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Department of Enforcement, Complainant, vs. John M. Saad Atlanta, GA, Respondent.

Complaint No. 2006006705601

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

*2009 FINRA Discip. LEXIS 29*

October 6, 2009

**TEXT:**

[\*1]

DECISION

**Registered representative misappropriated firm funds by submitting false receipts and expense reimbursement reports and accepting from the firm reimbursement to which he was not entitled. Held, findings and sanctions affirmed.**

**Appearances**

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

For the Respondent: Gregory Bartko, Esq.

**Decision**

Pursuant to NASD Rule 9311, n1 John M. Saad ("Saad") appeals a FINRA Hearing Panel's August 19, 2008 decision finding that Saad converted the funds of Penn Mutual Life Insurance Co. ("Penn Mutual") by misrepresenting that he had taken a business trip that he did not in fact take, creating fake receipts with counterfeit logos, and submitting false receipts and expense reimbursement reports to Penn Mutual's broker-dealer affiliate, member firm Homer, Townsend & Kent ("HTK"). The Hearing Panel barred Saad and assessed hearing costs. After a thorough review of the record, we find that Saad misappropriated Penn Mutual's funds by submitting false expense reimbursement requests and receipts and accepting reimbursement to which he was not entitled. We find that Saad's [\*2] deceitful conduct was premeditated and egregious and that aggravating factors exist. We therefore affirm a bar in all capacities.

n1 Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The

first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

## I. Background

Saad was associated with HTK as an investment company products and variable contracts limited representative, general securities representative, and general securities principal, and with HTK's insurance affiliate, Penn Mutual, from January 2001 through September 2006, when HTK filed a Uniform Termination [\*3] Notice for Securities Industry Registration ("Form U5") terminating Saad. The Form U5 indicated that HTK had terminated Saad for submitting expense reports seeking reimbursement from Penn Mutual for expenses that he had not actually incurred. n2 Saad testified that he currently is associated with National Life Insurance Company, but is not registered to sell securities.

n2 HTK's filing of this Form U5 precipitated FINRA's investigation and the filing of the complaint in this matter.

## II. Procedural History

In September 2007, FINRA's Department of Enforcement ("Enforcement") filed a complaint alleging that Saad violated Rule 2110 by submitting false expense reports and receipts to Penn Mutual that resulted in payments to Saad of \$ 1,144 to which Saad was not entitled. The complaint alleged that Saad's misappropriation of Penn Mutual's funds violated NASD Rule 2110.

In an August 2008 decision, the Hearing Panel found that Saad converted Penn Mutual's funds, barred Saad from associating with any member firm in any [\*4] capacity, and assessed costs. This appeal followed.

## III. Facts

Saad does not dispute the underlying facts, but denies that his misconduct rose to the level of conversion.

In 2006, Saad was based in Atlanta, Georgia, and served as Penn Mutual's regional director for five states. He supervised 30 registered representatives and 200 insurance agents. Saad spent most of his time recruiting insurance agents to sell Penn Mutual's insurance products as independent contractors and helping independent contractors already selling Penn Mutual's products build their insurance business.

Saad testified that, at the start of each month, Penn Mutual wired \$ 6,300 into a checking account that Saad maintained as his office account. Saad used this account only to pay office expenses and overhead, but the account was in Saad's name. n3 Although Saad was the only signatory on the account, his office administrator was responsible for the office's accounting. She prepared checks drawn on the account for Saad's signature to pay the company credit card and other bills. When Penn Mutual wired \$ 6,300 to Saad at the start of each month, it gave him discretion as regional director to spend the \$ 6,300 as [\*5] necessary for legitimate office expenses. Saad also personally incurred travel and other business expenses each month away from the office. The office administrator processed Saad's travel and other expense receipts and submitted Saad's month-end expense report (for business expenses that Saad incurred outside of the office) to Penn Mutual. Each month, when Penn Mutual approved Saad's month-end expense report, Saad then

transferred the approved amount of funds from his office expense account to his personal account.

n3 Saad testified that, although the account was held in his own name, he treated the account as a business account and utilized it for office-related expenses only and not for personal expenses.

Saad had been a large producer at Penn Mutual and had earned several production awards between 2002 and early in 2005. Between the end of 2005 and mid-2006, however, his production dropped precipitously because, Saad explained, he was focused on the serious illness of his one-year-old twin son. Saad generally [\*6] traveled extensively on recruiting trips, but reduced his travel schedule after the birth of his twin sons and the development of his son's illness. Saad testified that, in an effort to increase his production, he scheduled a meeting for July 10, 2006, in Memphis, Tennessee, with a potential independent contractor that he had hoped to recruit. Saad stated that he called his contact to confirm the meeting on the way to the airport on Sunday evening, July 9, 2006, and he learned that the meeting had been canceled. n4 Saad testified that he then contacted his wife, and she agreed that, rather than go home, Saad could spend two days and nights in a hotel in Atlanta to have time alone to focus on work. Saad did not notify his office of his change in plans -- the office administrator believed that Saad had traveled to Memphis. Instead, Saad checked into a hotel in Atlanta for two nights (July 9 and 10, 2006).

n4 Although Saad testified that he had planned the Memphis trip in advance, he had not purchased a plane ticket in advance. Saad indicated that he planned to buy the plane ticket at the airport on the evening of the flight.

[\*7]

At the end of July 2006, Saad submitted receipts and expense forms to the office administrator for processing. Among the receipts that he submitted was a purported receipt for \$ 478 for a flight from Atlanta to Memphis on July 9, 2006, and a returning flight from Memphis to Atlanta on July 11, 2006. Saad admitted that he prepared the false receipt on his computer. He also submitted a purported hotel bill on Marriott letterhead for the Marriott hotel in Memphis for \$ 274.44 for a two-night stay from July 9 through July 11, 2006. Saad admitted that he copied a Marriott logo from the Internet and prepared the false hotel receipt on his computer, using the logo. Saad also submitted to the office administrator a receipt for \$ 38.01 for four drinks purchased between 10:00 p.m. and 11:00 p.m. on Sunday, July 9, from the lounge at an Atlanta hotel. The office administrator questioned Saad about the receipt because it indicated that he was in fact in Atlanta, not Memphis, on the evening of July 9. Saad thereafter withdrew the lounge receipt from his expense report and threw the receipt in the wastebasket. Saad admitted that he submitted and received reimbursement for the remaining expenses. [\*8] The office administrator apparently retrieved the receipt and reported the discrepancy to Penn Mutual's home office, and Penn Mutual conducted an audit of Saad's expenses reports.

At the end of July 2006, Saad also submitted for reimbursement a July 14, 2006 receipt for the purchase of a cell phone for \$ 392.19. The section on the receipt that indicated the name of the recipient of the cell phone was blacked out. Saad indicated on the receipt that he had purchased the phone to replace his cell phone, which had broken. Saad admitted that, in reality, he had purchased the cell phone for Person A, a woman who was not affiliated with Penn Mutual or HTK but who, Saad stated, he had hoped to recruit to sell Penn Mutual products. Person A was affiliated with Aflac, Inc., an insurance products company, in Aflac's Atlanta, Georgia office. Saad had hoped that, in exchange for the cell phone, Person A would introduce him to other prospects in the Atlanta office of Aflac. Saad contended that, although he submitted a false receipt for the cell phone, under Penn Mutual's expense policies, he could have purchased a cell phone or other business equipment for an individual, such as Person A, who he [\*9] was attempting to recruit to sell Penn Mutual products and that Penn Mutual would have reimbursed his cost as a legitimate business expense. n5 Saad contended that he misrepresented the expense because he was concerned about submitting such an expense at a

time when his production was low.

n5 The Hearing Panel did not find Saad's contention credible. The Hearing Panel's credibility finding is entitled to considerable weight and deference. *Richard Kresge, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407*, at \*15 (June 29, 2007). The Hearing Panel's credibility determinations can be overcome only by substantial evidence. *Daniel D. Manoff, 55 S.E.C. 1155, 1161-62 n.6, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684*, at \*11 (Oct. 23, 2002). We find no reason to reject the Hearing Panel's credibility findings.

When HTK confronted Saad about his expenses, he admitted his misconduct and offered to reimburse Penn Mutual. [\*10] Penn Mutual declined reimbursement and terminated Saad.

#### IV. Discussion

The complaint alleged, and the Hearing Panel found, that Saad submitted false expense reports and receipts to Penn Mutual, resulting in the payment to Saad of \$ 1,144 to which he was not entitled, in violation of NASD Rule 2110. The Hearing Panel also found that Saad's actions constituted conversion of Penn Mutual's funds. n6 We find that Saad misappropriated Penn Mutual's funds (totaling \$ 1,144) by submitting and receiving payment for false receipts and expense reimbursement requests, in violation of NASD Rule 2110. Our finding of a violation of just and equitable principles of trade under Rule 2110 based on misappropriation is consistent with precedent. *See Henry E. Vail, 52 S.E.C. 339, 342 (1995), aff'd 101 F.3d 37 (5th Cir. 1996)*.

n6 The parties devoted significant effort to arguing over whether the complaint in fact alleged conversion. The cause of the complaint was titled "conversion," and the body of the complaint alleged that the conduct in which Saad engaged violated Rule 2110 and does not mention conversion. Enforcement argued, and the Hearing Panel found, that Saad converted Penn Mutual's funds. Saad disputed that his misconduct constituted conversion, and he argued that, absent a finding of conversion, the Hearing Panel sanctions must be reduced from a bar. As discussed in more detail below, we do not agree with Saad's argument that characterizing his actions as conversion is pivotal to our assessment of sanctions in this case.

[\*11]

##### A. Substantive Findings

Rule 2110 is an ethical rule. It requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. FINRA's authority to pursue disciplinary action for violations of Rule 2110 is sufficiently broad to encompass any unethical business-related misconduct, regardless of whether it involves a security. *Manoff, 55 S.E.C. at 1162, 2002 SEC LEXIS 2684*, at \*11 (finding that registered representative who used a co-worker's credit card without authorization violated Rule 2110); *James A. Goetz, 53 S.E.C. 472, 475 (1998)* (finding that registered person's misuse of member firm's matching gift program to obtain private school tuition credit violated Rule 2110); *Dist. Bus. Conduct Comm. v. Bruun*, Complaint No. C3B960004, 1998 NASD Discip. LEXIS 23, at \*10 (NASD NAC Jan. 23, 1998) (finding that registered person's submission of false reimbursement requests for seminar expenses that he did not incur violated Rule 2110). The test to determine whether conduct violates Rule 2110 is whether the misconduct "reflects on the associated [\*12] 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." *Manoff, 55 S.E.C. at 1162, 2002 SEC LEXIS 2684*, at \*12.

Saad does not dispute that he intentionally prepared and submitted false expense reimbursement requests and receipts to Penn Mutual for which he received monetary reimbursement. We find that Saad intentionally misappropriated Penn Mutual's funds and that such conduct violated Rule 2110.

#### B. Procedural Arguments

On appeal, Saad raises several procedural arguments. First, he argues that he was prejudiced by Enforcement's suggestion before the Hearing Panel that Saad's Atlanta hotel stay and lounge receipt involved spousal infidelity. Second, Saad argues that FINRA staff misled him into believing that he did not need legal representation when he attended an on-the-record interview. Third, Saad argues that the Hearing Officer did not timely issue the Hearing Panel's decision. Finally, Saad argues that the Hearing Panel improperly shifted the burden of proof from Enforcement to Saad. Below, we address each argument in turn.

Saad [\*13] argues that Enforcement unfairly implied that he was guilty of spousal infidelity and that this prejudiced the Hearing Panel. He contends that, by entering into the record Saad's July 9, 2006 receipt showing Saad's purchase of four beverages in an Atlanta hotel lounge and asking Saad why he spent two nights (July 9 and 10) in a hotel room just miles away from his home, Enforcement intimated that Saad had been unfaithful in his marriage, possibly with Person A, the woman for whom he purchased a cell phone that same week. Saad further criticizes Enforcement for failing to contact Person A to ask her about her relationship with Saad. Saad argues that, in all, Enforcement's suggestions prejudiced him before the Hearing Panel. We reject Saad's argument of prejudice.

Under FINRA's procedural rules, the Hearing Officer was to admit into the record relevant evidence and exclude evidence that was irrelevant, immaterial, unduly repetitious or unduly prejudicial. *See* NASD Rule 9263. The Hearing Officer properly admitted the evidence at issue, which was both relevant and material. The July 9, 2006 lounge receipt was relevant to whether Saad was in fact in Atlanta or Tennessee on July 9, and [\*14] the fact of Saad's initial efforts to submit this receipt to Penn Mutual for reimbursement demonstrates Saad's willingness to use false receipts to obtain reimbursement to which he was not entitled. We find nothing inappropriate in the nature of Enforcement counsel's questions regarding the receipt and Saad's Atlanta hotel stay. Saad himself suggested that his Atlanta hotel stay was a "legitimate" business expense because he worked out of the hotel room. Enforcement counsel's questions were factual and did not include suggestions of any type regarding Saad's relationship with Person A or Saad's marriage. Furthermore, Saad cites no evidence to support his theory that the Hearing Panel was somehow prejudiced by the inclusion in the record of this evidence. We reject Saad's argument of prejudice. *See John D. Audifferen, Exchange Act Rel. No. 58230, 2008 SEC LEXIS 1740*, at \*42 (July 25, 2008) (rejecting argument that evidence of respondent's personal relationship with customer was prejudicial).

We also reject Saad's argument that Enforcement staff misled him as to whether he could or should be accompanied by legal counsel during Enforcement staff's May 29, [\*15] 2007 on-the-record interview of him. FINRA staff summoned Saad to appear for an on-the-record interview in a May 8, 2007 letter. Saad does not deny his receipt of the letter. The May 8 letter clearly indicated that Saad could be represented by an attorney of his choice at the interview. Furthermore, an addendum attached to the letter reiterated that Saad could be represented by counsel at the on-the-record interview. The addendum also stated "If you are not represented by counsel, please advise NASD staff taking your testimony whenever, during your testimony, you desire to be represented by counsel. The [on-the-record interview] will be adjourned to afford you the opportunity to arrange to obtain legal representation." Saad neither brought legal counsel to the on-the-record interview nor halted the interview to request legal counsel. n7 FINRA provided Saad with adequate notice of his ability to be accompanied by counsel at the on-the-record interview. Saad's contentions that FINRA staff misled him or that he was prejudiced by staffs conduct are groundless. *See David A. Gingras, 50 S.E.C. 1286, 1292 (1992)* (rejecting claim that FINRA staff misled respondent [\*16] as to purpose of on-the-record interview and respondent's ability to be accompanied by an attorney).

n7 The addendum also advised Saad that the purpose of the interview was to determine if any person or firm subject to FINRA jurisdiction had violated FINRA's rules.

Saad's contention that the Hearing Officer failed timely to issue the Hearing Panel decision is equally baseless. NASD Rule 9268 requires the Hearing Officer to prepare a written decision within 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs. Saad argues that, because the last post-hearing brief was filed on April 30, 2008, the Hearing Panel erred in not issuing its decision until August 19, 2008, more than three months later. Saad's recitation of the pertinent dates is correct, but his understanding of the requirements of Rule 9268 is incorrect.

While Rule 9268 directs that the Hearing Officer "prepare" a written decision within 60 days, the rule does not require that the Hearing Panel [\*17] issue its decision within the same 60 days. After the Hearing Officer prepares a draft of the Hearing Panel's decision, he must then distribute it for approval to the other members of the Hearing Panel and provide them with an opportunity to review the decision and recommend revisions. There is no evidence in the record that the Hearing Officer did not prepare the decision within the required 60 days. We reject Saad's argument that the Hearing Panel decision was untimely. *See Morton Bruce Erenstein, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596*, at \*24 (Nov. 8, 2007) (rejecting argument that Rule 9268 requires issuance of Hearing Panel decision in a 60-day time period); *Dep't of Enforcement v. Lee*, Complaint No. C06040027, 2007 NASD Discip. LEXIS 6, at \*47 (NASD NAC Feb. 12, 2007), *sustained in part and remanded in part on unrelated grounds sub nom., Dennis Todd Lloyd Gordon, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819* (Apr. 11, 2008) (same).

We also reject Saad's assertion that the Hearing Panel improperly shifted the burden of proof from Enforcement to Saad. Saad contends that the Hearing Panel should have [\*18] required Enforcement first to enter into the record evidence of Penn Mutual's expense policies before rejecting Saad's argument that Saad's legitimate expenses (for performing work while staying in the Atlanta hotel) could be offset against the false expenses and that his purchase of a cell phone for Person A was an allowable business expense. We do not agree that the Hearing Panel improperly shifted the burden of proof from Enforcement to Saad. Enforcement carries the burden of proving a violation by a preponderance of the evidence. Here, Enforcement produced evidence of Saad's submission to Penn Mutual of false receipts and expense reimbursement requests. Once Enforcement satisfied that burden, the burden shifted to the respondent to produce evidence that refuted or rebutted Enforcement's evidence. *James B. Hovis, Exchange Act Rel. No. 55562, 2007 SEC LEXIS 604*, at \*28 (Mar. 30, 2007) (finding that, once Enforcement presented evidence of the allegations, the burden of going forward shifted to respondents to refute the evidence); *David Disner, 52 S.E.C. 1217, 1221 (1997)* (same).

Here, Enforcement proved by a preponderance [\*19] of the evidence, including Saad's own admissions, that Saad violated Rule 2110 by submitting to Penn Mutual false expense reimbursement requests and receipts for expenses that Saad had not in fact incurred. Once Enforcement proved the violation, the burden shifted to Saad to "produce evidence that refuted or rebutted the material introduced by Enforcement." *Hovis, 2007 SEC LEXIS 604*, at \*28. Saad claimed that Penn Mutual's policies allowed him to treat his Atlanta hotel stay as a legitimate expense that he could offset against his false expenses for a Memphis hotel and airfare and to purchase business equipment (such as a cell phone) for a business prospect. The burden of proving these assertions fell to Saad, and Saad failed to carry that burden. Furthermore, even if Saad had produced evidence of these policies, it would not negate the underlying violation. Even if Saad could have been reimbursed for other legitimate business expenses if properly submitted to Penn Mutual, that does not alter the facts here. Saad submitted false expense reimbursement forms for a trip that he did not take and a cell phone that he did not buy for himself to obtain reimbursement [\*20] to which he was not entitled from Penn Mutual. "Registered persons are expected to adhere to a standard higher than 'what they can get away with.'" *Leonard John Ialeggio, 52 S.E.C. 1085, 1088 (1996), aff'd, 1999 U.S. App. LEXIS 10362 (9th Cir. 1999)*. Saad's deceitful conduct violated NASD Rule 2110 regardless of Penn Mutual's legitimate business expense policies. *See Ialeggio, 52 S.E.C. at 1087-88; Manoff 55 S.E.C. at 1162-65, 2002 SEC LEXIS 2684*, at \*10-17.

## V. Sanctions

The Hearing Panel barred Saad in all capacities. We affirm this sanction.

We first consider Saad's claims that several mitigating factors exist. As stated in greater detail below, we reject Saad's mitigation arguments and find that several aggravating factors exist. First, Saad contends that he has a clean disciplinary history that should mitigate sanctions. We disagree. While the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating. *See, e.g., Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, [\*21] 2001 NASD Discip. LEXIS 3, at \*58-59 (NASD NAC May 17, 2001) (holding that the absence of disciplinary history is not considered part of "relevant disciplinary history" under the FINRA Sanction Guidelines for purposes of reducing sanctions); *Dep't of Enforcement v. Balbirer*, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29, at \*10-11 (NASD NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry..."). A respondent should not be rewarded because he may have previously acted appropriately as a registered person. Indeed, the Commission has consistently rejected similar arguments. *See Manoff*, 55 S.E.C. at 1165-66 n.15, 2002 SEC LEXIS 2684, at \*18; *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996).

Saad also argues that the false reimbursement requests constituted a "wash" as compared to legitimate business expenses that he incurred by, for example, paying for an Atlanta hotel, and for which he has not sought reimbursement. Saad similarly argues that he could have legitimately obtained reimbursement [\*22] for Person A's cell phone because he purchased it for her as a business prospect and that this should be considered mitigating. We reject these arguments as mitigating. Even if Penn Mutual would have reimbursed Saad for his Atlanta hotel stay or for Person A's cell phone if Saad had properly identified the costs and sought reimbursement, Saad's decision to misrepresent his expenses and submit falsified receipts and expense reports was unethical. The suggestion that he may have been able to obtain reimbursement for other legitimate expenses if submitted properly does not exonerate or lessen the significance of his unethical conduct. In any event, we also note that Saad offered no evidence to support his contention that he could have been reimbursed for his Atlanta hotel stay and Person A's cell phone.

Saad further suggests that the bar imposed by the Hearing Panel is excessive for what he describes as a one-time lapse in judgment. We do not agree that Saad's misconduct is essentially a one-time lapse in judgment. Saad's misconduct was premeditated, intentional and ongoing, factors that we find aggravating. n8 Crediting Saad's version of events, Saad learned on Sunday evening, July [\*23] 9, 2006, that his planned trip to Memphis was cancelled, and he decided to stay at a hotel in Atlanta. Rather than advise his employer that the trip had been cancelled, he chose instead on July 10 and 11 to allow his staff and Penn Mutual to believe that he traveled to Memphis. He thereafter compounded the lie by deliberately preparing falsified receipts for which he manufactured fake hotel and airline logos. When confronted by the office administrator regarding his Atlanta hotel lounge receipt for July 9, he could have ended the charade, but chose instead to continue his lie and submit his manufactured receipts.

n8 *FINRA Sanction Guidelines*, at 6 (2007) (Principal Considerations in Determining Sanctions, Nos. 9, 13) (2007), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> (hereinafter "*Guidelines*").

Thereafter, in a November 2006 email, Saad suggested to a state regulator that his falsified travel reimbursement request related to a trip that had not yet occurred (i.e., a [\*24] legitimate expense that he submitted for reimbursement early), rather than a trip that was made up and never really occurred. In April 2007, Saad misrepresented to a FINRA examiner that the cell phone he purchased was a legitimate expense because it replaced his broken phone and that he did not know Person A. Finally, during May 2007 on-the-record testimony, Saad again exhibited his willingness to be less than truthful on the issue of his travel reimbursements. Saad originally contended during his on-the-record interview

with Enforcement that he could not recall if he actually had purchased a plane ticket for the July 9 trip to Memphis. Only after Enforcement staff required Saad to prove that he had purchased the Memphis plane ticket by producing a credit card receipt did Saad admit that he had not purchased the ticket.

Saad had many opportunities to reverse his initial lapse in judgment. Rather than expose himself, he chose to compound his lies with an ongoing and intentional charade in support of which he fabricated documents. We find Saad's intentional and ongoing presentation of lies and half-truths to be an aggravating factor with respect to sanctions.

Saad also seeks credit [\*25] for accepting responsibility for his misconduct. We do not agree that Saad readily accepted responsibility for his own actions. Indeed, when confronted by the office administrator about inconsistencies in his expense forms, Saad withdrew a real receipt (for drinks in the Atlanta lounge) in favor of submitting fabricated receipts to Penn Mutual. As discussed above, Saad also was less than fully truthful during the initial phases of FINRA's and other regulators' investigations of this matter. Although after being exposed by the office administrator and questioned by Penn Mutual Saad eventually chose to admit his misconduct, he did so only after he was caught, and there is no evidence suggesting that he otherwise would have done so. We find his initial and repeated efforts to conceal his actions aggravating. n9

n9 *Guidelines*, at 6 (Principal Considerations, Nos. 10, 12).

Finally, Saad claims that we should consider that his motive was not to garner excessive profits for himself, but rather to conceal his lagging [\*26] performance. We do not find this mitigating. The fact is that Saad created false receipts, submitted to Penn Mutual fabricated expense reimbursement requests, and sought and received reimbursements to which he was not entitled. Regardless of his reasons for doing so, his actions harmed his own employer, HTK, and Penn Mutual. Indeed, we find aggravating Saad's willingness to mislead HTK and Penn Mutual and to obtain from them, in the form of reimbursements, funds to which he was not entitled. Regardless of his motive, his conduct had the potential to result in monetary gain to himself at the expense of Penn Mutual, and we find these factors to be aggravating. n10

n10 *Id.* at 6 (Principal Considerations, Nos. 11, 17).

We next turn to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines applicable to conversion or the improper use of funds recommend a fine of \$ 2,500 to \$ 50,000 for the improper use of funds. n11 The Guidelines also recommend a bar for all cases involving conversion and a bar for the improper [\*27] use of funds unless the misuse resulted from a misunderstanding or other mitigating factors exist. The Guidelines define conversion for purposes of imposing sanctions as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." n12 The Hearing Panel concluded that Saad's actions constituted conversion.

n11 *Id.* at 38 (Conversion or Improper Use of Funds or Securities).

n12 *Id.* at 38 n.2.

We have not based our sanctions on a finding that Saad converted Penn Mutual's funds. Instead, we base our



decision on the fact that no mitigating factors exist. Indeed, we find several aggravating factors, including the intentional and ongoing nature of Saad's misconduct, Saad's efforts to deceive HTK and Penn Mutual, Saad's initial instinct to conceal the extent of his actions from state and FINRA examiners, the monetary harm to Penn Mutual resulting from Saad's misconduct, and Saad's own monetary gain. We also have considered, [\*28] as instructed by the applicable Guidelines, whether Saad's misappropriation of funds resulted from a misunderstanding, and we conclude that it did not.

In assessing sanctions, we also considered the seriousness of Saad's offense and the potential for recurrence. n13 Although Saad's wrongdoing in this instance did not involve customer funds or securities, Saad's willingness to lie to Penn Mutual and HTK and obtain funds to which he was not entitled indicates a troubling disregard for fundamental ethical principles which, on other occasions, may manifest itself in a customer-related or securities-related transaction. *See Thomas E. Jackson, 45 S.E.C. 771, 772 (1975)* (finding that, although respondent's misconduct did not involve securities, NASD was justified in concluding that, on another occasion, it might). The securities industry is "rife with opportunities for abuse," and Saad's misconduct is no less serious because the firm and Penn Mutual were his victims rather than a public customer. *Mayer A. Amsel, 52 S.E.C. 761, 768 (1996)*; *see also Bernard D. Gorniak, 52 S.E.C. 371, 373 (1995)* (finding [\*29] that the securities industry presents many opportunities for overreaching and therefore depends heavily on the integrity of its participants). Saad's actions reveal a willingness to construct false documents and then lie about them that suggests that his continued participation in the securities industry poses an unwarranted risk to the investing public. *See Manoff, 55 S.E.C. at 1165-66, 2002 SEC LEXIS 2684, at \*17-18* (affirming bar for unauthorized use of a co-worker's credit card); *Eliezer Gurfel, 54 S.E.C. at 63-64* (affirming bar for misappropriating firm's insurance commissions). n14

n13 *See McCarthy v. SEC, 406 F.3d 179 (2d Cir. 2005)* (finding that, in connection with sanctions, it is appropriate to consider: (1) all mitigating factors that the respondent has raised; (2) the seriousness of his offenses; (3) the corresponding harm that he caused to members of the trading public; (4) his potential gain for disobeying the rules; (5) the potential for repetition of his misconduct in light of the current regulatory regime; and (6) the deterrent value to the respondent and others).

[\*30]

n14 We also have considered and reject without discussion all other arguments advanced by the parties.

In the absence of mitigation and in light of the many aggravating factors present here and the nature of Saad's misconduct, a bar for Saad's misappropriation of funds is within the range recommended in the Sanction Guidelines and appropriately remedial. n15 We therefore bar Saad in all capacities.

n15 *Guidelines*, at 38.

## VI. Conclusion

We affirm the Hearing Panel's findings that Saad violated NASD Rule 2110 by submitting false receipts and expense reimbursement requests to Penn Mutual and misappropriating firm funds. We also find that many aggravating factors and no mitigating factors exist and that Saad's misconduct constituted a serious ethical lapse. We affirm the Hearing Panel's imposition of a bar in all capacities and assessment of costs of \$ 2,080. We also assess appeal costs of \$

1,385. The bar imposed in this [\*31] decision will become effective immediately upon issuance of this decision. n16

n16 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, after seven days' notice in writing, will summarily be revoked for non-payment.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Senior Vice President

and Corporate Secretary

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