finding that a "reasonable investor would want to know that her money was not being used as represented"). We agree with the Hearing Panel that Braeger's false representations to his customers were "astonishingly brazen" and a violation of his ethical duties under FINRA Rule 2010.

D. Braeger's Other Arguments Have No Merit

On appeal, Braeger argues that the Hearing Panel's decision is improperly based on circumstantial evidence. Braeger also argues that his direction to the couple to make their check payable to Rubicon was an innocent mistake, and required by the subscription agreement they signed. Braeger further argues that the Hearing Panel improperly denied his request to call other

---

[cont'd]

Braeger also argues that Rubicon was never completely closed and points to statements in the record showing activity in Rubicon's MF Global accounts after July 2010. The record establishes, however, that this activity was an error in the account, which was quickly corrected.

Newport witnesses and that someone else at Newport actually took the couple's funds. Finally, Braeger argues that because of his family's wealth, he had no motive to convert his customers' funds, and that the legal fees he has incurred in defending himself prove his innocence. None of Braeger's arguments has any merit, and we reject them.

1. Circumstantial Evidence Can Be More Than Sufficient to Prove a Violation

Braeger complains that Enforcement's "entire case" was "circumstantial," and thus, inappropriate. While we do not agree with this characterization of the record, it is well established that circumstantial evidence may be probative, reliable, and sufficient to prove a violation. *See Joseph Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *18 n.18 (June 2, 2016) (finding that there was sufficient circumstantial evidence to prove that Butler had converted the funds of a customer). Moreover, there is no impediment to the use of circumstantial evidence in a FINRA disciplinary proceeding. *See id.* (citing *Dennis Todd Lloyd* 与, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *69 (Apr. 11, 2008)).

After an independent review of the record, we find that a preponderance of the evidence, both direct and circumstantial, supports the conclusion that Braeger converted his customers' funds and made numerous false statements to them.

2. Braeger's Claim of Innocent Mistake Does Not Withstand Scrutiny

During the hearing and on appeal, Braeger argues that he mistakenly gave the wrong version of the PPM to SE and TH, and that this mistake caused the customers to make their check payable to Rubicon rather than CommerceWest, the escrow agent. Braeger also argues on appeal that the couple's check had to be made payable to Rubicon, as the subscription agreement they signed directed. Braeger blames Newport for changing the PPM and causing confusion in the documents. Braeger points to a February 2010 version of the PPM sent by his attorney, BB, which had been marked by BB as "final." Braeger claims that this version was printed and he gating factors, applhis office. He further claims that before leaving to meet with SE and TH he mistakenly grabbed this earlier version, which he had failed to dispose of when the Rubicon PPM was later finalized. The record, however, undercuts Braeger's version of events.

First, there is no question that Braeger knew the February draft was not the final version of the Rubicon PPM. There are numerous communications in the record which demonstrate that Braeger knew the February draft had been changed, particularly with respect to using CommerceWest as the escrow agent for the offering. Indeed, Braeger himself signed the paperwork opening the escrow account and the escrow agreement with CommerceWest. Additionally, when the Rubicon PPM was finalized, Braeger asked SKS to promote the offering to other Newport registered representatives, something he did not do earlier.

More importantly, Braeger did not, as he claims, give a prior version of the PPM to SE and TH. The Rubicon PPM that SE and TH submitted to FINRA along with their complaint was the correct final version dated March 19, 2009, and contained the correct instructions for making their check payable to CommerceWest, as Rubicon's escrow agent, and sending the subscription

agreement and check to Newport in California. Rather, it was the *subscription agreement* that was stapled into the Rubicon PPM that the couple received which was not correct. Unlike the subscription agreements signed by the seven actual Rubicon investors, SE and TH's subscription agreement instructed them to make the check payable to Rubicon, made no mention of the escrow agent, and allowed them to submit the check and agreement to Braeger's Mequon office as an alternative to sending the documents to Newport. These facts, along with Braeger's acknowledgement that the subscription agreement was a template into which information about the offering was simply typed in, support the conclusion that Braeger intentionally gave SE and TH a subscription agreement that instructed them to make their check payable to Rubicon.

3. There Is No Basis for Braeger's Assertion that Others at Newport Converted His Customers' Funds

Notwithstanding how the customers made their check payable, Braeger insists that he sent the check to Newport and that someone else at Newport must have stolen SE and TH's funds.[12] Here too, the record contradicts Braeger's claims.

The timing of the deposit of the check makes it virtually impossible for Braeger to have sent the check to California. Braeger acknowledged that he met with the couple at their home on July 20, 2009, and that they gave him their Rubicon check and subscription agreement at this meeting. Braeger testified that he left the couple's home at 7 p.m. or 8 p.m. and that they lived about an hour from his office.

Braeger testified that he did not know how the couple's check actually was processed by his office. However, he testified that he normally would have given the check to his assistant who would have made copies and sent the documents to Newport in California via FedEx. Braeger acknowledged, however, that by the time he returned from the couple's home on July 20, 2009, his assistant would have been gone for the day. Braeger also testified that the last FedEx pickup from his office was at either 6:30 p.m. or 8 p.m. SE and TH's check was deposited the next day, on July 21, 2009.

Based on Braeger's testimony, it is virtually impossible that he sent the check to Newport and that it was stolen and deposited at Wells Fargo. If Braeger's assistant had processed and sent the check by FedEx on July 21, 2009, when she returned to the office, there is no way the check could have arrived and been deposited (coincidentally at the same bank Braeger used for his personal and business banking) that same day. Moreover, the timing of Braeger's meeting with TH and SE makes it virtually impossible for Braeger to have processed and shipped the check

---

[12] Braeger argues that Newport actually managed Rubicon and that he was merely a "figurehead." The record contradicts Braeger's characterization of his role. Instead, the record demonstrates that he was both formally designated as Rubicon's manager in its governing documents and in fact managed the fund in practice.

the night of July 20, 2009, after returning to his office from TH and SE's home.[13]

4. The Hearing Officer Properly Denied Braeger's Request to Call Other Newport Witnesses

Under FINRA Rule 9263(a), a Hearing Officer must admit all relevant evidence and has discretion to exclude all evidence that is irrelevant, unduly repetitious, or unduly prejudicial. We review the admission or exclusion of evidence only for an abuse of discretion. *See Robert J. Prager*, 58 S.E.C. 634, 664 (2005). "Because this discretion is broad, the party arguing abuse of discretion assumes a heavy burden that can be overcome only upon showing that the Hearing Officer's reasons to admit or exclude the evidence were so insubstantial as to render . . . [the admission or exclusion] an abuse of discretion." *Dep't of Enforcement v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, *36-37 (FINRA NAC July 21, 2016).

Braeger argues that the Hearing Officer improperly denied his requests to call other Newport associated persons as witnesses at the hearing. In addition, in his appellate brief, Braeger discusses unrelated alleged misconduct and litigation against other Newport associated persons. Braeger suggests that because these Newport associated persons may have engaged in other unrelated misconduct, they may also have stolen his customers' Rubicon investment check. Braeger, however, has not pointed to any connection between these people and the disappearance of his customers' check and there is absolutely nothing in the record to suggest any connection. Indeed, the record shows that SE and TH's check never made it to Newport; instead, the record demonstrates that Braeger endorsed and deposited the check in a Rubicon account at Wells Fargo that he controlled. Given that lack of any connection between the witnesses Braeger sought to call and the disappearance of SE and TH's check, we find that the denial of Braeger's request to call these witnesses was not an abuse of discretion.[14]

---

[13] In his appellate brief, Braeger cites a link to the FedEx website. He claims the link shows that "Fedex [sic] in fact guarantees delivery before 8am from Milwaukee to Los Angeles, and further will deliver throughout the day at 10:30 a.m. and 3: p.m. [sic]." Braeger attempts to submit this evidence without the required motion to adduce additional evidence pursuant to FINRA Rule 9346(b), and without showing good cause for his failure to do so at the hearing. In addition, Braeger says nothing about when the package would have to ship from Wisconsin in order for it to be delivered by these times. Finally, it is not clear that a website link submitted in 2018 has any probative value whatsoever to FedEx delivery times in 2009. Rather, the evidence in the record, which consists of Braeger's testimony, demonstrates that it is impossible for the check to have been sent to Newport in time for it to be deposited on July 21, 2009.

[14] On appeal to the NAC, Braeger filed another motion seeking testimony from five Newport associated persons. In addition to being untimely, Braeger again failed to point to any evidence that these people have any connection to the disappearance of his customers' check. The only specific argument Braeger made at the hearing is that a Wells Fargo employee told him the routing number for the account in which SE and TH's check was deposited indicates that this Wells Fargo account was opened in Arizona, where Braeger claims a Newport principal owned a home. Braeger provides no support for this claimed conversation with a Wells Fargo employee.

[Footnote continued on next page]

5. Braeger's Claimed Wealth and the Attorneys' Fees He Incurred Do Not Prove He did Not Convert His Customers' Funds

Braeger argues that because he is a beneficiary of a multi-million dollar family trust, he had no motive to convert his customers' funds. There is no evidence in the record, however, to support Braeger's claimed wealth. To the contrary, the record demonstrates that Braeger filed for bankruptcy in the past, and his bank statements reflect overdraft fees and items returned for insufficient funds during the relevant period. In any event, there is no requirement that there be a finding of motive to find conversion, and we find that Braeger's unsupported claims about his wealth are insufficient to outweigh the abundant evidence that he converted his customers' funds.

Similarly, Braeger's argument that his willingness to incur attorney's fees to defend himself proves his innocence has no merit. Again, we find the evidence of Braeger's conversion to be overwhelming. Moreover, as the Hearing Panel noted, an adverse finding in this proceeding could affect Braeger's ability to participate in private placements for his current auto financing business. This alone would be sufficient reason to incur the costs of defending himself in this matter.

IV. Sanctions

The Hearing Panel imposed a bar in all capacities for Braeger's conversion of his customers' funds and a separate bar in all capacities for making material misrepresentations to his customers. After an independent review of the record, we agree with the Hearing Panel's conclusion that Braeger poses a danger to the investing public and securities markets, and we affirm the sanctions imposed by the Hearing Panel.

[cont'd]

Moreover, Braeger's assertions that SKS testified that this Newport principal owned a home in Arizona is flatly wrong. To the contrary, SKS testified that she was unaware that this person supposedly had a house in Arizona. Indeed, the only evidence in the record of a connection to Arizona relates to Braeger. The record reflects that one of Braeger's companies had business activities in Arizona.

Braeger also submitted to the NAC a letter claiming that he cooperated with the SEC in connection with the investigation of an unrelated matter. Braeger argues that his alleged cooperation in this matter proves he did not convert his customers' funds. We disagree. Braeger's uncorroborated claims of cooperation in an unrelated matter are not relevant here, where abundant evidence supports the findings about his misconduct.

In assessing the sanctions for Braeger's violations, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the Guidelines' Principal Considerations in Determining Sanctions (the "Principal Considerations").[15]

A. A Bar Is the Appropriate Sanction for Braeger's Conversion of His Customers' Funds

The Guidelines for conversion or improper use of funds or securities provide that, in the case of conversion, a bar is standard regardless of the amount converted.[16] This standard reflects that conversion is "by its very nature . . . extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that underpin the self-regulation of the securities markets." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *73 (Feb. 10, 2012). Accordingly, conversion, absent mitigating factors, "poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy." *Id.* at *74.

In this case, there are no applicable mitigating factors and a number of aggravating factors which support imposing a bar for Braeger's misuse and conversion.[17] The record demonstrates that Braeger's misuse and conversion was intentional and resulted in his monetary gain.[18] Braeger's numerous lies and misrepresentations to his customers supports the intentional nature of his misconduct. In addition, Braeger's use of a subscription agreement different from those of actual Rubicon investors and inconsistent with the Rubicon PPM—something which there is no doubt Braeger knew—further supports that his misconduct was intentional.

---

15 *See FINRA Sanction Guidelines* (2019), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf (hereinafter "*Guidelines*").

16 *Id.* at 36. The Guidelines for improper use also recommend that an adjudicator consider a bar, unless the misuse resulted from a misunderstanding about the customer's intended use of the funds, or where other mitigation applies. *Id.* We, like the Hearing Panel, would impose a bar for Braeger's improper use, because of the numerous applicable aggravating factors, and no applicable mitigating factors. Because of the bar imposed for Braeger's conversion, however, we do not assess a sanction for improper use.

17 Braeger's argues that his lack of disciplinary history is mitigating. It is well established, however, that a lack of disciplinary history is not mitigating. *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 F. App'x 886 (11th Cir. 2011).

18 *Guidelines*, at 8 (Principal Considerations Nos. 13, 16).

Braeger's misconduct caused injury to his customers, and he has neither made any attempt to remedy the harm he caused, nor taken any responsibility for his misconduct.[19] To the contrary, Braeger spent years deceiving his customers to conceal his misconduct and lull them into inactivity.[20] Moreover, Braeger caused his customers additional financial harm by trying to intimidate them with a defamation suit and trying to use that suit to prevent them from complaining to FINRA or cooperating in a FINRA proceeding.[21] While Braeger ultimately paid TH and SE $20,000—to settle the lawsuit *he brought against them*—the couple testified that they incurred $12,000 in attorneys' fees defending against Braeger's lawsuit. To this day, the couple has not been made whole for the $30,000 Braeger converted. We agree with the Hearing Panel that Braeger's "behavior exhibit[ed] a complete indifference to the harm he caused his customers to suffer."

We agree with the Hearing Panel that Braeger's misconduct shows that he cannot be trusted to comply with regulatory requirements in the future. Accordingly, we find that a bar is the appropriately remedial sanction for Braeger's conversion of customer funds.

B. A Bar Is the Appropriate Sanction for Braeger's Misrepresentations and Omissions to His Customers

In the case of intentional misrepresentations and omissions of material fact, the Guidelines recommend a fine of $10,000 to $155,000 and, unless mitigating factors predominate, urge an adjudicator to "strongly consider" barring an individual.[22] Here, numerous aggravating factors, and no mitigating factors, apply to Braeger's omissions of material fact and false and misleading statements to his customers.

Braeger failed to tell his customers that Rubicon had been closed, liquidated, and dissolved. Instead, he engaged in a pattern of numerous misrepresentations to his customers over an extended period of time.[23] Braeger made these misrepresentations in statements, tax documents, written communications, and numerous oral statements to his customers. Braeger's misconduct was intentional, harmed his customers, and concealed his conversion of their funds.[24] Braeger has not accepted responsibility for his misconduct, has not remedied his misconduct, and

---

19 *Id.* at 7 (Principal Considerations Nos. 2, 4, 11).

20 *Id.* at 7 (Principal Considerations No. 10).

21 *Id.* In addition to the financial harm Braeger caused his customers, TH and SE testified at length about the stress and conflict his actions caused in their marriage.

22 *Id.* at 89.

23 *Id.* at 7 (Principal Considerations Nos. 8, 9).

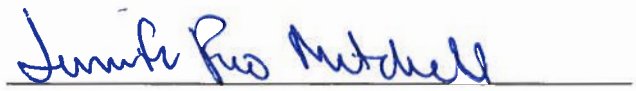
24 *Id.* at 7-8 (Principal Considerations Nos. 10, 11, 13).

continues to make assertions that are flatly contradicted by the evidence.[25] Under these circumstances, we agree that a bar in all capacities is the appropriate sanction for Braeger's misconduct.

V. Conclusion

Braeger violated NASD Rule 2330(a) and FINRA Rules 2150(a) and 2010 by misusing and converting his customers' funds instead of investing them as the customers had intended. For this violation, Braeger is barred in all capacities. Braeger also violated FINRA Rule 2010 by making numerous misrepresentations and omissions of material fact to his customers about the value and status of their investment and the reasons they could not recover their funds. For this violation, we impose a second bar in all capacities.[26] We affirm the Hearing Panel's order that Braeger pay $14,066.95 in hearing costs, and we order that Braeger pay appeal costs in the amount of $1,470.49.

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

---

25 *Id.* at 7 (Principal Considerations Nos. 2, 4).

26 The bars are effectively immediately upon the service of this decision.