BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

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| In the Matter of<br><br>Department of Enforcement,<br><br>Complainant,<br><br>vs.<br><br>Richard A. McGuire<br>Bay Shore, NY,<br><br>Respondent. | DECISION<br><br>Complaint No. 20110273503<br><br>December 17, 2015 |

**Respondent converted former customer's funds and forged her signature. Respondent also engaged in outside business activities without providing written notice to his employing firms, failed to notify firms of outside brokerage accounts and his association with member firms, and willfully failed to disclose tax liens on his Form U4. Held, findings and sanctions affirmed.**

## Appearances

For the Complainant: Josefina Martinez, Esq., Elizabeth Virga, Esq., and Richard Chin, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: David S. Richan, Esq.

## Decision

Richard A. McGuire ("McGuire") appeals a November 3, 2014 Hearing Panel decision. The Hearing Panel found that McGuire converted a former customer's funds and forged her signature on two purported loan agreements. It further found that McGuire: engaged in several outside business activities without providing written notice to his employing firms; failed to notify his employing firms of outside brokerage accounts (and failed to notify the firms where he opened brokerage accounts that he was associated with a member firm); and willfully failed to disclose several tax liens on his Uniform Application for Securities Industry Registration and Transfer ("Form U4"). The Hearing Panel barred McGuire and ordered that he pay $95,000 in restitution for converting his former customer's funds, and separately barred McGuire for forging her signature. The Hearing Panel assessed, but did not impose in light of the bars, additional sanctions for McGuire's remaining misconduct. After a thorough review of the record, we affirm the Hearing Panel's findings of violation and sanctions.

## I. Background

### A. McGuire's Association with Member Firms

McGuire entered the securities industry in 2003. During the time periods relevant to this matter, McGuire associated with the following firms as an investment company products and variable contracts limited representative:

- MML Investors Services, Inc. ("MML") from July 2005 to December 2007;
- TFS Securities, Inc. ("TFS") from May 2008 to December 2009;
- Ameritas Investment Corp. ("Ameritas") from December 2009 to April 2011; and
- Investacorp, Inc. ("Investacorp") from June 2011 to December 2012.

McGuire is not currently associated with a FINRA member firm.[1]

### B. McGuire's Other Business Activities

During the relevant time periods, McGuire engaged in other business activities, several of which are pertinent to this matter. In March 2006, McGuire formed Revolutionary Asset Management, LLC ("RAM"), an entity through which he provided consulting and marketing services to companies in the financial, insurance, and mortgage industries. McGuire was the sole and managing member of RAM, and he actively participated in RAM's business through 2010. McGuire continued to be affiliated with RAM and earned income from RAM until at least the fall of 2011. During the relevant time period, McGuire earned at least $69,000 in profits from RAM.

In May 2006, McGuire became a branch manager for Freedom Mortgage Corporation, a residential mortgage lender and servicer. McGuire was responsible for managing the origination of mortgage loans and supervising and developing personnel. McGuire earned more than $242,000 from Freedom Mortgage Corporation in 2006 and 2007, and was affiliated with this entity until at least December 2009.

Finally, McGuire was affiliated with SSU Consultants, Inc. ("SSU"). McGuire described SSU's business as "credit repair, loan modifications, [and] debt settle[ment]." In various documents, McGuire identified himself as SSU's president, chief executive officer, and manager for credit counseling. Similarly, McGuire is listed as SSU's chief executive officer (as of March 2013) in New York State records related to SSU. McGuire's affiliation with SSU began no later than December 2009 and continued until 2013. The record shows that McGuire earned $31,000 from his activities at SSU in 2009.

As described below, RAM served as the vehicle through which McGuire converted his former customer's funds, and McGuire failed to notify his employing firms of his outside business activities at RAM, Freedom Mortgage Corporation, and SSU.

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[1] McGuire was also employed by various insurance affiliates of his member firms.

II. Procedural History

In late April 2011, Ameritas contacted FINRA to report concerns that McGuire may have converted the funds of MP, McGuire's former customer. FINRA commenced an investigation, and in May 2013, FINRA's Department of Enforcement ("Enforcement") filed a complaint against McGuire. The complaint alleged that McGuire: (1) converted $95,000 of MP's funds, in violation of FINRA Rule 2010;[2] (2) forged, or caused to be forged, MP's signature on two purported loan agreements, in violation of FINRA Rule 2010; (3) failed to provide his employer firms with prompt or prior written notice of outside business activities, in violation of NASD Rules 3030 and 2110 and FINRA Rules 3270 and 2010; (4) failed to notify his employer firms of outside brokerage accounts, and failed to notify the member firms where he opened such accounts that he was associated with FINRA members, in violation of NASD Rule 3050 and FINRA Rule 2010; and (5) willfully failed to disclose on his Form U4 several tax liens, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.

McGuire denied the allegations, and the Hearing Panel conducted a seven-day hearing in January 2014. Enforcement called eight witnesses, although MP did not testify because she died in December 2011. Respondent testified and called a handwriting expert to testify.

The Hearing Panel issued its decision on November 3, 2014, which found that McGuire engaged in the misconduct alleged by Enforcement. With respect to the Hearing Panel's findings that McGuire converted MP's funds and forged her signature, it determined that McGuire did not testify credibly concerning his claim that MP loaned him the funds as purportedly evidenced by two loan agreements allegedly signed by MP. Instead, the Hearing Panel credited MP's version of the facts, as conveyed by three Enforcement witnesses who spoke directly and repeatedly with MP when she was alive, that she gave McGuire $95,000 to invest in an annuity-like product, did not loan McGuire money, and did not sign any loan documents. The Hearing Panel found that the testimony of Enforcement's witnesses concerning their conversations with MP was consistent and corroborated, concluded that "MP's version of events as recounted in those conversations" was trustworthy and reliable, and discounted the opinion of McGuire's handwriting expert because of admitted limitations to his determination that MP signed the loan agreements. It further found that other evidence in the record corroborated and supported these findings.

The Hearing Panel barred McGuire for converting MP's funds, and ordered that he pay $95,000 in restitution to MP's estate. The Hearing Panel separately barred McGuire for forging or causing to be forged MP's signature on the purported loan documents. In light of the bars, the Hearing Panel assessed, but did not impose, additional sanctions for McGuire's remaining misconduct, and ordered that he pay $16,500.03 in costs. This appeal followed.[3]

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

[3] McGuire requested oral argument and, through counsel, filed an opening brief with the NAC. Neither McGuire nor his counsel, however, appeared at oral argument.

## III. Discussion

### A. Conversion and Forgery

We affirm the Hearing Panel's findings that McGuire converted MP's funds, and twice forged her signature, in violation of FINRA Rule 2010.

#### 1. Facts

##### a. McGuire's Colleague Napolitano

McGuire met Gregory Napolitano ("Napolitano") around 2003 while both worked at a member firm. Thereafter, both McGuire and Napolitano worked at MML, and McGuire followed Napolitano to TFS and Ameritas.[4] Napolitano became registered as a general securities principal in March 2009, although he did not supervise McGuire's securities business at TFS. Similarly, Napolitano did not supervise McGuire's securities business at Ameritas. Napolitano did, however, assist McGuire with filling out and submitting paperwork and forms when McGuire joined TFS and Ameritas.[5]

##### b. MP

McGuire met MP in 2004 or 2005. At that time, MP was a 55-year old, self-employed artist who lived near McGuire. She was single and had no immediate family nearby. By 2006, MP had become a close friend of McGuire and his family, and MP opened an account with McGuire at MML. MP purchased a variable annuity and fixed annuity through McGuire. MP's new account form listed her net worth at $1.75 million, which consisted primarily of inherited real estate. MP was relatively unsophisticated concerning financial matters, and she had limited exposure to, and experience with, securities.

McGuire left MML at the end of 2007 and did not associate with another broker-dealer (TFS) until May 2008. During that time period, McGuire introduced MP to Napolitano, who was already associated with TFS. MP, through Napolitano, opened an account at TFS, surrendered the variable annuity that she had purchased through McGuire, and purchased a new variable annuity. Although Napolitano served as MP's broker, McGuire continued to assist MP with numerous matters, including her investments and finances.[6]

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[4] At all relevant times, McGuire and Napolitano worked from different offices. Napolitano was also employed by Freedom Mortgage Corporation and had business dealings with RAM. Further, McGuire worked for an insurance agency owned by Napolitano.

[5] Napolitano served as a manager of insurance agents' insurance-related activities at the various insurance affiliates of his member firms.

[6] McGuire testified that MP relied upon him heavily. For example, and in connection with MP's finances, McGuire testified that around 2007, MP became afraid to spend money. McGuire would remind her that she did not need to be afraid to spend, and wrote her notes to encourage her to spend her funds.

c. McGuire Experiences Financial Difficulties and MP Writes Checks Totaling $95,000

It is undisputed that after the 2008 financial crisis, McGuire experienced financial difficulties. McGuire explained that by 2009, he "was in a bad situation," "really needed the money," his monthly income dropped to near zero, and he needed help. It is also undisputed that in November 2009 and November 2010, MP signed two checks payable to RAM for $60,000 and $35,000, respectively. McGuire filled in all portions of the $60,000 check (which was dated November 3, 2009), including a notation on the memo line that read "investment" that MP directed McGuire to make. MP filled in all portions of the $35,000 check, which was dated November 5, 2010, at McGuire's direction.[7] McGuire endorsed each check, deposited them in RAM's bank account, and used at least part of the proceeds to benefit himself and RAM.

In connection with FINRA's investigation, McGuire produced copies of two loan documents, dated November 1, 2009, and November 1, 2010, each purportedly signed by MP as the lender and by McGuire, on behalf of RAM, as the borrower. The November 2009 loan was in the principal amount of $60,000, bearing 5% annual interest to be repaid in 120 monthly installments beginning in November 2011. The November 2010 loan was in the principal amount of $35,000, bearing 4% annual interest to be repaid in 120 monthly installments beginning in November 2012.

The parties dispute most of the remaining facts and circumstances surrounding the events underlying the conversion and forgery charges.

*i. McGuire's Version of Events*

McGuire testified that he informed MP of his financial difficulties and that MP repeatedly offered to give him money. McGuire testified that he did not want to accept any gifts from MP and refused her offers, but he eventually agreed that MP could lend him money at a time when he "really needed" it and his financial situation was particularly bad. McGuire testified that he and MP understood that MP's loans were "investments" in McGuire (which McGuire testified is why MP made him put the "investment" notation on the $60,000 check). Although McGuire testified that MP originally offered to loan him $100,000, he did not think he needed that much and told MP that "we'll start with 60 and we'll revisit it in a year and see where to go from there." McGuire testified that MP then loaned him $60,000 (through RAM) in November 2009. At the hearing, McGuire also testified that he called Napolitano on the day he received the $60,000 check from MP and showed him copies of the check and loan agreement.[8]

McGuire further testified that, approximately one year later, MP asked him how much more money he needed and MP again offered to gift McGuire the money. McGuire rejected MP's offer, but he informed MP that he could use another loan to get him and his family "back

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[7] The check for $35,000 did not contain any notation on the memo line.

[8] During his on-the-record interview, however, McGuire testified that he did not inform anyone of MP's alleged loans, not even his wife.

on track." According to McGuire, MP then loaned him $35,000 (through RAM). McGuire testified that he again consulted with Napolitano, who advised him that the loan agreement was "okay" but he should not include "investment" on the check as he did with the November 2009 loan.

McGuire also testified that he created the two loan documents from a software program, and that he was with MP when she signed each agreement and saw her sign the agreements. He stated that he and MP signed duplicate originals of each agreement, that MP retained an original of each agreement, and that he mailed MP additional copies of the agreements. At the hearing, McGuire further explained the discrepancies between the dates of the loan agreements and the dates of the checks (which were each dated several days after the dates of the respective loan agreements) and stated that the checks were not necessarily signed at the same time as each respective loan agreement and that the agreements were not necessarily signed on the day they were dated.[9]

After MP demanded the return of her money in April 2011, McGuire testified that he told her he could not afford to pay her back in full but he could, within several weeks, make the first year's payments due under the purported loan agreements. McGuire, however, has never made any payments under either of the purported loan agreements.

As described below, the testimony of Enforcement's three witnesses (Napolitano, Ameritas's chief compliance officer (Cheryl Heilman) ("Heilman")), and a FINRA examiner) paint a markedly different picture of the events at issue.

*ii. Napolitano's Version of Events*

Napolitano testified that in mid-April 2011, MP called him twice because she was unable to reach McGuire. MP had been trying to reach McGuire because he had previously helped her determine where to take funds to pay her property taxes and because MP had a question about her "account for Revolutionary Asset Management." Napolitano testified that he believed MP was confused because RAM was McGuire's company through which he provided his services and not something for which MP would maintain an account or in which MP would invest. Consequently, he told MP to double check her records and call him back.

Napolitano further testified that MP again called him on April 18, 2011, and stated that she had two canceled checks payable to RAM, that one of the checks contained the notation "investment" on the memo line, and that she had never received an account statement from RAM. MP informed Napolitano that McGuire had approached her in November 2009 with "a great idea for an investment" that purportedly was similar to an annuity but more liquid. MP told

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[9] During his on-the-record interview, however, McGuire testified that MP signed and gave him the $60,000 check at the same time they signed the loan agreement. Further, during his investigative testimony, McGuire testified that he could not recall how much time elapsed from when he agreed to accept a loan from MP and the time he created the first loan agreement, although he conceded that he downloaded the loan agreement within a year of agreeing to accept a loan from MP.

Napolitano that she asked McGuire to fill out the check because she could not spell "Revolutionary Asset Management." MP informed Napolitano that approximately one year later, McGuire told her that her investment was doing well but it would do better if MP increased her stake. At that time, MP wrote the second check payable to RAM. Napolitano testified that at least twice MP told him that she had never signed any documents, or received any documents, for her RAM investments and that she did not give McGuire the funds as a gift or a loan.

Napolitano also testified that on April 19, 2011, MP left him a message stating that McGuire had come to her house and "explained everything." Napolitano called MP back and she informed him that McGuire showed her an account statement from RAM that indicated she had $95,000 in her account. MP later told Napolitano that when she asked McGuire to close her RAM account, McGuire told her there would be surrender charges and she should therefore wait to do so. MP informed Napolitano that although she requested a copy of the account statement that McGuire had showed her, he did not leave a copy. MP further informed Napolitano that when MP called McGuire to reiterate that she wanted him to return her funds, McGuire hung up on her.[10]

Napolitano disputed McGuire's claim that he advised McGuire concerning the purported loans from MP. Napolitano testified that McGuire never informed him that MP had loaned him money and he never advised McGuire concerning any loans from MP. Napolitano further testified that he had never seen either of the two checks from MP and did not see or review any loan agreements.

*iii. Heilman's Version of Events Is Consistent with Napolitano's*

After initially speaking with MP, Napolitano became concerned and contacted Heilman, Ameritas's chief compliance officer. Napolitano relayed what MP had told him, and Heilman contacted MP because she "felt it was really important . . . to get in touch with MP to have a conversation with her."[11] Heilman testified that she spoke with MP six or seven times between April 20 and 27, 2011, and that MP conveyed to her many of the same facts that MP had conveyed to Napolitano. For example, Heilman testified that MP informed her that: McGuire usually helped MP determine from which accounts she should pay her property taxes, but that she could not get in touch with McGuire; MP did not receive or possess any statements for her RAM account, although McGuire eventually showed her a copy of an account statement with RAM's name on it; McGuire told her that she would incur penalties if she withdrew funds from her RAM account; McGuire wrote the first check because she could not spell "Revolutionary Asset Management"; she did not make a loan to McGuire and did not sign anything in connection with her investments in RAM; and McGuire hung up on MP when she requested that he return her money.

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[10] As described below, the Hearing Officer admitted into evidence a tape recording of one of Napolitano's and MP's conversations during this time period.

[11] MP was not an Ameritas customer. Heilman testified that when she first called MP, Heilman introduced herself and explained to her that Napolitano and McGuire were registered with Ameritas.

Heilman contacted FINRA and the FBI, and MP communicated with FBI personnel. MP subsequently wrote a letter to McGuire, dated April 26, 2011, asking that McGuire return her money. The letter also stated that MP did not "have a copy of the contract or even one statement" and never received any information or anything in writing concerning RAM despite MP's repeated requests for such information. MP did not receive a response from McGuire, and did not have any additional conversations with him. Ameritas terminated McGuire on April 27, 2011.[12]

*iv. Examiner's Testimony Further Corroborates Napolitano's and Heilman's Testimony*

Brian Vincent ("Vincent"), a FINRA examiner, testified that in connection with FINRA's investigation, he met with MP at her home in September 2011. Vincent's testimony concerning his conversation with MP was similar to Napolitano's and Heilman's testimony. Vincent testified that MP told him that McGuire approached her in November 2009 with an investment opportunity similar to an annuity, and she believed she was investing in a similar product in November 2010 when she gave McGuire additional funds. Vincent also testified that MP told him that she did not ask McGuire any questions because she trusted him, and did not sign any documents in connection with the two checks payable to RAM and had received no documentation regarding her investments. Indeed, when Vincent showed her copies of the two purported loan agreements, MP stated that she had never seen them or signed them. Vincent also testified that MP stated that she did not loan money to McGuire, that McGuire never tried to borrow money from MP, and that she was unaware of McGuire's financial situation. Further, Vincent testified that he searched several boxes where MP kept her financial documents and did not find anything with RAM's name on it, including original or copies of the loan agreements. Finally, Vincent testified that MP confirmed that she wrote the April 26, 2011 letter to McGuire demanding the return of her money.[13]

2. McGuire Converted MP's Funds

The Hearing Panel concluded that when MP gave McGuire the two checks totaling $95,000, she understood that her funds would be used to purchase an annuity or an investment similar to an annuity. It reached this conclusion based upon findings that: McGuire's testimony that MP loaned him the funds was not credible; the testimony to the contrary from

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[12] The Uniform Termination Notice for Securities Industry Registration ("Form U5") stated that the firm terminated McGuire for a "failure to follow policy and procedures in regard to reporting outside business activities." Ameritas later amended the Form U5 to notify FINRA that McGuire had also established a brokerage account without disclosing to the broker-dealer holding the account that he was registered with Ameritas. Heilman explained that Ameritas did not have "pure evidence" that McGuire misappropriated MP's funds, was unable to determine the true nature of the situation, and that MP did not allege to her or Ameritas that McGuire had stolen her funds.

[13] All three of Enforcement's witnesses testified that MP was coherent and understood and answered all questions asked of her.

Enforcement's witnesses—who conveyed MP's version of events—was probative and reliable; and additional evidence in the record further supported its credibility determinations and the trustworthiness of Enforcement's witnesses' testimony. It is undisputed that MP's funds were not used to purchase an annuity or other similar investment; instead, McGuire used at least a portion of these funds for his own personal benefit or the benefit of RAM.[14] McGuire never paid the funds back to MP or her estate, even after a formal written demand. Based upon all of the foregoing, the Hearing Panel found that McGuire converted MP's funds, in violation of FINRA Rule 2010.

FINRA Rule 2010 requires that members conduct their business in accordance with "high standards of commercial honor and just and equitable principles of trade."[15] It encompasses all unethical, business-related conduct, even if that conduct is not in connection with a securities transaction. *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); *see also Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (affirming the SEC's finding that an associated person violated just and equitable principles of trade by misappropriating funds from a political organization for which he served as the treasurer). Conversion is the intentional and unauthorized taking of, or exercise of ownership over, property "by one who neither owns the property nor is entitled to possess it." *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012). Conversion is conduct that violates FINRA Rule 2010. *Id.*

We affirm the Hearing Panel's findings that McGuire converted MP's funds, as the preponderance of the evidence in the record supports this conclusion. First, absent substantial evidence to the contrary, the Hearing Panel's credibility determinations are entitled to our deference. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) ("Credibility determinations by a fact-finder deserve special weight." (Internal quotation omitted)). We do not find substantial evidence in the record that warrants disturbing the Hearing Panel's extensive credibility determinations, including its wholesale rejection of McGuire's testimony concerning MP's purported loans to him. Indeed, as discussed below, we agree with the Hearing Panel that the evidence in the record supports its findings that, among other things, McGuire did not testify credibly concerning the events at issue.[16]

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[14] The record shows that after McGuire deposited MP's checks into RAM's bank account, he transferred thousands of dollars to his personal checking account and his wife's account, made personal loan payments and payments to credit card companies from the RAM account, paid his mortgage from the RAM account, and made numerous other ATM withdrawals and debit payments from the RAM account.

[15] FINRA Rule 2010 (formerly NASD Rule 2110) applies also to persons associated with a member pursuant to FINRA Rule 0140(a).

[16] McGuire also presents nothing on appeal to disturb the Hearing Panel's findings that: McGuire's untruthful testimony regarding other areas of his misconduct call into question his credibility concerning his conversion and forgery; McGuire's inconsistent testimony regarding the timing of the checks and signing of the loan documents further supports its credibility determinations; and Napolitano credibly testified that he never saw MP's checks or the loan

[Footnote continued on next page]

Second, we find that the testimony of Napolitano, Heilman, and Vincent further demonstrates that McGuire converted MP's funds. Each witness testified that, among other things, MP informed them that she believed she was investing in annuity-like products, that she did not loan or gift the funds to McGuire or RAM, and that she did not receive any statements or documents in connection with her purported investments until McGuire showed her a statement in April 2011. Although this testimony concerning what MP told them is hearsay, it is well-established "that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify." *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *46 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). When considering whether to rely on hearsay evidence, the adjudicator must evaluate its probative value, reliability, and the fairness of its use. *Id.* at *47. The factors to assess include any possible bias of the declarant; the type of hearsay at issue; whether the hearsay statements are signed and sworn to or anonymous, oral, or unsworn; whether direct testimony contradicts the hearsay statements; whether the declarant was available to testify; and whether the hearsay is corroborated. *Id.*

We find that the Hearing Panel properly admitted the testimony of Napolitano, Heilman, and Vincent concerning what MP told them, and reject McGuire's arguments that the Hearing Panel unfairly relied upon this testimony. This testimony was undoubtedly probative as to whether McGuire engaged in the misconduct alleged by Enforcement. *See, e.g.*, *Dep't of Enforcement v. Brookstone Secs. Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *115-17 (FINRA NAC Apr. 16, 2015) (finding that customers were unavailable due to physical and cognitive infirmities and hearsay testimony of customers' sons was probative because it related to the charges against respondents). Further, we agree with the Hearing Panel that the testimony was reliable. MP was unavailable to testify, and the record shows that until McGuire refused to return her funds, she and McGuire were close friends, she trusted him, and she did not have any apparent bias or animus against him.[17] *Cf. Dep't of Mkt. Regulation v. Jaloza*, Complaint No. 2005000127502, 2009 FINRA Discip. LEXIS 6, at *56-57 (FINRA NAC July 28, 2009) (finding hearsay declarant's testimony unreliable because he was biased against respondents where he admitted he was "at war" with respondents' firm and was not on good terms with the firm).

Moreover, the testimony of each witness conveying MP's version of events was consistent in all material respects (even though the witnesses talked with MP independently and

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agreements, and never advised McGuire concerning the purported loans from MP. Indeed, McGuire's contrary testimony was undermined by his on-the-record testimony, where he testified that he did not tell anyone about MP's loans, not even his wife. *See Manoff*, 55 S.E.C. at 1161-62.

[17] Indeed, after MP's first few calls with Napolitano, she left Napolitano a message informing him that McGuire had "explained everything" and showed her an account statement from RAM that indicated she had $95,000 in her account, which appeared to alleviate any concerns she had that McGuire acted improperly (at least temporarily).

at different times), and corroborated the other witnesses' testimony.[18] *See John Montelbano*, 56 S.E.C. 76, 90 (2003) (holding that hearsay testimony of witnesses was mutually corroborative and consistent and thus reliable); *Dep't of Mkt. Regulation v. Leighton*, Complaint No. CLG050021, 2010 FINRA Discip. LEXIS 3, at *49 (FINRA NAC Mar. 3, 2010) (finding hearsay testimony reliable because it was consistent and corroborated by witnesses who testified at hearing); *Dep't of Enforcement v. Sears*, Complaint No. C07050042, 2007 FINRA Discip. LEXIS 1, at *15-16 (FINRA NAC Sept. 24, 2007) (finding hearsay reliable where, among other things, it was corroborated by other witnesses' live testimony and documentary evidence), *aff'd in relevant part*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008). We reject McGuire's argument that he is not liable for any misconduct because his live, direct testimony contradicted Enforcement's witnesses' hearsay testimony. *See Dep't of Enforcement v. Butler*, Complaint No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *23-25 (FINRA NAC Sept. 25, 2015) (rejecting respondent's argument that no direct evidence supports a finding of conversion because the Hearing Panel discredited respondent's testimony and customer did not testify), *appeal docketed*, SEC Admin. Pro. File No. 3-16912 (Oct. 20, 2015).

Additional evidence in the record further corroborates and supports the witnesses' testimony. For example, a tape recording of MP's April 25, 2011 conversation with Napolitano supports findings that: MP asked McGuire for a copy of any annuity contract or agreement with RAM; McGuire showed MP a statement from RAM in April 2011 but did not let her keep it; MP never received any RAM contracts or statements; McGuire hung up on MP when she asked for her money back; and MP spoke to the FBI and FBI personnel told her to write McGuire a demand letter. We reject McGuire's argument that the Hearing Officer erred in admitting this recording.[19] Although the recording has several inaudible gaps in the conversation, the Hearing Officer found that it was generally intelligible (unlike the recordings of other conversations between Napolitano and MP that the Hearing Officer excluded from evidence). The recording is highly probative, captures MP's own words, and it is generally corroborative of pertinent aspects

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[18] McGuire argues that Napolitano was biased against him and had motives to encourage and induce MP's distrust of him. For example, on appeal McGuire argues that Napolitano influenced and coached MP for his own personal gain, and questions the veracity of Napolitano's testimony that MP contacted him in mid-April 2011 (versus McGuire's assertion that Napolitano initiated the contact). The record, however, does not support McGuire's claims. MP was already Napolitano's customer in 2011, and the record shows that Napolitano and McGuire had a mutually beneficial business relationship and friendship during all relevant time periods. Indeed, when MP first told Napolitano her version of events, he asked MP to double check her records and get back to him (rather than immediately believing that McGuire had engaged in misconduct). Similarly, the record does not support McGuire's argument that Heilman's conversations with MP were "infected with a bias conferred by her conversations with Napolitano." Like Napolitano, McGuire has pointed to no legitimate reason for Heilman to be biased against him, and Napolitano's initial conversations with Heilman reasonably caused her to look into potential misconduct involving an Ameritas registered representative. In fact, prior to mid-April 2011, Heilman did not know who McGuire was.

[19] The Hearing Officer admitted the recording and transcript of Napolitano's and MP's April 25, 2011 conversation (not their April 21, 2011 conversation as averred by McGuire).

of Napolitano's testimony, as well as the testimony of Heilman and Vincent. We find no error in the Hearing Officer's ruling. *See Epstein*, 2009 SEC LEXIS 217, at *47.

Heilman's and Vincent's notes of their conversations with MP also corroborate their testimony, and are consistent with Napolitano's version of events.[20] Similarly, the "investment" notation on the November 2009 check to RAM, which was identical to notations on other checks written by MP for annuities purchased through McGuire, supports the witnesses' testimony that MP believed she was investing in an annuity-like product and not lending money to McGuire. Finally, MP's April 26, 2011 letter to McGuire requesting the return of her funds also supports the witnesses' testimony. Vincent testified that MP authenticated the letter, the contents of which are consistent with witness testimony concerning MP's conversations with the FBI and McGuire's conversion of her funds generally. We reject McGuire's allegation that the Hearing Officer improperly admitted this letter into evidence.

In sum, we find the hearsay testimony at issue was probative and reliable, and supported by additional evidence in the record. McGuire does not point to anything specific in the record, other than the fact that Enforcement's witnesses' testimony was unfavorable to him and the Hearing Panel rendered a decision finding that he engaged in the misconduct alleged by Enforcement, suggesting that the Hearing Panel was unfairly prejudiced by any of the evidence

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[20] McGuire argues that the Hearing Panel should not have admitted Heilman's contemporaneous notes because they were not created as part of her business duties at Ameritas (and thus inadmissible pursuant to the business records exception to the hearsay rule). We disagree. As a general matter, FINRA "is [not] bound by rules of evidence and may rely upon hearsay evidence under appropriate circumstances." *Joseph Abbondante*, 58 S.E.C. 1082, 1101 (2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). Thus, Enforcement did not need to demonstrate that Heilman's notes satisfied the business records exception to the hearsay rule under the Federal Rules of Evidence, but rather that the notes were reliable under the precedent discussed herein. We find that Heilman's notes were probative, reliable, and corroborated her testimony and the other testimony at the hearing. This is true even though, as McGuire argues, Heilman did not take notes of one of her conversations with MP and another set of notes is undated.

Similarly, we reject McGuire's arguments that Vincent's notes were improperly admitted into evidence because they allegedly "lack the essential hallmarks of reliability." The record indicates that Vincent made the notes at or near the time of his interview with MP. Further, the fact that FINRA did not obtain a sworn statement from MP between April 2011 and her death in December 2011 does not render Vincent's notes unreliable or otherwise inadmissible. *See Mullins*, 2012 SEC LEXIS 464, at *40-41 (rejecting applicant's argument that FINRA should have obtained the testimony of victimized customer prior to her death because it purportedly would have helped applicant's case and overturn adverse credibility determinations and finding that FINRA has discretion in determining who to interview). Vincent testified that when he met with MP in September 2011 she appeared to be relatively healthy, was coherent, and understood every question asked of her. McGuire's additional attempt to undermine Vincent's testimony by alleging that MP's death just a few months after Vincent interviewed her "raises a reasonable inference that [MP] was in fact quite ill at the time of the interview" is conjecture that is not supported by anything in the record.

presented at the hearing. *See John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at *42 (July 25, 2008) (rejecting applicant's claim that evidence admitted at hearing was unfairly prejudicial); *cf.* Fed. R. Evid. 403, Advisory Committee Note (providing that evidence is unfairly prejudicial where it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"). Under the facts and circumstances, and considering the aggregate of all the evidence in the record taken as a whole, we find that the evidence amply demonstrates that McGuire converted MP's funds, in violation of FINRA Rule 2010.[21]

3. McGuire Forged MP's Signature

The Hearing Panel also found that McGuire forged, or caused to be forged by transferring MP's signatures from other documents, MP's signature on the 2009 and 2010 loan agreements, in violation of FINRA Rule 2010. The Hearing Panel based its findings on its determinations that McGuire's testimony that MP loaned him $95,000 was not credible, and Enforcement's witnesses' testimony that MP told them that she did not loan McGuire money, did not sign the loan agreements, and never saw the loan agreements, was reliable. We affirm these findings.

The Commission has "repeatedly held that forgery is a violation of Rule [2010] when the misconduct defrauds a customer or otherwise benefits the forger." *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *16 (Aug. 22, 2008). McGuire has not presented substantial evidence sufficient to overturn the Hearing Panel's credibility determination concerning his testimony that MP loaned him the money and signed the two loan agreements. *See Manoff*, 55 S.E.C. at 1162 n.6. For the reasons described above, we also find Napolitano's, Heilman's, and Vincent's testimony that MP never loaned McGuire money, and Vincent's testimony that MP never signed or saw the two loan agreements that purportedly bore her signatures, was probative and reliable. Further, we find that McGuire's forgery harmed MP, who believed her funds were being invested in an annuity-like product, and benefited McGuire.

McGuire argues that Enforcement did not present any expert testimony to support its assertion that McGuire forged MP's signatures, whereas he presented expert testimony to

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[21] We also reject McGuire's claim that the hearsay testimony admitted into evidence "so unfavorably colored the entire proceeding that it deprived" him of a fair hearing. Securities Exchange Act of 1934 ("Exchange Act") Section 15A(b)(8) provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. Exchange Act Section 15A(h)(1) 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." Fairness is determined by examining the entirety of the record. *See Mark H. Love*, 57 S.E.C. 315, 324 (2004). We find that, under the circumstances and where the Hearing Panel appropriately admitted, and relied upon, probative and reliable hearsay evidence to conclude that McGuire engaged in misconduct, McGuire received a fair hearing. We also reject any suggestion that the Hearing Panel was biased against McGuire, as the record does not support such a contention. *See Epstein*, 2009 SEC LEXIS 217, at *62 (holding that "[a]dverse rulings, by themselves, generally do not establish improper bias" and bias is demonstrated 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").

support his claim that MP signed the loan agreements. We reject McGuire's argument. As an initial matter, the absence of expert testimony is not dispositive to a determination that McGuire forged MP's signature. *See Dep't of Enforcement v. Kirlin Secs. Inc.*, Complaint No. EAF0400300001, 2009 FINRA Discip. LEXIS 2, at *60-61 (FINRA NAC Feb. 25, 2009) (rejecting respondent's argument that the hearing panel's finding that he forged signatures must be overturned because it was not supported by expert or customer testimony and stating that "expert testimony is not required for a finding of forgery in FINRA cases"), *aff'd*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168 (Dec. 10, 2009); *Dep't of Enforcement v. Masceri*, Complaint No. C8A040079, 2006 NASD Discip. LEXIS 29, at *23 (NASD NAC Dec. 18, 2006) (rejecting argument that expert testimony is required to demonstrate that respondent forged customer's signature); *see also Meyer Blinder*, 50 S.E.C. 1215, 1222 (1992) ("We further note that, in proceedings of this type generally, the absence of expert testimony or the fact that only one party has offered such evidence is hardly dispositive.").

Moreover, we find that the Hearing Panel appropriately weighed the testimony of McGuire's handwriting expert and his "qualified" opinion that the signatures on the loan agreements were MP's against the countervailing evidence that MP did not sign the two loan agreements. McGuire's expert could only offer a qualified opinion that the signatures on the loan documents were MP's "due to limitations associated with the very wide range of variation in [MP's known writing] samples and the limited quantity of samples on or about the dates of the questioned writings." Importantly, McGuire never provided to his expert the two checks signed by MP at the time she purportedly signed the two loan agreements, and his expert testified that when authenticating signatures it is preferable to use samples made at or near the time of the signatures in question.[22] Further, although McGuire's expert requested original documents, McGuire inexplicably did not provide him with the original loan agreements or any original document containing MP's signature. Thus, the expert testified that it was possible that MP's signature had been transposed onto the loan agreements and he could not rule out this possibility without seeing the original documents.[23] *See Dep't of Enforcement v. Ortiz*, Complaint No. E0220030425, 2007 FINRA Discip. LEXIS 3, at *25 (FINRA NAC Oct. 10, 2007) (finding that testimony from respondent's handwriting expert did not exonerate respondent from a forgery finding where original documents were not available and stating that "[w]e have previously determined that faulty methodology in collecting handwriting samples undercuts an expert's findings"), *aff'd*, 2008 SEC LEXIS 2401. The Hearing Panel rejected McGuire's assertion that he believed he had provided originals to FINRA or his lawyer to excuse his failure to provide originals to the expert, and concluded "that McGuire lied about why original agreements were

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[22] The Hearing Panel also found that the signatures on the checks are "very different in appearance" from the signature on each corresponding loan document. *See Dep't of Enforcement v. Manoff*, Complaint No. C9A990007, 2001 NASD Discip. LEXIS 4, at *28 (NASD NAC Apr. 26, 2001) (affirming hearing panel's findings, without the aid of expert testimony, that the differences between co-worker's actual and purported signatures support co-worker's version of events and not respondent's), *aff'd*, 55 S.E.C. 1155.

[23] McGuire's expert further testified that although there was no evidence showing that MP's signature had been cut and pasted into the loan agreements, he was not asked to consider whether that had occurred.

not made available."[24] On appeal, McGuire does not present any evidence to overturn the Hearing Panel's credibility determination.

Finally, we reject McGuire's argument that the Hearing Panel "essentially shifted the burden to McGuire" to prove that the signatures on the loan agreements were not forged because his expert could not rule out that MP's signature had been transposed onto the documents. The Hearing Panel weighed the testimony of Enforcement's witnesses that MP did not loan McGuire funds and did not sign the loan documents, McGuire's incredible testimony to the contrary, additional evidence in the record buttressing these findings, and the qualified opinion of McGuire's expert, and found that the preponderance of the evidence demonstrated that McGuire forged MP's signatures. The fact that McGuire's expert could not rule out that MP's signature had been transposed onto the loan agreements was not the basis for the Hearing Panel's conclusion that McGuire forged MP's signature, although it supported the limited weight it gave to McGuire's expert's opinion. *See Kirlin Secs.*, 2009 SEC LEXIS 4168, at *64 n.87 (finding that FINRA had the burden to prove that an applicant engaged in conduct violating Rule 2010 and respondent has the burden of producing evidence to support any purported defenses). Consequently, we find that McGuire engaged in unethical behavior when he forged MP's signatures to the loan documents, in violation of FINRA Rule 2010.

B. McGuire Engaged in Outside Business Activities Without Providing his Employing Firms with Written Notice

The Hearing Panel found that McGuire violated NASD Rules 3030 and 2110, and FINRA Rules 3270 and 2010, by failing to provide his firms with prompt or prior written notice of his outside business activities. We affirm these findings.

NASD Rule 3030 provided that "[n]o person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." FINRA Rule 3270, which superseded NASD Rule 3030 in December 2010, provides that:

[24] Vincent testified that he did not receive originals and originals were not contained in FINRA's investigative file. Vincent also testified that when he searched through several boxes of MP's financial records during his visit to her home, he did not find the loan agreements (either copies or originals) even though MP saved relatively inconsequential financial documents. On appeal, McGuire avers that the Hearing Panel improperly allowed Vincent to testify that he did not find any loan agreements among MP's records, and that the boxes of MP's records were never requested nor produced to FINRA or McGuire. We find nothing improper regarding Vincent's testimony concerning his observations of MP's records, and whether the boxes of records were produced to any party has no bearing on our determination that McGuire forged MP's signatures.

> No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.

McGuire's firms' policies also required written notice and approval of a registered representative's outside business activities, and generally required that registered representatives annually complete questionnaires to disclose outside business activities.[25]

Notwithstanding the requirements of NASD Rule 3030, FINRA Rule 3270, and the policies of McGuire's various firms, McGuire failed to disclose in writing, and get prior approval from, his firms for certain of his outside business activities that were outside the scope of his member firms' employment and for which McGuire received (or expected to receive) compensation. For example, despite McGuire's affiliation with RAM beginning in 2006, McGuire failed to provide written notice of such affiliation to MML, TFS, and Ameritas. McGuire also failed to disclose in writing his affiliation with RAM to Investacorp, even though it expressly conditioned McGuire's employment on him ceasing all outside business activities except fixed insurance sales. McGuire subsequently misrepresented to Investacorp that he would "immediately stop any 'outside businesses'" and would only "be conducting fixed insurance sales." Similarly, McGuire failed to disclose in writing to MML his affiliation with Freedom Mortgage Corporation, and failed to disclose in writing to TFS and Investacorp his affiliation with SSU.[26]

On appeal, McGuire does not dispute these facts, but argues that he did not deliberately fail to disclose certain outside business activities, disclosed some of his outside business activities to his firms, and disclosed others to Napolitano. McGuire states that while he was "perhaps careless or negligent," he lacked a motive to hide these outside business activities from his member firms.

We reject McGuire's arguments. First, intent is not required to demonstrate a violation of FINRA's rules concerning outside business activities. Moreover, McGuire's contention that he did not deliberately fail to disclose at least some of his outside business activities is contradicted

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[25] A violation of FINRA's rules governing outside business activities also violates FINRA Rule 2010 (and its predecessor NASD Rule 2110). *See Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *18 (Dec. 20, 2011) (finding that violation of NASD Rule 3030 violated just and equitable principles of trade).

[26] The Hearing Panel found incredible McGuire's unsubstantiated claims that he submitted to MML a written request to engage in outside business activities with Freedom Mortgage Corporation and submitted to TFS a written request to engage in outside business activities with SSU. McGuire has not presented substantial evidence sufficient to overturn these credibility determinations. *See Manoff*, 55 S.E.C. at 1162 n.6. Further, the Hearing Panel found that McGuire falsely denied working for SSU.

by his misrepresentations to Investacorp that he had ceased all outside business activities in order to secure employment with the firm. Second, that McGuire disclosed some of his outside business activities to certain employing firms does not absolve him of liability for failing to disclose his other outside business activities for which he was charged. Third, we reject McGuire's claim that he satisfied the requirements of FINRA's outside business activities rule because Napolitano was aware of such activities. Napolitano's awareness of McGuire's activities does not satisfy McGuire's obligation to provide written notice to his firms under FINRA's outside business activities rule.[27] *See Giblen*, 2014 FINRA Discip. LEXIS 39, at *17 (holding that even if respondent provided constructive notice to firm regarding his outside business activities, FINRA's rule "requires actual, written notice of an associated person's outside business activities").

C. McGuire Failed to Disclose Outside Brokerage Accounts

The Hearing Panel found that McGuire failed to disclose two outside brokerage accounts to his employing firms and the firms at which McGuire held the accounts, in violation of NASD Rule 3050 and FINRA Rule 2010. We affirm these findings.

NASD Rule 3050(c) provides that:

> A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member; provided, however, that if the account was established prior to the association of the person with the employer member, the associated person shall notify both members in writing promptly after becoming so associated.

A registered representative's failure to notify his employing firm and the executing member firm prior to opening a brokerage account also violates FINRA Rule 2010. *See Dep't of Enforcement*

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[27] Moreover, the record shows that Napolitano was not responsible for supervising McGuire's securities activities at TFS or Ameritas and he did not have the authority to approve McGuire's outside business activities (which authority resided with each firm's compliance department). The same holds true for McGuire's securities supervisor at MML. *See Dep't of Enforcement v. Giblen*, Complaint No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at *17 n.17 (FINRA NAC Dec. 10, 2014) (holding that even if respondent provided written notice to a firm principal and supervisor, respondent violated Rule 3030 because the firm principal and supervisor did not have the authority to approve outside business activities). We also reject McGuire's attempts to blame Napolitano as the person "who was responsible for helping McGuire complete" relevant documentation. McGuire was responsible for complying with the notice requirements of FINRA's outside business activities rule and ensuring that any forms disclosing such activities were accurate, and he failed to do so. *See Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 (1994) (rejecting applicant's attempts to shift blame to others for misconduct), *aff'd*, 69 F.3d 549 (10th Cir. 1995).

*v. Ng*, Complaint No. 2009019369302, 2013 FINRA Discip. LEXIS 6, at *17 n.11 (FINRA NAC Apr. 24, 2013).

On December 7, 2009, McGuire opened an individual brokerage account in his own name at E*Trade Financial. Although McGuire was registered with and employed by TFS, in his E*Trade account application McGuire falsely stated that he was not employed by a broker-dealer and was employed by SSU. McGuire also failed to notify TFS that he had opened an account at E*Trade, and failed to notify Ameritas of this account when he moved there at the end of December 2009.[28]

Similarly, on January 13, 2011, while registered with and employed by Ameritas, McGuire opened a brokerage account in RAM's name at Buckman, Buckman, & Reid, Inc. ("BBRI").[29] On BBRI's new account form, McGuire left unanswered the question whether he was affiliated with, or employed by, a broker-dealer. McGuire also failed to notify Ameritas that he had opened the BBRI account, and failed to notify Investacorp of the BBRI account promptly after joining that firm. Ameritas's policies required that their registered representatives obtain prior approval from its compliance department before opening an outside brokerage account, and Investacorp required that registered representatives notify the firm in writing of existing brokerage accounts upon becoming associated with the firm.[30]

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[28] During his on-the-record interview, McGuire denied having opened this account and testified that someone stole his identity and opened the account. At the hearing, McGuire was confronted with an audio recording of an inbound call to E*Trade on December 7, 2009, during which the customer inquired about wiring instructions for his account. McGuire admitted that the voice "definitely sounds like me" but maintained that he did not recall filling out an application to open the E*Trade account. The new account application contained, among other things, a user name that was selected by the individual who opened the account. In this instance, the user name was "rmsell36," which included McGuire's initials and a number that was associated with him when he played baseball. The Hearing Panel found that McGuire's testimony that the E*Trade account resulted from identity theft was false.

[29] NASD Rule 3050(e) provides that Rule 3050(c) shall apply to, among other things, an account in which an associated person has a financial interest. There is no dispute that McGuire had a financial interest, through RAM, in the BBRI account. McGuire bought and sold penny stocks in the account until June 2011, and it remained open for several more months.

[30] The Hearing Panel did not credit McGuire's testimony that: (1) he was uncertain about how to fill out the BBRI form because he was "in between broker-dealers or in the process of possibly leaving a broker-dealer" in January 2011; and (2) he contacted BBRI and was allegedly told that he should fill out BBRI's form to the best of his ability, send it in, and the person with whom McGuire spoke would then talk to a supervisor and get back to him. When McGuire opened the account at BBRI in January 2011, he had been employed at Ameritas for more than a year and remained at Ameritas for four more months until his termination in late April 2011. Further, the Hearing Panel did not credit McGuire's claims that he orally notified Ameritas and Napolitano of the account at BBRI.

In McGuire's notice of appeal, he argues that he never opened an account at E*Trade because the account was never actually funded and he therefore had nothing to disclose.[31] We disagree. First, an E*Trade representative testified that McGuire opened his account on December 7, 2009, when McGuire completed the online form and E*Trade's internal system did not detect any red flags. He also testified that accounts are automatically closed if they are not funded within 60 days.[32] Second, the notification requirement contained in NASD Rule 3050(c) is not conditioned upon an associated person successfully funding a brokerage account; rather, it requires an associated person to notify his employing firm and the firm at which he is opening an account *prior to opening* an account or placing an initial order for the purchase or sale of securities. *See also* NASD Rule 3050(b)(1) (requiring executing member firm to notify the employer member firm in writing, prior to executing a transaction for such account, of the executing member's intention to open or maintain such an account). McGuire failed to provide the necessary notifications before he opened his outside brokerage accounts, in violation of NASD Rule 3050(c).

D. McGuire Willfully Failed to Disclose Tax Lien and Warrants

The Hearing Panel found that McGuire willfully failed to disclose on his Form U4 two state tax warrants and one federal tax lien, in violation of Article V, Section 2 of FINRA's By-Laws and FINRA Rules 1122 and 2010. We affirm these findings.

Every associated person must keep his Form U4 current at all times. *See* FINRA By-Laws, Article V, Section 2(c); FINRA Rule 1122 ("No member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof." ). Amendments to an associated person's Form U4 must be made within 30 days after learning of the facts or circumstances giving rise to the amendment. *See* FINRA's By-Laws, Article V, Section 2(c). Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012) (holding that representative's failure to disclose numerous judgments, liens, and bankruptcy filings violated FINRA's rules). A registered representative's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt

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[31] Although McGuire raised this issue in his notice of appeal, he did not address his violation of NASD Rule 3050(c) in his brief.

[32] On the day McGuire submitted his online application to E*Trade and his account was opened, an attempt was made to fund the account by wiring funds from RAM's bank account. This attempt was unsuccessful, and as discussed above, the record contains a recording of a call on December 7, 2009, concerning this account to discuss wiring instructions. On December 8, 2009, a second unsuccessful attempt was made to wire funds from RAM's bank account to the E*Trade account. Pursuant to E*Trade policies, it automatically closed McGuire's account on February 10, 2010.

on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional." *Id.* at *32.

It is undisputed that on May 4, 2010, the Internal Revenue Service filed a tax lien against McGuire in the amount of $21,167. Further, on May 20, 2010, New York State filed a tax warrant against McGuire in the amount of $445. New York State filed a second tax warrant against McGuire in the amount of $1,256 on September 16, 2010. McGuire became aware of these liens sometime before early May 2011, when he was seeking employment with Investacorp. Indeed, Investacorp initially refused to hire McGuire based upon, among other things, its review of his credit report. Investacorp eventually reconsidered, but as a condition to McGuire's employment, Investacorp required that he satisfy any pending liens and judgments and agree to refrain from all outside business activities except fixed insurance sales. McGuire omitted the tax lien and warrants when he submitted his Form U4, which lead Investacorp to conclude that McGuire had satisfied all outstanding judgments and liens filed against him. The tax lien and warrants remained undisclosed on four subsequent amendments to McGuire's Form U4 made between June 2011 and August 2012.[33] McGuire's failure to update his Form U4 to reflect these warrants and lien violated Article V, Section 2 of FINRA's By-Laws and FINRA Rules 1122 and 2010.

On appeal, McGuire argues that while his failure to update his Form U4 may have been "careless and sloppy," he did not intentionally conceal the tax lien and warrants and did not willfully fail to update his Form U4. He also argues that he had no motive to hide these matters. We reject McGuire's arguments. "A willful violation under the federal securities laws simply means that the person charged with the duty knows what he is doing." *See id.* at *41 (internal quotations omitted). We need not find that McGuire "was aware of the rule he violated or that he acted with a culpable state of mind." *See id.* Nor do we need to find that McGuire had a motive to conceal the tax lien and warrants. Rather, McGuire's failure to disclose his tax lien and warrants is willful if he "of his own volition provides false answers on his Form U4." *See id.* Here, although McGuire knew about the tax lien and warrants, his initial Form U4 that Investacorp submitted to FINRA (which McGuire signed both physically and electronically) and subsequent amendments to his Form U4 (which McGuire signed electronically) omitted such matters. *See Dep't of Enforcement v. Amundsen*, Complaint No. 2010021916601, 2012 FINRA Discip. LEXIS 54, at *14 n.10 (FINRA NAC Sept. 20, 2012) (holding that respondent signed Forms U4 and therefore "he alone is responsible for the information contained therein"), *aff'd*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148 (Apr. 18, 2013), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014). Moreover, the evidence shows that McGuire had a motive to omit the tax lien and warrants, and intentionally omitted these matters from his Form U4, to secure employment with Investacorp.

We also affirm the Hearing Panel's findings that McGuire omitted material information from his Form U4. *See Tucker*, 2012 SEC LEXIS 3496, at *47 (holding that respondent's judgments, liens, and bankruptcies were material information because it "significantly altered the total mix of information made available" and cast doubt on respondent's ability to manage his

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[33] McGuire satisfied the New York State tax warrants in late May 2012, and the federal tax lien remained in effect until at least 2014.

financial affairs). McGuire's willful failure to update his Form U4 to include this material information renders him statutorily disqualified. *See* Exchange Act Section 3(a)(39)(F) (providing that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization); FINRA's By-Laws, Article III, Section 4 (providing that a person is subject to statutory disqualification if he is disqualified pursuant to Exchange Act Section 3(a)(39)).

## IV. Sanctions

### A. Conversion

The Hearing Panel barred McGuire and ordered that he pay $95,000 in restitution for converting MP's funds. For the reasons set forth below, we affirm the Hearing Panel's sanctions.

In determining the appropriate sanctions for McGuire's conversion, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions.[34] The Guidelines provide that the standard sanction for conversion is a bar, regardless of the amount converted.[35] Conversion "poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry. Indeed, conversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money." *Olson*, 2015 SEC LEXIS 3629, at *9 (internal quotations omitted).

We find that barring McGuire for his conversion is appropriate under the circumstances and is supported by the presence of numerous aggravating factors. McGuire took advantage of MP, an unsophisticated customer who trusted and relied upon him, by taking $95,000 from her under false pretenses.[36] McGuire concocted a story to conceal his conversion and created loan agreements to support his fabricated version of events.[37] McGuire used MP's funds for his own personal benefit, and refused to pay her back despite her requests that he do so.[38] McGuire's flagrantly dishonest and egregious misconduct was intentional, and we find no applicable mitigating factors.[39] McGuire is unfit to continue in the securities industry, and a bar is an appropriate sanction under the circumstances.

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34 *See FINRA Sanction Guidelines* (2013) [hereinafter *Guidelines*].

35 *Guidelines*, at 36.

36 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 17 and 19).

37 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

38 *Id.* (Principal Considerations in Determining Sanctions, No. 11).

39 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

We also affirm the Hearing Panel's order that McGuire pay $95,000 in restitution (plus interest) to MP's estate. The Guidelines provide for restitution "to restore the status quo ante where a victim otherwise would unjustly suffer loss" and is appropriate where an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct.[40] We find all conditions are satisfied here, and order that McGuire pay to MP's estate $95,000, plus prejudgment interest.

B. Forgery

The Hearing Panel also barred McGuire for forging MP's signature on the two loan agreements. The Guidelines for forgery or falsification of records recommend that we consider the nature of the forged document and whether the respondent had a mistaken, but good faith belief of express or implied authority to sign the document.[41] They further instruct that where mitigating factors exist, we consider suspending the respondent in any or all capacities for two years, and in egregious cases consider a bar.[42] The loan documents that McGuire forged were central to concealing his conversion of MP's funds. McGuire intentionally forged MP's signature and knew that MP did not give him authority to sign her name to these fictitious documents. He later produced them to FINRA in connection with its investigation, and used them at hearing to support his false assertions that MP loaned him money. No mitigating factors exist that would warrant any sanction less than a bar for McGuire's egregious misconduct, and we affirm the Hearing Panel's sanction.

In McGuire's notice of appeal, he suggests that several factors should mitigate the bars imposed by the Hearing Panel. For instance, McGuire argues generally that he lost his job because of the Hearing Panel's decision and the "pending process." This factor, however, is not mitigating here. *See, e.g.*, *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 14) (consider whether the respondent's firm disciplined the respondent for the same misconduct prior to regulatory detection). McGuire also argues that he cooperated with FINRA's investigation and never violated FINRA Rule 8210. Even assuming the veracity of this assertion, Enforcement did not charge McGuire with violating FINRA Rule 8210, and McGuire's purported compliance with other rules is not mitigating. *See Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797, at *54 (Aug. 14, 2009) (rejecting argument that applicants' violations of FINRA rules were mitigated because of their general compliance with the rules in other instances), *aff'd*, 409 F. App'x 396 (2d Cir. 2010).

McGuire also asserts that these proceedings have "destroyed him financially" and that his health has deteriorated as a result of the Hearing Panel's decision. These assertions, even if true, are not mitigating. *See Olson*, 2015 SEC LEXIS 3629, at *19 n.29 (finding that collateral consequences of termination resulting from applicant's misconduct are not mitigating); *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *35-36 (Feb. 20, 2014)

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

41 *Id.* at 37.

42 *Id.*

(rejecting applicant's argument that he had "suffered enough" as a result of the disciplinary proceeding and finding that "any collateral consequence that Houston may have suffered as a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor"); *cf. Dep't of Enforcement v. Harari*, Complaint No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at *38 (FINRA NAC Mar. 9, 2015) (finding that the financial, health, and other personal pressures respondent was under at the time of his violations are not mitigating). Finally, McGuire suggests that because the decision was not issued within 60 days from the hearing's completion, a bar is not warranted for his misconduct and he believed that he would not be barred due to the Hearing Panel's alleged delay. We reject this argument. The Commission has stated that FINRA Rule 9268 "addresses the timing of the Hearing Officer's preparation of a decision (which must then be distributed to other members of the Hearing Panel), and not the issuance of the decision." *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *24 (Nov. 8, 2007), *aff'd*, 316 F. App'x 865 (11th Cir. 2008). Moreover, the fact that the Hearing Panel issued its decision more than 60 days after the conclusion of the hearing, and McGuire's personal beliefs concerning the significance of this fact, has no bearing on our determination that McGuire engaged in egregious misconduct that warrant the most serious of sanctions.

C. Outside Business Activities

The Hearing Panel assessed, but did not impose in light of the bars, a $25,000 fine and a one-year suspension for violating FINRA's outside business activities rules. It also required that McGuire requalify by examination as an investment company products and variable contracts limited representative. We affirm these sanctions.

The applicable Guidelines recommend a fine of $2,500 to $50,000, and where the outside business activities do not involve aggravating conduct, a suspension of up to 30 business days.[43] Where the outside business activity involves aggravating conduct, the Guidelines recommend considering a suspension of up to one year, and in egregious cases (such as those involving a substantial volume of activity or significant harm to firm customers) a longer suspension or a bar. Factors to consider include whether the outside activity involved firm customers, the extent of injury to customers, the duration of the outside activity, and whether the respondent misled his firm or concealed his activity.[44]

A number of factors serve to aggravate McGuire's misconduct. McGuire's outside business activity related to RAM involved MP, a customer of MML and TFS, and caused significant harm to MP. McGuire failed to notify four different firms of his activity with RAM for more than five years. Similarly, McGuire worked for Freedom Mortgage Corporation for more than a year without notifying MML, and did not notify TFS or Investacorp of his affiliation with SSU.[45] Indeed, with respect to Investacorp, McGuire misrepresented that he had ceased all

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[43] *See Guidelines*, at 13.

[44] *Id.*

[45] *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

outside business activities except fixed insurance sales in order to secure employment, even though he continued to receive compensation from RAM and SSU for these outside business activities. McGuire's repeated and numerous disclosure failures evidence a deliberate disregard of FINRA's rules.[46] Finally, McGuire attempted to blame Napolitano and others for his misconduct, and the sanctions assessed by the Hearing Panel for McGuire's egregious misconduct are appropriate under the circumstances.[47]

D. Outside Brokerage Accounts

For McGuire's violations of NASD Rule 3050(c), the Hearing Panel assessed but did not impose a $5,000 fine and a three-month suspension. It also required that McGuire requalify by examination as an investment company products and variable contracts limited representative. We affirm these sanctions.

The Guidelines for violations of NASD Rule 3050(c) recommend a fine of $1,000 to $25,000, and, in egregious cases, they suggest a suspension of up to two years or a bar.[48] McGuire falsely stated that he was not employed by a broker-dealer on his E*Trade account application, and failed to notify TFS and Ameritas of this account. Similarly, McGuire failed to disclose to BBRI that he was affiliated with or employed by a broker-dealer and failed to notify Ameritas and Investacorp of this account.[49] McGuire falsely testified that he gave verbal notice of his BBRI account to Ameritas and that someone stole his identity and opened the E*Trade account.[50] Rather than accept responsibility for his misconduct, McGuire sought to shift blame to BBRI staff and Napolitano. We find that, under the circumstances, the Hearing Panel's sanctions are appropriately remedial.

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[46] *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 and 13).

[47] The fact that McGuire may have "eliminated all other" outside business activities after the fact does not serve to mitigate his sanctions. Further, although not raised by McGuire on appeal, Ameritas's termination of McGuire for engaging in outside business activities and opening outside brokerage accounts, in violation of FINRA rules and the firm's policies, does not outweigh the numerous aggravating factors in connection with the sanctions assessed for this misconduct. *See Olson*, 2015 SEC LEXIS 3629, at *17-20 (finding the firm's termination of respondent prior to regulatory detection for the misconduct at issue to be mitigating but sustaining FINRA's sanctions based upon other aggravating factors). Finally, we find that requalification as an investment products and variable contracts limited representative is appropriate. *See Guidelines* at 5 (General Principles Applicable to All Sanction Determinations, No. 7) (providing that requiring that a respondent requalify in any or all capacities may be imposed where "a respondent's actions have demonstrated a lack of knowledge or familiarity with the rules and laws governing the securities industry").

[48] *Id.* at 16. The Guideline-specific factors to consider in imposing sanctions are inapplicable to McGuire's misconduct.

[49] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 8).

[50] *Id.* (Principal Considerations in Determining Sanctions, No. 10).

E. Willful Failures to Disclose Tax Lien and Warrants

Finally, the Hearing Panel assessed a $10,000 fine and a one-year suspension of McGuire for his willful failures to disclose his tax lien and warrants. The Guidelines for filing a false or misleading Form U4 suggests a fine of $2,500 to $50,000 and that we consider suspending the individual for five to 30 business days. In egregious cases, the Guidelines recommend a longer suspension or a bar.[51] Factors to consider include, among other things, the nature and significance of the information.[52]

We affirm the Hearing Panel's sanctions. McGuire failed to disclose three tax liens and warrants that had been filed against him, which reflected McGuire's tenuous personal financial situation. *See Tucker*, 2012 SEC LEXIS 3496, at *32 (stressing importance of disclosing tax liens, judgments, and bankruptcies). McGuire failed to initially disclose this information to Investacorp, and then failed on four subsequent occasions during a 14-month period to properly update his Form U4.[53] We find that McGuire deliberately omitted this information from his Form U4 to secure employment with Investacorp and deprived his employers and the investing public of important relevant and important information concerning his financial condition.[54] Under the facts and circumstances, we find that a $10,000 fine and one-year suspension in all capacities are appropriately remedial sanctions.

V. Conclusion

We affirm the Hearing Panel's findings that McGuire violated FINRA Rule 2010 by converting MP's funds and twice forging her signature. We further affirm the Hearing Panel's findings that McGuire failed to provide his employer firms with prompt or prior written notice of outside business activities, in violation of NASD Rules 3030 and 2110 and FINRA Rules 3270 and 2010; failed to notify his employer firms of outside brokerage accounts, and failed to notify the member firms where he opened such accounts that he was associated with FINRA members, in violation of NASD Rule 3050 and FINRA Rule 2010; and willfully failed to disclose on his Form U4 several tax liens, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. Accordingly, we bar McGuire in all capacities for his conversion of MP's funds, and order that he pay $95,000 (plus interest) in restitution to MP's estate.[55] We

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51 *Id.* at 69-70.

52 *Id.* at 69.

53 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

54 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10 and 13).

55 Interest shall accrue from November 8, 2010 (i.e., the date that McGuire deposited MP's $35,000 check) until paid. 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). *See Guidelines*, at 11 (Technical Matters). Where MP's estate cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the customer's last know residence.

separately bar McGuire for twice forging MP's signature on loan agreements. McGuire is also ordered to pay costs in the amount of $16,500.03, plus appeal costs of $1,196.68.[56]

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[56] The bars are effective as of the date of this decision. We also have considered and reject without discussion all other arguments advanced by the parties.