FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MICHAEL JOSEPH CLARKE (CRD No. 1078211), Respondent.	Disciplinary Proceeding No. 2016050938301 Hearing Officer–DW **HEARING PANEL DECISION** May 8, 2019

Respondent Michael Clarke engaged in unethical conduct by converting $612,400 advanced to him for the purpose of purchasing and reselling sports tickets. Clarke also engaged in unethical conduct by causing at least 60 bounced checks and failed electronic payments over a three-year period. For his misconduct, Clarke is barred from associating with any FINRA member in any capacity, ordered to pay restitution, and assessed costs.

Appearances

For the Complainant: Melissa K. DePetris, Esq., Colleen O'Loughlin, Esq., and Savvas A. Foukas, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Stefan Savic, Esq., Shipkevich, PLLC

DECISION

I. Introduction

Respondent Michael Joseph Clarke has been a member of the securities industry for more than three decades. Over that time, he repeatedly borrowed money from his industry colleagues. This disciplinary action arose from Clarke's failure to repay substantial loans from colleagues at a member firm where he worked.

Clarke pitched his colleagues the chance to participate in his side business that involved reselling tickets. Clarke claimed to have many contacts willing to sell him various sporting event tickets at a discount. Clarke also claimed to have numerous buyers willing to repurchase the tickets at a premium. What Clarke did not have was money. So he offered his colleagues a deal—they would front him the money to buy sporting event tickets, and once Clarke resold the tickets, he would repay them the full amount of their advances along with a share of his profits.

But after taking their money, Clarke never repaid his colleagues. Instead, Clarke gave repeated excuses for non-repayment, and sometimes a small partial payment, but never the repayment he promised. Over several transactions between October 2015 and April 2016, three colleagues advanced Clarke more than $612,000. Clarke never repaid all of the money. As Clarke's failure to pay continued, his employment became increasingly strained until he resigned—just when he was about to be fired.

The firm disclosed that it fired Clarke for engaging in a scheme to defraud, which led to the investigation that led to this proceeding.[1] The first cause of the Department of Enforcement's Complaint alleged that by borrowing and not repaying the loans, Clarke improperly converted the money. The second cause claimed that Clarke made material misrepresentations to his colleagues to induce them to give him the funds. The third cause alleged that Clarke engaged in other unethical conduct by causing at least 60 bounced checks and failed electronic payments over a three-year period, totaling nearly half a million dollars. Each cause alleged a violation of FINRA Rule 2010, which requires members to observe high standards of commercial honor and just and equitable principles of trade. In his Answer, Clarke generally denied the allegations. Detailed stipulations entered into by the parties make the salient facts largely undisputed. Clarke's primary defense is that the loans he obtained from his colleagues had usurious rates of interest, and therefore were unenforceable under New York law. A hearing on the claims and defenses was held in New York, New York.

II. Findings of Fact

A. Clarke's Background

Clarke first entered the securities industry associating with a FINRA member in 1982.[2] In 1986, Clarke registered with FINRA as a Municipal Securities Representative.[3] Since 1982, Clarke has been associated with 13 FINRA-regulated broker-dealers.[4] From November 2010 through September 2015, Clarke was associated with Tradition Asiel Securities, Inc.[5] From October 2015 through July 2016, he associated with MARV Capital, Inc.[6] Since July 2016, Clarke has been associated with Avatar Capital Group LLC.[7] Clarke worked as a Municipal Securities Representative with each of his firms.[8]

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[1] While the disclosure reports that the firm fired Clarke, he actually resigned before being terminated.

[2] Stipulation ("Stip.") ¶ 1.

[3] Stip. ¶ 2.

[4] Stip. ¶ 3.

[5] Stip. ¶ 4.

[6] Stip. ¶ 5.

[7] Stip. ¶ 6.

[8] Stip. ¶¶ 4-6.

Because Clarke is currently registered, he is subject to FINRA's jurisdiction.[9]

B. Clarke's Ticket Business

Over the course of his career, Clarke told his industry employers about his outside business involving brokering or reselling tickets to sporting events, concerts, and other events.[10] Clarke's business was buying tickets from his suppliers and reselling them at a profit.[11] Clarke claimed contacts with various individuals and venues in the greater New York area who supplied him with tickets to various events, including sporting events.[12] He also touted contacts within the securities industry (and elsewhere) interested in purchasing those tickets for entertaining clients, personal use, or for resale.[13]

Clarke often borrowed money from his co-workers to fund his ticket purchases.[14] He solicited loans from co-workers on the promise that the loans were without risk, as Clarke claimed to have buyers already lined up for tickets.[15] So he enticed his lenders with the prospect of a quick and assured profit.[16]

Unfortunately for Clarke's lenders over the years, their profits from these purported transactions seldom materialized. For instance, in 2008 when Clarke worked for Whitaker Securities, he borrowed just over $64,000 from the firm's CEO on the promise of buying and reselling World Series tickets.[17] Clarke signed promissory notes agreeing to repay the money in full (plus interest) by October 15, 2008.[18] Clarke gave the CEO a check for $25,000 on October 10, along with a promise to pay the rest in a few days.[19] The check bounced,[20] and Clarke attempted no other payment until November, when he paid $10,000.[21] By December 2008, Clarke was still promising to pay the money he owed but had not done so.[22] At one point, Clarke

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[9] Stip. ¶ 7.

[10] Hearing Transcript ("Tr.") (Clarke) 453-57; Joint Exhibit ("JX")-58, at 2.

[11] Tr. (Clarke) 456-57.

[12] Tr. (Clarke) 457-58.

[13] Tr. (Clarke) 458-59.

[14] Tr. (Clarke) 463-66.

[15] Tr. (Clarke) 460-62; Tr. (Raparthi) 174-75.

[16] Tr. (Clarke) 465-66.

[17] Tr. (Clarke) 467-71.

[18] Complainant's Exhibit ("CX")-7 at 3, 21.

[19] Tr. (Clarke) 473-75; CX-7, at 6.

[20] Tr. (Nicosia) 731.

[21] Tr. (Nicosia) 733-34; CX-7, at 17.

[22] Tr. (Nicosia) 732; CX-7, at 14.

gave the CEO a blank check as a sign of "good faith."[23] In February 2009, Clarke paid another $36,000, leaving a balance of about $18,000 of the principal.[24] He never paid the rest of the principal or any interest.[25]

Clarke repeated this pattern over several years, borrowing from industry co-workers on the promise of quick ticket resale profits, and then failing to deliver.[26] Whitaker suspended and eventually fired Clarke in early 2010 for doing just that to several colleagues.[27] Around the time of his firing, Clarke was investigated by the Kings County District Attorney's Office. That office's investigation into Clarke led to an April 2011 deferred prosecution agreement related to loans from three individuals to Clarke as part of ticket resales.[28] The agreement was that the prosecutor would not bring charges if Clarke repaid the three individuals $63,100, the full amount of the principal advanced to Clarke.[29] The agreement reflected the District Attorney's view that Clarke's representations about his ticket reselling "may have been false and/or fraudulent when he made them, in that he lacked the capacity to arrange and execute the supposed deals."[30]

After Whitaker fired him, Clarke joined Tradition Securities.[31] Clarke's supervisor at Tradition specifically directed him to close down his ticket business.[32] But Clarke ignored that mandate and continued borrowing money from colleagues.[33] Over time, Clarke borrowed hundreds of thousands of dollars from his industry co-workers.[34] By the middle of 2015, Clarke owed one co-worker, Jim, over $169,000.[35] He owed another colleague, Peter, at least $210,000.[36] He owed other colleagues money as well.[37] In the latter part of 2015, Clarke

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[23] Tr. (Nicosia) 734-35; CX-7, at 18.

[24] Tr. (Nicosia) 736; CX-7, at 19.

[25] Tr. (Nicosia) 737.

[26] Tr. (Clarke) 483-91, 495-96, 506, 508.

[27] Tr. (Nicosia) 748-56; CX-6, at 5; JX-42, at 10.

[28] CX-10.

[29] CX-10.

[30] CX-10.

[31] Tr. (Clarke) 520-21.

[32] Tr. (Clarke) 522.

[33] Tr. (Clarke) 523.

[34] Tr. (Clarke) 525-30.

[35] Tr. (Clarke) 526-27; JX-33.

[36] Tr. (Clarke) 529-30; JX-34.

[37] Tr. (Clarke) 540-41.

changed firms, moving to MARV Capital, leaving outstanding debts to his Tradition colleagues.[38]

C. Clarke Borrowed Money from MARV Capital Colleagues

MARV Capital is a small broker-dealer operated by two partners—Maneesh Awasthi and Virupaksha Raparthi.[39] Clarke went to work for MARV in October 2015.[40] Almost immediately, Clarke solicited his new co-workers for loans as part of his purported ticket business.[41] In the latter part of October, Awasthi lent Clarke $61,500 to purchase tickets for resale.[42] Clarke assured Awasthi that Clarke already had buyers lined up to purchase the tickets.[43] Clarke promised to quickly return Awasthi's money along with another $10,000 in interest.[44] The interest would come from the profits Clarke generated by reselling the tickets.[45] Awasthi advanced the money in two tranches, on October 23 and 26.[46]

Clarke also borrowed money from others at the firm. Between October and November 2015, Raparthi loaned Clarke $218,600 to purchase tickets for resale.[47] AG, a MARV advisory client and business associate of Awasthi and Raparthi, also participated in the deal, loaning Clarke another $45,300.[48] As with Awasthi, Clarke told Raparthi and AG that he already had buyers lined up to purchase the tickets. Clarke promised to repay Raparthi $33,590 in interest along with his principal.[49] AG would recoup his principal along with $5,700 in interest, according to Clarke.[50] Clarke promised repayment by the end of November 2015.[51]

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[38] Tr. (Clarke) 540.

[39] Tr. (Raparthi) 159-60.

[40] Tr. (Clarke) 540.

[41] Tr. (Raparthi) 170-72.

[42] Stip. ¶ 8.

[43] Stip. ¶ 9.

[44] Stip. ¶ 10.

[45] Tr. (Awasthi) 80.

[46] Stip. ¶¶ 11, 12.

[47] Stip. ¶¶ 15, 18. Raparthi loaned the money together with his wife and two entities he controlled, RBCA, Inc. and AARILR, LLC. Tr. (Raparthi) 258-62; JX-3. The funds were transferred by November 5, 2015. Stip. ¶¶ 20-24.

[48] Stip. ¶ 18. These funds were also transferred by November 5, 2015. Stip. ¶¶ 20-24.

[49] Stip. ¶¶ 16, 17.

[50] Stip. ¶ 19.

[51] Tr. (Raparthi) 174.

Although he told his colleagues he would use their money to purchase tickets, Clarke used the money for other purposes.[52] Clarke's checking account went from being overdrawn to flush with cash after receiving money from Awasthi, Raparthi, and AG.[53] And as soon as the money came in, Clarke started spending it. He owed money to former Tradition colleagues Peter and Jim, so he paid them $130,000 and $43,000, respectively.[54] Clarke paid yet another creditor $13,000.[55] Clarke also withdrew more than $20,000 in cash.[56] He made two transfers totaling $6,700 to his daughter.[57] And he used the money for several other personal expenditures, including restaurants, liquor stores, grocery stores, and other expenses.[58] Clarke admitted that he used portions of his colleagues' funds to pay his personal expenses.[59]

D. Clarke Falsely Promised U.S. Open Seat Licenses

In November 2015 shortly after receiving the loans from his MARV colleagues, Clarke proposed another ticket venture to Raparthi.[60] Clarke claimed that he had a chance to acquire lifetime rights to multiple luxury permanent seat licenses at the U.S. Open Tennis Championship in Queens, New York.[61] Clarke claimed to know a family interested in selling the seat licenses because of financial hardship and he offered Raparthi the "rarely" available opportunity to purchase some of the rights to six available seat licenses.[62]

Clarke claimed that he would invest his own money to buy three of the licenses, and proposed that Raparthi buy the other three.[63] Once Raparthi bought the licenses, he could either resell them for a substantial profit or use them for his own enjoyment.[64] But when it came time to put up the money, Clarke was short of funds, and he asked Raparthi to advance him a portion of Clarke's cost.[65] Based on Clarke's representations, Raparthi sent $312,000 to Clarke's

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[52] Tr. (Brown) 853-57; Tr. (Clarke) 564-87.

[53] Tr. (Clarke) 563-64.

[54] Stip. ¶ 13; Tr. (Clarke) 571.

[55] Tr. (Clarke) 565.

[56] Tr. (Clarke) 564-66.

[57] Tr. (Clarke) 565, 571-72.

[58] Tr. (Clarke) 569, 587.

[59] Tr. (Clarke) 566-69.

[60] Tr. (Raparthi) 193-94; Stip. ¶ 35.

[61] Tr. (Raparthi) 113, 194.

[62] Tr. (Raparthi) 195-96.

[63] Tr. (Raparthi) 196.

[64] Tr. (Raparthi) 194-95, 200.

[65] Tr. (Raparthi) 197.

personal checking account.[66] Clarke assured Raparthi that the funds would be placed in an escrow account until the transaction closed.[67] Clarke promised that the transfer would take four to six weeks.[68]

In fact, Clarke never put Raparthi's funds into escrow.[69] Clarke never used the funds to purchase any U.S. Open tickets and never provided any tickets to Raparthi.[70] Instead, the same day Raparthi wired him the money, Clarke wired $255,000 to Peter.[71]

E. Clarke Failed to Repay the Loans and Advances from MARV Capital Colleagues

When it came time to repay the advances from his colleagues at the end of November 2015, Clarke failed to return the money as promised.[72] Instead, Clarke delivered a series of assurances and excuses for nonpayment and false promises about repayment in the future.[73] Clarke represented at various times that a check from his buyer did not come as expected, or the buyer forgot to send it sooner and the check was in the mail, or there was some problem with the mail so the buyer would send the check again.[74] Clarke claimed that he did not have the money because the buyer was on vacation, and that the money would come through in a couple of days.[75]

Clarke constantly promised that payment was on the horizon. He often claimed that large bank deposits were imminent.[76] He claimed he was expecting a large payment from someone in Florida that would enable him to repay his MARV colleagues.[77] But despite Clarke's claim in

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[66] Tr. (Raparthi) 202-04. The funds were transferred on November 12, 2015. Stip. ¶ 36.

[67] Stip. ¶ 38.

[68] Tr. (Raparthi) 197-98.

[69] Stip. ¶ 39.

[70] Stip. ¶¶ 40, 41.

[71] Tr. (Clarke) 596-97. Clarke falsely claimed at the hearing that Peter was helping to facilitate the U.S. Open transaction. Tr. (Clarke) 597-99. In fact, Clarke was repaying previous loans from Peter. Tr. (Brown) 867-69. Peter knew nothing about any U.S. Open seat licenses. Tr. (Brown) 874-75.

[72] Tr. (Awasthi) 80-81.

[73] Tr. (Awasthi) 80-81.

[74] Tr. (Awasthi) 82-83.

[75] Tr. (Awasthi) 81-83; Tr.(AG) 405.

[76] JX-26.

[77] Tr. (Clarke) 631-32; Tr. (AG) 405-06; Tr. (Raparthi) 272-73.

text messages that he was in Florida getting the money, in truth he was still at home in New York.[78]

And Clarke became difficult to contact. He claimed in text messages he was unavailable because of travel to the Super Bowl in California, when in truth he was at home in New York.[79] He claimed family emergencies that precluded communication.[80]

This went on for months. By January 2016, Awasthi had become increasingly concerned and wanted to have Clarke's promise to repay in writing.[81] Clarke agreed and signed documents acknowledging the loan amounts and dates by which Clarke promised to repay.[82] Clarke also gave Awasthi a blank check in an apparent effort to reassure him.[83]

But Awasthi was not reassured. He told Clarke, "[I]f you're having any problem, any trouble, you know, it's not – you know, I just want a final date when you will pay me my money back, and, you know, if you need a little bit more time, I'm okay with that; you come up with a date when you're surely able to pay me my money back."[84] Clarke assured Awasthi that repayment would happen by February 16, 2016.[85] So Awasthi gave Clarke an extra month, and they agreed to repayment by March 16, 2016.[86] Clarke executed another document promising to pay Raparthi and AG all of their principal and interest by mid-February 2016.[87] The agreement also documented the money Raparthi advanced for the U.S. Open seat licenses. It provided that Clarke "affirm[ed] that the $312,000 has been deposited in a mutual escrow [attorney trust] account with [an] attorney."[88] The representation was false. The money was not in escrow.[89]

Clarke did make a $5,000 interest payment to AG in late January as well as payments to Awasthi and Raparthi later in February.[90] These payments represented Clarke's promised interest

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[78] Tr. (Clarke) 632-36.

[79] Tr. (Clarke) 623-26.

[80] JX-26.

[81] Tr. (Awasthi) 83.

[82] JX-1. Clarke promised a first repayment by December 4, 2015, and a second payment by January 30, 2016. The undated document was signed shortly before January 30. Tr. (Awasthi) 87; JX-1.

[83] Stip. ¶ 14; Tr. (Awasthi) 87-88.

[84] Tr. (Awasthi) 91-92.

[85] Tr. (Awasthi) 92.

[86] Tr. (Awasthi) 92; JX-2.

[87] JX-3.

[88] JX-3.

[89] Tr. (Clarke) 615-16.

[90] Stip. ¶¶ 26, 27; Tr. (Awasthi) 97; Tr. (Raparthi) 263.

on the loans, so Awasthi received $10,000 and Raparthi $34,290.[91] Raparthi gave AG $700, his outstanding interest.[92] But Clarke paid none of the principal owed to Awasthi ($61,500), Raparthi ($218,600), or AG ($45,300).[93] Clarke's promised payment deadlines came and went without further payment.[94]

In April 2016, Clarke gave Awasthi a blank check and wrote checks to Raparthi and AG for their oustanding principal balances of $218,600 and $45,300, respectively.[95] But Clarke's bank account did not have enough funds to cover either check.[96] In April 2016, Clarke agreed that MARV could withhold a portion of the commissions he earned to partially offset his outstanding debts.[97] So Awasthi and Raparthi took $25,000 in commissions MARV owed to Clarke.[98] Awasthi, Raparthi, and AG decided to split the money evenly, with each receiving $8,333.[99]

As Raparthi and Awasthi contemplated terminating Clarke from MARV, Clarke tendered his resignation in July 2016 and moved to another firm, Avatar Capital Group. Ultimately, Clarke failed to repay Awasthi's $53,167 outstanding principal; AG's $36,967 principal; and Raparthi's $210,266 loan principal and $312,000 advanced for the U.S. Open seat licenses, totaling $612,400.[100]

F. Clarke Continued His "Business" after Exiting MARV

Clarke was not dissuaded by his unpaid debts. Even after leaving MARV, Clarke continued borrowing from—and failing to repay—colleagues. When he started working at Avatar in June 2016, the firm required Clarke to sign a document prohibiting him from conducting any business with any other employee without prior written approval.[101] Clarke ignored this agreement when he borrowed $5,000 from an Avatar co-worker in the Fall of 2016,

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[91] Tr. (Awasthi) 97; Tr. (Raparthi) 263. Clarke repaid Raparthi in part with a $16,000 check that was made out to "cash" and drawn on an account of an individual Raparthi did not know. Tr. (Raparthi) 265.

[92] Tr. (Raparthi) 263.

[93] Tr. (Awasthi) 99; Tr. (Raparthi) 263; Tr. (AG) 415-16; CX-2; CX-3.

[94] Tr. (Awasthi) 110; Tr. (Raparthi) 315; Tr. (AG) 415-16.

[95] Stip. ¶¶ 14, 29, 30.

[96] Stip. ¶ 31.

[97] Tr. (Awasthi) 102-07; JX-28.

[98] Tr. (Awasthi) 102-07.

[99] Tr. (Awasthi) 106-07.

[100] CX-2; CX-3.

[101] CX-11; JX-37.

purportedly for event tickets.[102] Clarke borrowed the money on a Friday promising repayment on the following Monday.[103]

When Monday came, Clarke had no money for repayment.[104] Two weeks later, Clarke wrote the co-worker a check repaying the loan with interest.[105] The check bounced.[106] When advised by his co-worker that the check did not clear, Clarke said the bank had made a mistake.[107] Clarke said the bank would send a bank check instead.[108] When the co-worker advised that he had not received anything from the bank and needed the money to pay his property taxes and mortgage, Clarke said he would electronically transfer the money the next day.[109] The next day, Clarke confirmed to his co-worker that he transferred the funds, but no money ever arrived in the co-worker's account.[110] Days later, Clarke drove to his bank with his co-worker to pick up a bank check.[111] Clarke came out of the bank claiming the check was not ready.[112] Later, Clarke gave him a check drawn on a business account.[113] This account also lacked funds to cover the check.[114] Clarke ultimately never repaid the loan.[115]

G. Clarke Misrepresented the Purpose of the Loans

Central to Clarke's purported "business" was his claimed access to contacts willing to sell him event tickets at a discount and buyers willing to repurchase the tickets at a premium. But despite these claims, Clarke seldom delivered promised profits. Instead, he usually delivered a series of excuses for nonpayment. And Clarke continued to deliver excuses lacking in credibility

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[102] Tr. (Giuliani) 931; CX-12.

[103] Tr. (Giuliani) 932.

[104] Tr. (Giuliani) 934-35.

[105] Tr. (Giuliani) 935-36.

[106] Tr. (Giuliani) 935.

[107] Tr. (Giuliani) 938.

[108] Tr. (Giuliani) 941-42.

[109] Tr. (Giuliani) 944-45.

[110] Tr. (Giuliani) 946.

[111] Tr. (Giuliani) 950.

[112] Tr. (Giuliani) 950.

[113] Clarke opened an account in the name of an LLC he created to conduct his ticket business. Tr. (Clarke) 667.

[114] Tr. (Giuliani) 952-55. The co-worker never deposited the check after a bank employee told him that the check could not be negotiated because the account did not have adequate funds.

[115] Tr. (Giuliani) 958-59.

at the hearing. "Sometimes I was not reimbursed at the time."[116] "I did a lot of stuff with him with cash which he didn't even remember."[117] "We were working on trying to get the tickets."[118]

Yet there was scant evidence of Clarke's work. Clarke kept no meaningful records of his ticket business.[119] He seemed to be unaware of how much money, if any, he made from actual ticket resales.[120] The only evidence of Clarke's use of the money was bank records, and those records revealed few expenditures consistent with ticket purchases.[121] Those same bank records evidenced substantial personal expenditures and repayments of prior debts by Clarke.[122] From this we infer that Clarke's claimed intention of using his colleagues' money for ticket resales was false. Instead, Clarke intended to use the borrowed funds in large part to repay prior creditors and fund his personal expenditures. He then made a continuing series of misrepresentations about his business efforts to put off and stall his creditors when he was unable to repay his debts.

H. Clarke Passed Bad Checks

As described above, Clarke at times wrote his colleagues checks in purported satisfaction of his debts but without sufficient funds in his account. This was part of a larger pattern for Clarke. Between February 2013 and September 2016, Clarke wrote at least 46 checks and authorized 14 electronic payments that failed to clear because of insufficient funds.[123]

Clarke's bad checks and payments were drawn on four different checking accounts at different banks.[124] Clarke wrote bad checks in all the accounts knowing that he lacked adequate funds. For instance, in October 2014, Clarke made an ATM withdrawal from his account leaving a balance of $523.[125] The same day, Clarke wrote a check for $19,500.[126] In December 2014, Clarke wrote an $11,000 check when he had a negative balance of $1,776 in his account.[127] In September 2015, he wrote a $30,000 check when his account balance was only $152.[128]

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[116] Tr. (Clarke) 1033.

[117] Tr. (Clarke) 589.

[118] Tr. (Clarke) 617.

[119] Tr. (Clarke) 1004-07.

[120] Tr. (Clarke) 1005.

[121] Tr. (Clarke) 579-80; Tr. (Brown) 846-59.

[122] Tr. (Clarke) 563-66.

[123] Stip. ¶ 43; CX-4.

[124] Stip. ¶ 42.

[125] Tr. (Brown) 895; CX-5.

[126] Tr. (Brown) 896; JX-32.

[127] Tr. (Brown) 896-97.

[128] CX-4.

Clarke opened a new account in late June 2016, with an initial $160 deposit.[129] The same day, he withdrew $100 from the account at an ATM.[130] Without making any additional deposits to the account, Clarke wrote two checks days later—the first for $2,800 and the second for $26,000.[131] At the time, his account balance was only $6.[132]

Of the 60 bad checks and failed payments Clarke caused, 51 posted when the account had a negative balance, frequently by thousands of dollars.[133] Clarke took little account for his conduct, offering the excuse that "[a]t times I didn't get reimbursed."[134] In total, Clarke wrote $473,431 in bad checks and authorized more than $6,400 in failed payments.[135] When asked whether he paid attention to the amount of money in his account, Clarke testified "[not] that much anymore, no."[136]

III. Conclusions of Law

A. Clarke Obtained Loans through Unethical Misconduct

The first two causes of the Complaint relate to the loans Clarke obtained from his MARV colleagues. The first cause alleges that Clarke converted the loan proceeds, and the second alleges that Clarke obtained the funds by means of misrepresentations, all in violation of FINRA Rule 2010.

FINRA Rule 2010 requires that the business-related conduct of FINRA members and their associated persons comport with "high standards of commercial honor and just and equitable principles of trade."[137] It mandates that securities industry participants not only conform to legal and regulatory requirements, but also conduct themselves in the course of their business with integrity, fairness, and honesty.[138]

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[129] Tr. (Clarke) 698-99; JX-20.

[130] Tr. (Clarke) 699.

[131] Tr. (Clarke) 700-01; JX-20.

[132] CX-4; JX-20.

[133] CX-4.

[134] Tr. (Clarke) 1065.

[135] CX-4.

[136] Tr. (Clarke) 677.

[137] *Dep't of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *14 n.14 (NAC Oct. 10, 2007), *aff'd*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008).

[138] *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *21 n.20 (Feb. 13, 2015) ("[T]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. [The Rule] protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation.").

The rule's intentionally broad scope is calculated to remediate "methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market."[139]

1. Clarke Converted the Loan Proceeds

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."[140] The act of conversion "is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money," and amounts to a violation of FINRA Rule 2010.[141] Conversion violates FINRA Rule 2010 even if the person from whom the funds or property is converted is not a customer.[142]

We find that Clarke converted the investments of Awasthi, Raparthi, and AG.[143] He secretly took their money for his own purposes. Clarke's undisclosed diversion was both intentional and unauthorized.

Clarke disputes that his conduct was unauthorized, maintaining that Awasthi, Raparthi, and AG each gave him their money voluntarily.[144] True, each freely gave their money to Clarke. Even so, Clarke's use of the funds for purposes other than the business he promised suffices to establish that his use of the money was "unauthorized."[145] Bank records showed that as soon as the money came into Clarke's account, he consistently used the funds on a multitude of personal purchases, expenditures, and debt repayments unrelated to the business purposes described to his colleagues. The lack of any records or documentation showing that Clarke expended substantial

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[139] *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009).

[140] *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012).

[141] *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *11, 25 (Mar. 29, 2016).

[142] *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *20 (NAC Jan. 13, 2017).

[143] At the hearing, Clarke insisted on referring to the instruments as "loans," and not "investments" or "securities." The interests were clearly loans. That said, the loans were also investments and quite possibly securities, given that the expected interest or profit was to be derived from Clarke's business efforts. *See SEC v. Edwards*, 540 U.S. 389, 396-97 (2004) ("We hold that an investment scheme promising a fixed rate of return can be an 'investment contract' and thus a 'security.'"). However, because Enforcement does not press the point and because we do not consider it material to our decision, we make no determination as to whether the instruments were securities.

[144] Respondent's Pre-Hearing Brief at 3.

[145] *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23 (Sept. 30, 2016) (respondent's use of funds was an unauthorized conversion when he received money for investment purposes and instead used the funds to pay his personal expenses).

funds on ticket purchases undermines any claim that he used some portion of the money as promised.[146] And to date, Clarke has not repaid the funds.[147]

Clarke also maintains that the loans carried rates of interest that were usurious under New York law, and for that reason the agreements are unenforceable and his conduct somehow excused.[148]

We reject this defense. Clarke cannot convert with impunity money entrusted to him simply because he promised his victims too much interest in return.[149] Whether the contractual loan arrangements are enforceable under state usury law does not speak to Clarke's unethical misconduct.[150] The SEC and federal courts recognize that at the core of conversion misconduct is "deception and fraud in the handling of others' property that endangers the integrity of the securities industry."[151] Even if the agreements here are unenforceable under New York's usury laws, Clarke's conversion of money was no less deceptive and dishonest.

We therefore find that the preponderance of the evidence established that Clarke converted the funds Awasthi, Raparthi, and AG loaned him, in violation of FINRA Rule 2010.

2. Clarke Obtained Loans through Misrepresentations

The second cause alleges an alternative theory of liability for the same conduct, that Clarke acted unethically by misrepresenting to his MARV colleagues his use of loan proceeds to obtain the money. An associated person obtaining money or conducting business through misrepresentations and omissions acts in a manner inconsistent with just and equitable principles of trade.[152] FINRA Rule 2010 is "broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."[153]

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[146] *Joseph Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *18 (June 2, 2016) (respondent's intent to convert and conversion demonstrated by, among other things, "his failure to maintain records concerning his conversion or how he used [the victim's] funds").

[147] Clarke repaid the interest, but not the principal amounts of the loans.

[148] Respondent's Pre-Hearing Brief at 4-5.

[149] Indeed, even cases interpreting New York usury law appear to recognize that even where "a usurious loan . . . would ordinarily be unlawful, void and unenforceable," equity may dictate recovery by the lender where "the transaction was the brainchild of the defendant." *Keezing v. Rodriguez*, 765 N.Y.S.2d 196, 198-99 (N.Y. Sup. Ct., Kings Cty. June 11, 2003).

[150] *See Dep't of Enforcement v. Jennings*, No. 2008013864401, 2013 FINRA Discip. LEXIS 18, at *58 (OHO Mar. 4, 2013) ("Liability under [FINRA Rule 2010] is not dependent upon a breach of contract.").

[151] *Saad v. SEC*, 873 F.3d 297, 303 (D.C. Cir. 2017).

[152] *Donner Corp.*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *29 (Feb. 20, 2007).

[153] *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996).

We find Clarke's deceptive tactics in connection with the loan arrangements inconsistent with just and equitable principles of trade. To obtain money, Clarke deceived his colleagues as to the reason for the loans, enticing them with the prospect of lucrative business profits while secretly intending to use the money for his own purposes. And his deception continued even after he received the funds, putting off his lenders with false promises, bogus assurances, and made-up excuses.

Clarke defends his misconduct, claiming that "promises of future conduct are not actionable as negligent misrepresentations."[154] But even if a bare failure to honor a promise or an errant prediction of future events is not necessarily a misrepresentation, "to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold," is a deceit.[155] Clarke obtained hundreds of thousands of dollars on the pretense that the money would be used to purchase and resell tickets, knowing full well he would use the money for other things. This was misconduct.[156]

And Clarke's misrepresentations continued even after he received the money. When the promised business did not happen and failed to yield profits, Clarke fabricated a series of excuses to justify his failure to honor his commitments. At one point, Clarke falsely represented that over three hundred thousand dollars earmarked for U.S. Open seat licenses was safe in an escrow account, when in fact the money was gone. Clarke's misconduct was patently unethical and inconsistent with just and equitable principles of trade, in violation of FINRA Rule 2010.

B. Clarke Acted Unethically by Passing Bad Checks

The third cause alleges that Clarke violated FINRA Rule 2010 by writing bad checks and authorizing electronic funds transfers that failed to clear. A registered representative has "a duty to ensure that there [are] sufficient funds available in his checking account (or a sufficient overdraft privilege) to cover the checks that he issue[s]."[157] Thus, an associated person violates FINRA Rule 2010 when he writes checks and authorizes transfers that he knows, or has reason to know, will fail to clear.[158]

Clarke wrote checks and authorized electronic transfers with ample reason to know the transactions would not clear. Over a three-year period, Clarke authored at least 60 checks and electronic transfers that did not clear because of insufficient funds. Clarke caused failed payments across several accounts. He wrote bad checks when he knew that other checks had

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[154] Respondent's Pre-Hearing Brief at 5, citing *Murray v. Xerox Corp.*, 811 F.2d 118, 123 (2d Cir. 1987).

[155] *United States v. Grayson*, 166 F.2d 863, 866 (2d Cir. 1948).

[156] *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) ("To sell an option while secretly intending not to permit the option's exercise is misleading, because a buyer normally presumes good faith.").

[157] *John Gordon Simek*, 50 S.E.C. 152, 161 (1989).

[158] *George R. Beall*, 50 S.E.C. 230, 231 (1990); *Simek*, 50 S.E.C. at 161.

been returned and the account was necessarily unfunded. He wrote bad checks in accounts that he had just opened and had not deposited funds, so that the insufficiency of deposited funds was certain.

We find that the frequency, volume, and duration of the failed payments over the relevant period establish that Clarke deliberately passed bad checks and caused the failed electronic transfers. This misconduct was also unethical and inconsistent with just and equitable principles of trade, in violation of FINRA Rule 2010.

IV. Sanctions

We now consider appropriate sanctions for Clarke's violations. We do so bearing in mind that the purpose of FINRA's disciplinary process is to protect the investing public, support and improve overall business standards in the securities industry, decrease the likelihood of recurrence of misconduct by the disciplined respondent, and deter others from engaging in similar misconduct.[159]

FINRA's Sanction Guidelines ("Guidelines") contain General Principles Applicable to All Sanction Determinations, Principal Considerations in Determining Sanctions, and Guidelines applicable to specific violations.

A. Loan Misconduct

Because the allegations of Clarke's conversion and misrepresentations in connection with the loans substantially overlap in the first two causes, we assess the sanction appropriate to this misconduct together.[160] For conversion, the pertinent Guideline recommends that adjudicators "[b]ar the respondent regardless of amount converted."[161] The Guideline does not recommend a fine "since a bar is standard."[162]

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[159] Guidelines at 2 (2019) (General Principle No. 1), http://www.finra.org/industry/sanction-guidelines.

[160] Guidelines at 4 (Principal Consideration No. 4); *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *59 (Sept. 24, 2015) (batching outside business activity and selling away violations for purposes of sanctions).

[161] Guidelines at 36; *accord Casas*, 2017 FINRA Discip. LEXIS 1, at *43; *Grivas*, 2016 SEC LEXIS 1173, at *25 (quoting *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007)). ("This approach reflects the judgment that, absent mitigating factors, conversion 'poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry.'"); *Grivas*, 2016 SEC LEXIS 1173, at *25 (quoting *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007)).

[162] Guidelines at 36.

The Guideline applicable for fraud or misrepresentations of material fact recommends that in cases of intentional or reckless misconduct, adjudicators should strongly consider a bar, along with a fine of $10,000 to $155,000.[163]

We find many aggravating factors here. Misconduct that results from an intentional act is aggravating, and conversion is necessarily intentional.[164] Also aggravating is the fact that Clarke's misconduct led to his own monetary gain, as he has been enriched by the proceeds of the loans he never repaid, totaling more than $612,000.[165] Clarke's failure to repay the loans caused injury to his colleagues, also aggravating his misconduct.[166]

Clarke has not accepted responsibility for his misconduct.[167] He never acknowledged taking the funds, continuing to insist that his "business" was legitimate and satisfaction for his victims was right around the corner.

We are especially troubled by Clarke's history of misconduct of this sort. One employer disciplined Clarke and later fired him for borrowing money under a similar pretext of using the money for ticket resales and then failing to make repayment. Yet Clarke failed to appreciate the problematic nature of his conduct. Clarke entered into a non-prosecution agreement with the Kings County District Attorney's Office that reflects the prosecutor's view that Clarke's activity was fraudulent, yet Clarke persisted in engaging in the very same behavior. Clarke's failure to heed these prior warnings aggravates his current violations.[168]

Clarke's history reinforces our view that his misconduct was not a one-time event, caused by an isolated mistake in judgment. Rather, it was an intentional, ongoing series of wrongful acts constituting a pattern of misconduct.[169] We find no mitigating factors.

Taking into account these factors, and consistent with the remedial purposes of the Sanction Guidelines, we conclude that the only appropriate sanction for Clarke's violations is a bar from association with any FINRA member firm in any capacity.

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[163] Guidelines at 89.

[164] *Grivas*, 2016 SEC LEXIS 1173, at *25 (explaining "the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry") (quotation omitted).

[165] Guidelines at 8 (Principal Consideration No. 16: Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

[166] Guidelines at 7 (Principal Consideration No. 11: With respect to other parties, including the investing public, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury).

[167] Guidelines at 7 (Principal Consideration No. 2).

[168] Guidelines at 8 (Principal Consideration No. 14: Whether the respondent engaged in misconduct despite prior warnings from a regulator or a supervisor).

[169] Guidelines at 7-8 (Principal Consideration Nos. 8-9, 13).

We also find it appropriate under the Sanction Guidelines to order Clarke to make restitution to his former colleagues at MARV.[170] The Guidelines authorize restitution "when an identifiable person . . . has suffered a quantifiable loss proximately caused by a respondent's misconduct."[171] Here, Clarke converted and misappropriated money rightfully belonging to Awasthi, Raparthi, and AG. We find that Clarke should make restitution of $612,400, reflecting the outstanding principal amounts still owed to Awasthi ($53,167), Raparthi ($522,266), and AG ($36,967). Clarke shall also pay prejudgment interest from November 12, 2015, on amounts owed Raparthi; from November 5, 2015, on amounts owed AG; and from October 26, 2015, on amounts owed Awasthi. These are the dates by which Clarke had received the advances from each individual.

B. Bad Check Misconduct

There are no Guidelines directly applicable to Clarke's misconduct in passing checks and causing electronic transfers that failed because of insufficient funds. We therefore rely on the Principal Considerations applicable to all violations to determine an appropriate sanction.

We first note that Clarke's bad check misconduct was not aberrant or isolated. His extensive, years-long practice of passing bad checks and causing failed electronic transfers aggravates his violation.[172] And the circumstances surrounding the misconduct make clear that Clarke's actions were intentional, as he repeatedly passed checks when he knew they could not be cashed. We also find troubling Clarke's complete lack of remorse or acceptance of responsibility for this conduct. Clarke's testimony at the hearing on the question of his bounced checks consisted of little more than an extended series of excuses and justifications for his obvious and intentional misconduct. His lack of accountability for his violative conduct is aggravating.[173]

The SEC has long recognized that the securities industry "cannot function efficiently unless people in it are able to treat each other's checks as substitutes for currency."[174] By repeatedly defeating that expectation, Clarke engaged in "patently unethical" conduct.[175] Thus, in the absence of any circumstances mitigating Clarke's misconduct and to effectuate the remedial purposes of the Sanction Guidelines, protect the public interest, improve overall business standards in the securities industry and deter others from engaging in similar

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[170] We do not impose any fine beyond the restitution ordered. Guidelines at 10. ("Adjudicators generally should not impose a fine if an individual is barred and the Adjudicator has ordered restitution. . . .").

[171] Guidelines at 4.

[172] Guidelines at 7 (Principal Consideration No. 8: Whether the respondent engaged in numerous acts and/or a pattern of misconduct).

[173] Guidelines at 7 (Principal Consideration No. 2: Whether the respondent accepted responsibility and acknowledged the potential for the respondent's monetary or other gain).

[174] *Lamb Brothers, Inc.*, 46 S.E.C. 1053, 1057 (1977).

[175] *Id*.

misconduct, we conclude that the only appropriate sanction for this violation is a bar from association with any FINRA member firm in any capacity. In light of the bar, we do not impose a fine for the misconduct.[176]

V. Order

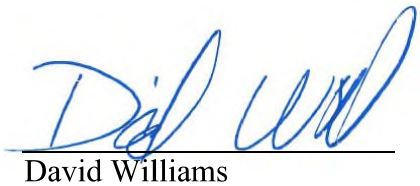
We find that Respondent Michael Joseph Clarke committed the violations alleged and impose remedial sanctions as follows:

Under causes one and two, Clarke converted $612,400 from three colleagues through misrepresentations, in violation of FINRA Rule 2010. We bar Clarke from association with any FINRA member in any capacity for these violations. Clarke is also ordered to pay restitution in the amount of $612,400 to Awasthi ($53,167), Raparthi ($522,266), and AG ($36,967), plus interest on the unpaid balance from the date Clarke received the funds until paid in full. So interest shall accrue beginning on November 12, 2015, for restitution owed Raparthi; November 5, 2015, for restitution owed AG; and October 26, 2015, for restitution owed Awasthi. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).[177]

Under cause three, Clarke authored 60 bad checks and failed electronic transfers over a three year period, also in violation of FINRA Rule 2010. We also bar Clarke from association with any FINRA member in any capacity for this violation.

Clarke is also ordered to pay costs of $9,337.89, which includes a $750 administrative fee and $8,587.89 for the cost of the transcript.

If this decision becomes FINRA's final disciplinary action, the bars shall become effective immediately. Restitution and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.[178]



David Williams
Hearing Officer
For the Hearing Panel

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[176] Guidelines at 10 ("Adjudicators generally should not impose a fine if an individual is barred and there is no customer loss.").

[177] The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.

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

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