BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. William Bruce Smith Uxbridge, MA, Respondent.	DECISION Complaint No. 2011029152401 Dated: February 21, 2014

Respondent converted customer funds and misrepresented and omitted material facts. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Stuart P. Feldman, Esq. and Paul D. Taberner, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Pursuant to FINRA Rule 9311, William Bruce Smith ("Smith") appeals a February 19, 2013 decision. In that decision, the Hearing Panel found that Smith violated NASD Rules 2330 and 2110 by converting customer funds, and NASD Rule 2110 and FINRA Rule 2010 by misrepresenting and omitting material facts.[1] For these violations, the Hearing Panel barred Smith from associating in any capacity with any FINRA member and ordered that he pay restitution. After an independent review of the record, we affirm the Hearing Panel's findings but modify the sanctions it imposed.

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

I. Background

A. Smith's Background

Smith entered the securities industry in 1983. From June 2003 to December 2011, Smith was associated with Triad Advisors, Inc. ("Triad") as a general securities principal and a general securities representative. Smith also owned W.B. Smith Companies, Inc. ("W.B. Smith"), an umbrella entity under which he operated W.B. Smith Financial Group, a registered investment advisor, and W.B. Smith Property, LLC. Smith is not currently associated with a FINRA member firm.

B. Smith's Relationship with Customer SH

Customer SH was a long-time employee at an insurance company, while her husband, RH, had been employed as a vice president of marketing services for another insurance company. During their marriage, RH made all of the financial decisions for the family.

RH and Smith had a business and social relationship. RH introduced Smith to SH in the 1990's. SH described the couple's relationship with Smith as "very cordial." SH testified that RH considered working part-time with Smith after retiring, which he contemplated doing when he reached age 63.

In August 2003, however, RH died of pancreatic cancer at age 56. Shortly after her husband's death, SH received proceeds from RH's life insurance policies. The one payment, central to this case, was a check dated September 10, 2003 for $100,147.95. This amount constituted approximately one-third of SH's total assets after RH's death. SH also received some additional funds, including a distribution from RH's 401(k).

C. Smith Becomes SH's Financial Advisor

Shortly following RH's death, Smith became SH's financial advisor. Smith frequently visited SH at her home to assist her with financial matters. For example, Smith helped SH with the leasing of an automobile and also advised her to place some of her funds into an IRA and to purchase an annuity. SH had confidence in Smith's financial advice. In September 2003, SH opened an account at Triad, with Smith as her broker. The account documents described SH's account objectives as preservation of capital and income and capital appreciation, and they showed her risk tolerance as conservative. The application reflected that SH had no knowledge of stocks, bonds, and limited partnerships.

D. Smith Directs the Transfer of SH's Insurance Proceeds

When Smith established SH's brokerage account, he recommended that SH invest $50,000 of her husband's life insurance proceeds in certificates of deposit ("CDs"). SH agreed, and authorized Smith to transfer this amount from her brokerage account to her personal bank account. Then, acting on Smith's instructions, SH signed a blank check which she gave to Smith to purchase the CDs.

When Smith filled in the amount of the check, he dated it September 27, 2003, and made it payable to his wife and his wife's bank, Unibank. Smith deposited the check into his wife's account at Unibank and then transferred those funds into his W.B. Smith bank account.

Approximately one month later, on October 21, 2003, Smith instructed SH to authorize Triad to wire the remaining $50,000 in life insurance proceeds from her brokerage account to her checking account so he could purchase additional CDs on her behalf. SH complied, and she signed and gave Smith a second check. Again, SH did not date the check or name a payee, although she did make the notation "CD" on the memo line. Smith dated the check and made it payable to Commonwealth National, the bank where Smith maintained his company bank account.

In fact, Smith did not purchase CDs for SH. It is undisputed that Smith transferred the $100,000 to his W.B. Smith bank account to support his financially distressed business. Smith testified that he at first believed that $50,000 would be sufficient to financially bolster his company, but he quickly discovered he would need more, hence the two transfers. Smith characterized the transfer of the life insurance proceeds as a "loan" from SH in lieu of the investment that RH had purportedly agreed to make before he died.

E. Smith's Creation of Asset Review Statements

After engaging Smith as her financial adviser in 2003, SH met with Smith about twice a year to review her finances. Some of their meetings occurred at SH's home, while others took place at Smith's office. The two also discussed SH's finances over the phone. During these meetings and phone calls, Smith would update SH on the status of her investments. According to SH's testimony, when she asked Smith about the status of her CDs, Smith told her that, as they matured, he purchased new certificates and deposited the interest earned into her brokerage account. When she asked where the CDs were located, he told her that they were at a bank called EverBank.

In addition to the meetings and phone calls, from September 2005 through June 2011, Smith provided SH with written "asset reviews." These reviews purported to summarize the assets in SH's bank and brokerage accounts. Each of the asset reviews contained a line reading "Bank CD $100,000," thereby providing SH with written confirmation of what Smith had told her—that she continued to hold CDs valued at $100,000.

In August 2011, Smith met with SH to discuss her retirement. SH was about to turn 63, and she was considering how soon to retire. After they met, Smith sent SH a letter dated August 9, 2011, with a binder of information about the financial implications of alternative retirement dates. Again, Smith identified as an asset, on a page devoted to a summary of SH's financial information, "Bank CDs -- OTHER TAXABLE ACCOUNT" valued at $100,000.

In December 2011, SH learned that an expected monthly transfer of cash from her brokerage account to her checking account, on which she depended to pay bills, was not made. She attempted to contact Smith, leaving him a voicemail message. Instead of hearing from

Smith, SH received a call from Smith's son, Peter Smith, who informed SH that Triad terminated his father's employment and that Triad transferred SH's account to another broker-dealer, for which Peter Smith was now acting as the broker. Peter Smith met with SH shortly thereafter to review her financial records. Both Peter Smith and SH became concerned that they could not find any record of the CD accounts at EverBank or at Triad.

In January 2012, SH succeeded in contacting Smith. Smith continued to assert that he had purchased the CDs on SH's behalf at EverBank. However, to assuage SH's concerns, Smith told SH that he would immediately return $50,000 to her, and that afterwards he would discuss returning the remaining $50,000. Instead, Smith sent SH a bank treasurer's check, dated January 30, 2012, for $25,000. He also sent her a memorandum to sign. The memorandum's stated subject is "loan," and it reads "please find the payment arrangement for the loan" of $100,000 to W.B. Smith. The memorandum stated that SH accepted the $25,000 check as "partial payment on the loan" and confirmed that she made the loan "with full knowledge." It also contained a "payment schedule" indicating that Smith would repay SH the balance of the "loan" in three additional quarterly payments of $25,000. SH did not sign the statement and did not immediately deposit the check, concerned that doing so would legitimize Smith's claim that she loaned him the money.[2]

II. Procedural History

After receiving Smith's bank treasurer's check and memorandum, SH contacted Triad for assistance. Triad informed SH that, it in order for it to take action on Smith's handling of her account, SH would have to file a formal complaint. With the assistance of Peter Smith, SH prepared and sent a notarized letter to Triad, dated January 27, 2012, describing the handing over of the $100,000 of life insurance proceeds to Smith for the purchase CDs, and a summary of the events following her transfer of the funds. In addition, Triad also received a letter dated January 30, 2012, from Smith's wife. In this letter, Mrs. Smith attested that she did not sign the first $50,000 check, noting that it was not her signature, and that she was never aware that such funds were deposited in her account.

On March 28, 2012, FINRA's Department of Enforcement ("Enforcement") filed a two-cause complaint alleging that Smith converted customer funds, in violation of NASD Rule 2330 and NASD Rule 2110, and made material misrepresentations and omissions in violation of NASD Rule 2110 and FINRA Rule 2010. In his answer, Smith denied these allegations.

On June 20, 2012, Smith sent an e-mail to the lawyer SH had retained to help her recover the life insurance proceeds. In the e-mail, Smith wrote, "I have a proposition. . . . Have [SH] retract her FINRA filing on my U4 by stating she was mistaken and that she had knowledge of the funds and the whereabouts. I can help with the wording. This will end the . . . FINRA

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[2] SH eventually deposited the check.

situation immediately."[3] Neither SH nor her lawyer responded to this proposition. They instead forwarded Smith's e-mail to Enforcement.

The Hearing Panel conducted a hearing on August 21, 2012. Enforcement called SH as its sole witness. Smith testified on his own behalf. On February 19, 2013, the Hearing Panel issued its decision. The Hearing Panel found that Smith converted customer funds and misrepresented and omitted material facts. The Hearing Panel imposed a unitary sanction and barred Smith in all capacities. The Hearing Panel also ordered that Smith pay restitution to SH in the amount of $75,000, with interest. This appeal followed.

III. Discussion

The disposition of this case relies heavily on the resolution of the testimonial conflict between the two individuals who testified at the hearing below—SH and Smith. Although we conduct our review of Hearing Panel's decision de novo, we give deference to the Hearing Panel as the fact finder on the matter of witness credibility, because the Hearing Panel heard testimony and had the opportunity to observe the witnesses' demeanor. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *53 (Dec. 10, 2009) (finding that the credibility determination of an initial fact finder is entitled to considerable weight and deference and generally can be overcome only where the record contains substantial evidence for doing so); *Eliezer Gurfel*, 54 S.E.C. 56, 62 (1999), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000); *Dep't of Enforcement v. Frankfort*, Complaint No. C02040032, 2007 NASD Discip. LEXIS 16, at *24-25 (NASD NAC May 24, 2007); *Dep't of Enforcement v. DaCruz*, Complaint No. C3A040001, 2007 NASD Discip. LEXIS 1, at *23-24 (NASD NAC Jan. 3, 2007).

Smith testified during the proceedings below that the $100,000 in life insurance proceeds that he transferred to his company's account were either an investment in W.B. Smith or an interest free loan. Smith further testified that SH was well aware that her funds were being used in this manner. Smith provided no documentation to support either assertion. Smith never prepared loan documents, never provided SH with collateral, and never recorded the loan in his company's books. Furthermore, Smith's attempt to induce SH, with a $25,000 treasurer's check, to sign a false statement that she loaned him the funds, and Smith's emailed 'proposition' to SH's lawyer, are powerful evidence of Smith's attempts to cover up the true nature of his deeds. SH disputed Smith's assertions and testified that she and Smith both knew that the proceeds were to be used to purchase CDs.

The Hearing Panel found, and we agree, SH's testimony, based on its substance, her demeanor, and the corroboration provided by the documentary evidence, to be entirely credible. In contrast, we, like the Hearing Panel, find that Smith's testimony lacks credibility, in the

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[3] Although Enforcement's investigation of Smith was prompted by SH's complaint to Triad, Enforcement's decision to initiate a disciplinary action against Smith was its decision. Smith, when sending this e-mail to SH's lawyer, was apparently operating under the mistaken assumption that SH was the complainant, or was responsible for or had some control over Enforcement's handling of the case.

absence of any evidence supporting his characterization of his use of SH's funds. Thus, for the reasons discussed more fully below, we find that Smith converted SH's funds and made misrepresentations of material fact.

A. Smith Converted SH's Life Insurance Proceeds

NASD Rule 2330(a) provides that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." FINRA Sanction Guidelines state that "[c]onversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[4] Furthermore, "conversion is generally among the most grave violations committed by a registered representative . . . [and] is 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)(internal citations omitted).[5] Here, Smith took and improperly used SH's funds for his own benefit. Smith accomplished this by falsely promising SH that he would invest the funds in CDs. Thereafter, Smith transferred the funds to an account held by his company and proceeded to use the funds to pay for various business expenses. Smith had no right to exercise ownership over these funds. His exercise of ownership over, as opposed to the borrowing of, SH's funds is further established by his failure to pay interest or other distributions, repay principal, or take any other action to account for the purported loan or investment of her funds until challenged by SH and Triad over eight years later.

Smith's taking of SH's money was also intentional, as evinced by the multiple steps he took to surreptitiously secure the proceeds. For the first transfer of funds, Smith instructed SH to provide him with a check with a blank payee. Smith proceeded to make the check out to his wife, deposit the funds into his wife's account, and then move the funds to his business account. As to the second transfer, Smith made the check out to the bank that held his business account and directly deposited it into the account. Both these transactions indicate an attempt to make the money hard to trace, not the process of borrowing funds. The evidence shows that Smith actively hid his conversion by providing SH with fictitious financial statements. Consequently, we find that Smith violated NASD Rule 2330(a) and FINRA Rule 2010 by converting SH's funds for his own benefit.

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[4] FINRA Sanction Guidelines (2011), at 36 n.2, http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]

[5] *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.")

B. Smith Misrepresented and Omitted Material Facts

NASD Rule 2110 and FINRA Rule 2010 require persons associated with member firms to "observe high standards of commercial honor and just and equitable principles of trade."[6] To mislead a customer by misrepresenting the true state of the customer's account "is the antithesis of a registered representative's [duty to uphold] high standards of commercial honor," and a violation of NASD Rule 2110 and FINRA Rule 2010. *Dep't of Enforcement v. Abbondante*, Complaint No. C10020090, 2005 NASD Discip. LEXIS 43, at *31-32 (NASD NAC Apr. 5, 2005) (citation omitted), *aff'd*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23 (Jan. 6, 2006).

From September 2005 through June 2011, Smith provided SH with no less than eight fabricated "asset reviews." Significantly, each of the reviews contained a line item which read "Bank CD $100,000." Smith also verbally confirmed the existence of the CDs to SH on multiple occasions beginning in 2003, as well as with his August 2011 retirement information binder. Moreover, the information involving the supposed existence of these CDs was material. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (stating that information is material "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). We therefore find that Smith misrepresented a the true state of his customer's account through his repeated representations that $100,000 of her assets were being held in CDs, and omitted the material fact he had transferred the funds to his business account, in violation of NASD Rule 2110 and FINRA Rule 2010.

IV. Sanctions

The Hearing Panel barred Smith as a unitary sanction for his violations. We however, believe that it is appropriate to impose a distinct sanction for each cause of action. While the causes of action are interrelated, a majority of the misrepresentations Smith made to SH occurred years after his initial conversion, and the misrepresentations and omissions manifest in the "asset reviews" did not begin until two years after Smith converted the funds. Based on this temporal gap, we find separate sanctions to be appropriate.

We find that Smith's misconduct with respect to each cause of action was egregious, and a bar is the only appropriate remedial sanction for each violation to protect the investing public and deter others from engaging in such misconduct.

The Hearing Panel also ordered that Smith pay SH restitution in the amount of $75,000. In light of payments made to SH by Triad after the issuance of the Hearing Panel's decision, and

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[6] NASD Rule 0115 (now FINRA Rule 0140) makes all FINRA rules applicable both to FINRA members and all persons associated with FINRA members.

based on the General Principles Applicable to All Sanction Determinations in the Guidelines,[7] we modify the Hearing Panel's sanction and order Smith to disgorge $74,000 (including pre-judgment interest), of which $19,000 shall be paid to SH and the remaining $55,000 to FINRA.[8]

A. Conversion

We have considered the FINRA Sanction Guidelines ("Guidelines") in determining the appropriate sanctions for Smith's violation. The Guidelines governing sanctions for conversion direct us to "[b]ar the respondent regardless of amount converted."[9]

We also have considered the Principal Considerations in Determining Sanctions.[10] Upon consideration, we find that there are numerous aggravating factors associated with Smith's conversion and no mitigating factors that lead us to conclude that a sanction less than a bar is in order. We find it aggravating that Smith's conversion harmed the customer by depriving her of $100,000,[11] while at the same time resulting in monetary gain for Smith.[12] We also find that SH was not a sophisticated investor.[13] SH relied on her husband to make all of their financial decisions, and then relied on Smith for financial advice after her husband's death. Smith was well aware of SH's lack of sophistication, as noted on SH's brokerage account application, and took advantage of her lack of sophistication. We note that the amount of money converted was substantial, representing approximately one-third of SH's net worth.[14] We also find it

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7 The Guidelines indicate that, in appropriate cases, disgorged funds be used to redress harms suffered by customers. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

8 After the Hearing Panel issued its decision, Smith made an additional payment of $1,000 to SH while Triad paid $55,000 to SH. This is in addition to the $25,000 previously paid to SH by Smith.

9 *Guidelines*, at 36.

10 *Id.* at 6-7.

11 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 11) (adjudicators should consider whether the respondent's misconduct resulted in injury to the investor).

12 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17) (adjudicators should consider whether the respondent's misconduct resulted in the potential for monetary gain).

13 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 19) (adjudicators should consider the level of sophistication of the injured or affected customer).

14 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 18) (adjudicators should consider the number, size and character of the transaction at issue).

aggravating that Smith's misconduct was intentional in that he instructed SH to give him blank checks to access $100,000 in insurance proceeds and then proceeded to deposit that money in his company's bank account and spend it.[15] In light of these numerous aggravating factors, and considering that a bar is the standard sanction in conversion cases, we hereby bar Smith in all capacities for the conversion of SH's funds.

B. Misrepresentations or Omissions of Material Facts

The Guidelines governing sanctions for misrepresentations or material omissions of fact direct us to consider suspending the individual for up to 30 business days in cases where the misrepresentations or omissions were made negligently, suspending the individual for a period of 10 business days to two years in cases where the misconduct was intentional or reckless, and barring the individual when the misconduct is egregious.[16]

Smith's misrepresentations and omissions were egregious. In addition to the aggravating factors articulated above, which apply equally to this cause of action, there are additional Principal Considerations implicated in Smith's misrepresentations and omissions of material facts. Smith's misconduct spanned eight years.[17] Furthermore, from 2005 through 2011, Smith provided SH with at least eight fictitious "asset reviews" and a "retirement income evaluation" predicated on the assumption that SH's funds were invested in bank CDs, omitting the fact that the funds were in fact being used by Smith to support his company.[18] Smith's false financial statements were also an attempt to conceal his conversion of the insurance proceeds from SH and Triad.[19] Smith has not accepted responsibility for his misconduct. While Smith has not contested the facts in this case and has acknowledged that he made a "mistake," he blames Triad and FINRA for encouraging SH to initiate this proceeding and blames SH for challenging his characterization of the use of the insurance proceeds.[20]

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15 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13) (adjudicators should consider whether the respondent's misconduct was intentional).

16 *Id.* at 88.

17 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 9) (adjudicators should consider whether the respondent engaged in the misconduct over an extended period of time).

18 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 8) (adjudicators should consider whether the respondent engaged in numerous acts and/or a pattern of misconduct).

19 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10) (adjudicators should consider whether the respondent attempted to conceal his or her misconduct from the customer).

20 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2) (adjudicators should consider whether the respondent accepts responsibility for and acknowledges the misconduct).

Taking all these factors into account, we find that Smith's misrepresentations and omissions of material facts were egregious and a bar is an appropriate sanction for this violation. Moreover, the bar serves to deter others from engaging in such egregious misconduct.[21]

C. Disgorgement

Although the Hearing Panel ordered restitution, we find this case to be more suitable for a disgorgement analysis—otherwise, Smith stands personally to benefit from Triad's willingness to help make SH whole. To remediate misconduct, the Guidelines instruct us to consider a respondent's ill-gotten gains when fashioning an appropriate sanction.[22] "[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched." *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991). "We may order disgorgement after a reasonable approximation of a respondent's unlawful profits." *Dep't of Enforcement v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *40 n.42 (FINRA NAC Oct. 3, 2011); *Laurie Jones Canady*, 54 S.E.C. 65, 84 (1999) (noting that "courts have held that the amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation") (internal quotation marks omitted), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000). Any risk of uncertainty in calculating disgorgement "falls upon the wrongdoer whose misconduct created the uncertainty and who bears the burden of proving that the measure is unreasonable." *Evans*, 2011 FINRA Discip. LEXIS 36, at *40 n.42.

Smith converted $100,000 from SH. To date, he has repaid $26,000 to SH; accordingly, we order that Smith disgorge a total of $74,000 including prejudgment interest.[23] Because the Guidelines allow for disgorged funds be used to redress harms suffered by customers, we order that Smith pay $19,000 to SH including prejudgment interest, calculated from October 21, 2003, the date of the last transfer of SH's life insurance funds.[24] We also order that Smith pay prejudgment interest to SH on the $26,000 he has repaid, calculated from October 21, 2003 through January 31, 2012, the date Smith provided the bank treasurer's check to SH. We further order Smith to pay prejudgment interest to SH on the $55,000 that Triad paid to SH, calculated from October 21, 2003 through the date SH received payment from Triad. To complete the disgorgement of Smith's ill-gotten gains, we order that he pay $55,000 to FINRA.

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21 *Id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

22 *Id.* at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

23 The assessment of prejudgment interest is an important tool to strip Smith of the benefits he received from possessing his customer's funds for nearly 10 years. Prejudgment interest is critical "because disgorgement alone does not reflect the time value of ill-gotten gains, and in effect, provides the respondent with an interest free loan until the disgorgement order is final." *Dep't of Enforcement v. Davidofsky*, Complaint No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *42 (FINRA NAC Apr. 26, 2013).

24 In light of the $55,000 Triad paid to SH, the amount needed to restore SH's principal is $19,000.

D. Smith's Arguments in Favor of Mitigation Fail

Smith makes several arguments in support of a reduction of sanctions. We find none of these arguments convincing. Smith maintains that the Enforcement attorney that prosecuted the case had a personal vendetta against Smith and has endeavored to end Smith's career through this disciplinary proceeding. As an initial matter, the record does not support Smith's claim of improper selective prosecution. "To establish such a claim, a petitioner must demonstrate that he was unfairly singled out for prosecution based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right." *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *53 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). No such showing was made here.

Furthermore, Section 15A(b)(8) of the Exchange Act provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. *See Scott Epstein*, 2009 SEC LEXIS 217, at *51 (holding that FINRA must provide fair procedures for its disciplinary actions). Section 15A(h)(1) of the Exchange Act requires that FINRA, in a disciplinary proceeding, "bring specific charges, notify such member or person of and give him an opportunity to defend against, such charges, and keep a record." Here, we find that the proceedings before the Hearing Panel were fair and conducted in accordance with FINRA rules. Enforcement commenced its investigation of Smith after it received SH's January 2012 letter concerning possible misconduct by Smith. Following receipt of the letter and after taking Smith's investigative testimony, Enforcement filed a complaint against Smith on March 28, 2012. We find also that Smith had ample notice of the allegations against him and had an opportunity to defend himself throughout the underlying proceedings. Regardless of any acrimony that may exist between the parties, there is no evidence in the record that support Smith's claim that Enforcement's prosecution stemmed from any crusade to end Smith's career. Indeed, even if there were, our de novo review, in which we have carefully considered all of the evidence in the case and the transcripts of the proceedings below, "dissipates even the possibility of unfairness." *Robert Tretiak*, 56 S.E.C. 209, 232 (2003); *see also Robert E. Gibbs*, 51 S.E.C. 482, 484-85 (1993) (discussing how de novo review by the NASD Board during NASD disciplinary proceedings insulates against bias), *aff'd*, 25 F.3d 1056 (10th Cir. 1994) (table).

We also reject Smith's argument that the Hearing Panel erred when it determined that his conduct was "egregious," for the reasons discussed in Part IV. B above. Smith also argues for mitigation because of the purported economic losses he has already sustained from his violations. He contends that without his license he will be unable to earn a living and will likely have to file for bankruptcy. Both FINRA and the SEC have rejected the concept that the harm, economic or otherwise, that befalls a respondent as a result of his actions should factor into a sanctions determination. *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) (holding that the Commission does not "consider mitigating the economic disadvantages [the respondent] alleges he suffered because they are a result of his misconduct").

Finally, Smith maintains that his one "mistake" with respect to SH's account should not undue a successful 30-year career in the industry. The Commission has held that the "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person

should not be rewarded for acting in accordance with his duties as a securities professional." *See, e.g., Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006). Moreover, the one "mistake" to which Smith refers consists of a series of actions that spanned more than nine years and caused serious customer harm. His conversion of a customer's funds violates a cardinal principle of FINRA that an associated person should always protect a customer's funds, not take them for personal use. We therefore find that no mitigating factors exist and agree with the Hearing Panel that Smith's misconduct was egregious.

V. Conclusion

Accordingly, we find that Smith violated NASD Rules 2330 and 2110 by converting customer funds, and NASD Rule 2110 and FINRA Rule 2010 by misrepresenting and omitting material facts to a customer. For his conversion of customer funds, Smith is barred from associating with any member firm in all capacities. For his misrepresentations and omissions of material facts, Smith is likewise barred from associating with any member firm in all capacities. In addition, Smith is ordered to pay disgorgement to SH of $19,000, as well as to pay disgorgement of $55,000 to FINRA, including prejudgment interest on these amounts calculated from October 21, 2003.[25] Finally, we affirm the order that Smith pay $2,191.15 in hearing costs, and we impose appeal costs of $1,315.71.[26]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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[25] The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), the same rate that is used for calculating interest on restitution awards. *Guidelines*, at 11 (Technical Matters).

[26] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.