

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 77984 / June 2, 2016

Admin. Proc. File No. 3-16912

In the Matter of the Application of

JOSEPH R. BUTLER

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY
PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Former registered representative of member firm engaged in conduct inconsistent with just and equitable principles of trade by converting customer funds and completing and submitting a false annuity beneficiary change request form. *Held*, association's findings of violations and imposition of sanctions are *sustained*.

APPEARANCES:

Todd K. Pounds, of Alexander & Cleaver, for Joseph R. Butler.

Alan Lawhead, *Andrew Love*, and *Celia L. Passaro* for FINRA.

Appeal filed: October 20, 2015
Last brief received: February 9, 2016

Joseph R. Butler, a former registered representative with Woodbury Financial Services, Inc. ("Woodbury"), a FINRA member firm, seeks review of a FINRA disciplinary action. FINRA found that Butler converted \$170,408.18 from a customer's bank accounts in violation of FINRA Rule 2010.¹ FINRA also found that Butler violated Rule 2010 by completing and submitting to The Hartford Financial Services Group, Inc. ("The Hartford") a beneficiary change request form that named him as the primary beneficiary of the customer's \$453,000 variable annuity policy and falsely represented that he was the customer's son. For these violations, FINRA barred Butler from association with any FINRA member firm in all capacities, ordered him to pay restitution plus prejudgment interest, and assessed costs.

On appeal, Butler does not dispute that he withdrew the funds or that he misrepresented his relationship with the customer on the beneficiary change request form. Rather, he contends that he made all of the withdrawals with the customer's approval and authorization and that the withdrawals were either expenditures for her benefit or gifts to him. He also contends that the customer directed that he name himself as primary beneficiary of her annuity and refer to himself as her son on the beneficiary change request form. We reject Butler's contentions. For the reasons set forth below, we sustain FINRA's findings of violations and imposition of sanctions.

I. Facts

A. Butler's background

The facts are largely undisputed. Butler entered the insurance industry in 1967. In January 1994, he joined Woodbury where he became registered as an Investment Company and Variable Contracts Products Representative (Series 6) and Uniform Securities Agent (Series 63). He remained associated with Woodbury until he was fired in August 2012.² Woodbury filed a Form U5 (Uniform Termination Notice for Securities Industry Registration) reporting his termination.

¹ FINRA Rule 2010 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." This Rule applies to Butler through FINRA Rule 0140(a), which provides that persons associated with members have the same duties and obligations as members.

² Butler subsequently registered and associated with another FINRA member firm. Although Butler is not currently registered, he remains subject to FINRA's jurisdiction for the purpose of this disciplinary proceeding because FINRA's complaint was filed within two years following the termination of his registration with a member firm, and the complaint charges him with misconduct that began before the termination of his registration. *See* FINRA By-Laws, Art. V, § 4 (providing for FINRA's continuing jurisdiction over formerly associated persons).

B. Butler sold LW a variable annuity.

The misconduct in this case arises out of Butler's relationship with LW, his neighbor of more than 30 years.³ Butler first met LW in 1984 and befriended her in 2006. By then, LW was a 75-year old widow living alone. Her husband died in 2005 and her only child also had died. Her immediate family consisted of two elderly sisters and two adult granddaughters. After LW became his customer in 2007, Butler had more frequent contact with her. Butler drove her to doctor appointments, church, the grocery store, among other places. He also claimed to have helped her with household chores and repairs. Butler admitted that LW became dependent on him and trusted him to take care of her.

LW became Butler's customer in November 2007 when he sold her a \$453,000 variable annuity policy from The Hartford.⁴ LW purchased the annuity using the proceeds from several certificates of deposit that she redeemed. Butler completed and signed LW's annuity application and submitted it directly to The Hartford.⁵ LW named her two granddaughters as equal beneficiaries of the annuity.⁶

C. Butler was added as a joint owner of LW's bank accounts, began withdrawing money from those accounts, and became primary beneficiary of her estate.

Butler testified that, as early as 2009, he observed that LW's mental faculties were declining and she was having difficulty managing her finances. Butler noticed unpaid bills lying around her home. In one incident, he found a notice indicating that LW's house was to be auctioned at a tax sale for failure to pay property taxes. LW was unaware of the impending sale. Butler arranged for payment of her delinquent taxes and prevented the sale from taking place. After this incident, LW asked Butler for help paying her bills, and he agreed.

On April 16, 2009, Butler was added as a joint owner of LW's bank accounts. Butler testified that he became a joint owner for the sole purpose of enabling him to pay LW's bills, that he never deposited his own funds into LW's accounts, and that the money in LW's accounts belonged to LW. He said that he never considered that being a joint owner of LW's accounts would be a conflict of interest.⁷

³ We refer to the customer by her initials to protect her privacy.

⁴ A variable annuity is a "hybrid" financial product "containing elements of an ordinary long-term investment in a security, an annuity, and life insurance." *Collins v. SEC*, 736 F.3d 521, 522 (D.C. Cir. 2013); *see generally Variable Annuities: What You Should Know*, <https://www.sec.gov/investor/pubs/varannty.htm> (providing a general description of variable annuities) (last visited June 1, 2016).

⁵ Butler earned approximately \$27,000 in commissions from his sale of the annuity.

⁶ The suitability of the sale of the annuity is not at issue in this case.

⁷ Butler testified that in June 2009 he arranged for LW to receive meals through a food delivery program for seniors because she was "forgetting to eat." He testified that he believed

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Also on April 16, 2009, \$25,000 was electronically transferred from LW's accounts to Butler's bank account. Butler denied that he requested the wire transfer and claimed that LW initiated the transfer. Asked why LW requested it, Butler answered, "Because she wanted to." Asked what he did with the \$25,000, he replied, "I don't have a clue."

Between September 2009 and December 2010, Butler wrote nine checks against LW's accounts totaling \$105,646.18. Eight of the checks were made payable to cash or to Butler and were either cashed by him or deposited into his personal account.⁸ The ninth check, dated June 2010, was written to the United States Treasury in the amount of \$18,846.18 to pay his federal income taxes.

In June 2010, Butler took LW to see his attorney Todd K. Pounds about preparing a will.⁹ On June 9, 2010, LW signed the will, which designated Butler as her personal representative and primary beneficiary of her estate. LW also executed a power of attorney designating Butler as her attorney-in-fact and a medical directive allowing Butler and one of her sisters to make health care decisions on her behalf.

D. Butler continued to make withdrawals from LW's bank accounts and became the primary beneficiary of her variable annuity.

In January 2011, LW's doctor diagnosed her with dementia. Around this time, Butler arranged to have LW's monthly bank account statements delivered to his home address instead of her address. Butler explained that he did this because LW misplaced her bills and could not reconcile her statements, and because it was easier for him to have the statements mailed directly to him.

The same month, Butler electronically transferred \$5,000 from LW's accounts to his account. He claimed that the \$5,000 wire transfer was a "test" to see if he could pay LW's bills online. However, he could not explain why he picked that amount or what he did with the money. He testified that he "probably" kept the \$5,000 as reimbursement for expenses he had incurred on her behalf, but could not say what those expenses were.

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that LW stopped driving in late 2009 or early 2010 after she caused minor damage to her car and got lost on the way to the grocery store. He testified that in 2010 he started to call LW three times a day to remind her to take her pills, disabled her gas stove for her own safety, and learned that one of her granddaughters had been using her credit cards without her knowledge.

⁸ In 2009, Butler wrote three checks in the amounts of \$15,550, \$6,000, and \$12,750, and dated September 1, October 22, and November 30, respectively. In 2010, he wrote five checks in the amounts of \$12,000, \$12,000, \$10,000, \$6,500, and \$12,000, and dated January 6, March 22, April 14, April 21, and December 6, respectively.

⁹ Pounds represents Butler in this disciplinary proceeding.

Between February 2011 and January 2012, Butler wrote another seven checks against LW's accounts totaling \$34,762. Six of the checks were made payable to cash and were cashed by him.¹⁰ The seventh check, dated April 2011, was written to the Comptroller of Maryland in the amount of \$10,262 to pay his state income taxes. In all, Butler withdrew \$170,408.18, consisting of 16 checks and two wire transfers, from LW's accounts between April 2009 and January 2012.

In May 2011, Butler completed and submitted to The Hartford an annuity beneficiary change request form for LW's \$453,000 annuity. In it, he removed LW's granddaughters as equal beneficiaries and named himself as the 90% beneficiary (and a charity as the other 10% beneficiary). In the section of the form asking for his relationship to LW, he wrote "son." The Hartford approved the beneficiary change request. Butler testified that he did not consider that being the primary beneficiary of his customer's estate and annuity would be a conflict of interest.

In December 2011, LW's doctor diagnosed her with advanced dementia. In January 2012, LW was admitted into a hospital. The medical referral order stated that LW suffered from dementia and memory loss and had a cyst on her brain. During her hospitalization, Butler arranged to have LW moved into an assisted living facility. But before Butler could finalize those arrangements, LW's family intervened, his power of attorney was revoked, and alternative arrangements for LW's care were made. Since then, Butler has had no contact with LW.

E. FINRA investigated and initiated a disciplinary proceeding.

In May 2012, a friend of LW's family filed a complaint about Butler with Woodbury and FINRA, resulting in separate, simultaneous investigations. In August 2013, FINRA's Department of Enforcement ("Enforcement") filed a complaint against Butler alleging, *inter alia*, that he violated FINRA Rule 2010 by converting LW's funds for his own personal use and by completing and submitting a beneficiary change request form that designated him as the primary beneficiary of LW's \$453,000 annuity and falsely stated that he was her son.

1. Butler's conflicting statements during the investigations and hearing.

In connection with Woodbury's investigation, Butler submitted a statement explaining that LW had added his name to her accounts so he could pay her bills and monitor her finances. Butler claimed that it was LW's wish to designate him as the primary beneficiary of her will and annuity and give him a power of attorney over her affairs.

Butler provided a similar response to FINRA's June 2012 request for information and documents. In his response, Butler claimed that he used all of the funds withdrawn from LW's accounts for her benefit, but acknowledged that he did not retain any receipts documenting the expenses he had incurred on her behalf. He also claimed that he wrote "son" on the beneficiary change request form because she called him her son.

¹⁰ In 2011, Butler wrote five checks in the amounts of \$3,000, \$2,000, \$7,000, \$4,000, and \$5,000, and dated February 16, May 2, May 9, May 12, and August 5. In 2012, he wrote one check in the amount of \$3,500 and dated January 20.

In September 2012, Butler stated during on-the-record ("OTR") testimony that he was aware of LW's declining mental health beginning in 2009 and that all the checks he had cashed were to reimburse him for expenses that he had incurred for LW's benefit.¹¹ However, he had no paperwork documenting these expenses and could not recall the names of any persons who provided services.¹² He denied that LW had ever compensated him for anything he had done for her or that she gave him any cash gifts.

In response to an October 2012 follow-up request, Butler told FINRA that the \$10,262 check to the Comptroller of Maryland had been written to pay his state income taxes and *was a gift* from LW to thank him for his assistance. He claimed, for the first time, that LW did "at times" "endow him with gifts." He also submitted a list of goods and services that he purportedly purchased for LW and for which he was reimbursed approximately \$30,000, although he did not provide documentation to support his claims of expenses.

During a second OTR in May 2013, Butler again acknowledged his awareness of LW's declining mental health and continued to maintain that all of the funds withdrawn from her accounts were used to pay her bills or reimburse him for expenses that he had paid on her behalf. He claimed that the only gift he received from LW was the \$10,262 check to pay his state income taxes.

In contrast to his earlier testimony, at the hearing Butler testified that LW was capable of managing her financial affairs and balancing her checkbook up until late 2011. He said some of the withdrawals were gifts from LW who told him to "treat" himself to cash to thank him for helping her.¹³ As for the change of beneficiary form, Butler admitted at the hearing that he was not related to LW, but asserted that she referred to him as her "son." As proof of their close relationship, he submitted into evidence a note that she wrote to him on December 12, 2007, and signed "your other mom."

2. FINRA decisions

On July 8, 2014, a FINRA Hearing Panel issued a decision finding that Butler had converted LW's funds and completed and submitted a false beneficiary change request form, and as a result violated FINRA Rule 2010. The Panel found that Butler's contemporaneous conduct, his statements during Woodbury's and FINRA's investigations, and the documentary evidence, including medical records, belied his claim that LW was competent to manage her finances, and demonstrated instead that he had "direct knowledge of LW's vulnerability and limited ability to manage her finances as early as April 2009" when he became a joint owner of her accounts. The Panel also found that Butler had failed to provide documentation to support his claims that LW

¹¹ After Butler answered the complaint, Enforcement became aware of other checks that he had written on LW's accounts. In December 2013, Enforcement filed an amended complaint to allege additional instances of conversion by Butler.

¹² Asked how he could be sure that the funds were used for LW's benefit, Butler replied, "Because I know it wasn't for mine."

¹³ LW was not competent to testify at the hearing due to dementia.

authorized the withdrawals from her accounts and that they were either expenditures for her benefit or gifts to him. The Panel further found that Butler's claim that some of the withdrawals were gifts or "treats" was contradicted by his OTR testimony that LW never gave him cash gifts. As for the change of beneficiary request form, the Panel found that Butler intentionally falsified the form to try to avoid questions that The Hartford might raise about LW designating her registered representative as the 90% beneficiary of her annuity.

The Panel imposed separate bars on Butler for his Rule 2010 violations, ordered him to pay LW \$170,408.18 in restitution plus prejudgment interest, and assessed \$4,135.79 in hearing costs. Butler appealed to FINRA's National Adjudicatory Council ("NAC") which, in a September 25, 2015, decision, affirmed the Panel's findings of fact, including its credibility determinations, and imposition of sanctions, and assessed \$1,490.26 in appeal costs. The NAC concluded that "Butler's intentional exploitation of an elderly customer for his personal benefit constitutes a serious violation of one of the most important ethical standards applicable to associated persons and warrants a permanent bar from the industry." This application for review followed.

III. Analysis

A. Standard of Review

We base our findings on an independent review of the record and apply a preponderance of the evidence standard for self-regulatory organization ("SRO") disciplinary actions.¹⁴ Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether those SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.¹⁵

B. Butler engaged in the conduct found by FINRA.

We find that Butler engaged in the conduct found by FINRA. As discussed below, we sustain FINRA's findings that Butler converted LW's funds and falsified an annuity beneficiary change request form.

¹⁴ See *Mathis v. SEC*, 671 F.3d 210, 215 (2d Cir. 2012) (stating that "[o]n the petition of a disciplined party, any disciplinary action taken by FINRA is reviewed by the SEC, which conducts a *de novo* review of the record and makes its own findings as to whether the alleged conduct violated FINRA rules"); see also *Gonchar v. SEC*, 409 F. App'x 396, 399 (2d Cir. 2010) (upholding preponderance of the evidence standard in FINRA disciplinary proceedings); *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (same).

¹⁵ 15 U.S.C. § 78s(e)(1); *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *4 (Mar. 29, 2016) (citing Exchange Act Section 19(e)(1)); see *Heath v. SEC*, 586 F.3d 122, 138-39 (2d Cir. 2009) (acknowledging "obligation to afford some level of deference to [the SRO's or SEC's] interpretation of [SRO] rules").

1. Butler converted LW's funds.

FINRA defines conversion 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."¹⁶ FINRA found that Butler converted \$170,408.18 in funds belonging to LW.

We agree with FINRA that Butler intended to deprive and did deprive LW of her funds by writing checks against her accounts and electronically transferring money from her accounts to his account, using a portion of her funds to pay his income taxes.¹⁷ His intent to convert and conversion of LW's property is aptly demonstrated by his failure during FINRA's investigation to provide FINRA staff with full information concerning the amounts he withdrew from LW's accounts, his failure to maintain records concerning his conversion or how he used her funds, and his conflicting statements in his OTR testimony and at the hearing about the purpose of his withdrawals.¹⁸

¹⁶ FINRA Sanction Guidelines, at 36 n.2, <http://www.finra.org/industry/sanction-guidelines>.

¹⁷ Although we need not find scienter to establish a Rule 2010 violation, *see, e.g., Eliezer Gurfel*, Exchange Act Release No. 41229, 1999 WL 172666, at *4 (Mar. 30, 1999) (stating that "[p]roof of scienter is not required to establish a violation of NASD Conduct Rule 2110," the precursor to FINRA Rule 2010), *petition denied*, 205 F.3d 400 (D.C. Cir. 2000), we believe that Butler's concealment of his conversion further demonstrates that he acted intentionally. *See, e.g., Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *8 (Jan. 9, 2015) (finding that applicant's "concealment of his actions from his customer and his deceit further demonstrated deliberate intent and bad faith"), *aff'd*, ___ F. App'x ___, 2016 WL 386062 (2d Cir. Feb. 2, 2016).

¹⁸ Butler contends that FINRA failed to meet its burden of proving conversion because there was no direct evidence that his withdrawals from LW's accounts were unauthorized. It is well established that "circumstantial evidence can be more than sufficient to prove a violation of the securities laws." *Keith Springer*, Exchange Act Release No. 45439, 2002 WL 220611, at *5 n.15 (Feb. 13, 2002); *see SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 491 (S.D.N.Y. 2002) (stating that "an action based upon circumstantial evidence is not any less sufficient than one based on direct evidence") (citing *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960)); *Donald M. Bickerstaff*, Exchange Act Release No. 35607, 1995 WL 237230, at *5 & n.16 (Apr. 17, 1995) (finding witness's testimony to be "persuasive evidence" even though it was "circumstantial"). Moreover, "there is no impediment to the use of circumstantial evidence in [a FINRA] proceeding." *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 WL 1697151, at *15 (Apr. 11, 2008). We find ample evidence here, including LW's diminished capacity and Butler's awareness of that fact, to establish that LW could not and did not authorize Butler's withdrawals.

Butler also contends that FINRA failed to call as witnesses LW, her family members, and the friend who filed the complaint. We find no fault in the lack of testimonial evidence from these individuals. "[O]ur decisions have long preserved the discretion of prosecutors in conducting their investigations, particularly with regard to their decisions on which witnesses to

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Butler contends that it was legally impossible for him to convert LW's funds because he was a joint account holder and therefore had "full legal and authorized use" of her funds.¹⁹ But the use of funds was not authorized and therefore constituted conversion. The burden was on Butler to produce credible evidence to support his claim that his withdrawals were authorized by LW,²⁰ and he failed to meet that burden. FINRA did not credit Butler's self-serving hearing testimony that LW authorized his withdrawals, that LW had the mental capacity to give her authorization, and that the withdrawals were either reimbursements for expenses that he had incurred on her behalf or gifts. We see no basis to disagree with FINRA's credibility determination about this testimony and agree with FINRA that Butler fabricated his hearing

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interview." *John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *10 (Feb. 10, 2012). The record shows that FINRA interviewed LW but determined that she did not have a sufficient memory of Butler or the underlying events. As for LW's family members and friend, there was no indication that they had personal knowledge of the historical facts or circumstances surrounding the charges against Butler.

¹⁹ Butler failed to cite to any legal authorities in his briefs. Rule 450(b) requires, among other things, that parties' briefs contain citations to relevant legal authorities. See 17 C.F.R. § 201.450(b) (setting forth requirements for contents of briefs and providing, *inter alia*, that "[e]xceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statements, decisions and other authorities as may be relevant"). We recently "emphasized the importance of compliance with Rule 450(b)," *John Thomas Capital Mgmt. Grp. LLC*, Exchange Act Release No. 74100, 2015 WL 242391, at *1 (Jan. 20, 2015), and reiterated that "[a] filing may be rejected if it fails to meet the requirements of any rule or order." *Id.* (quoting *Adopting Release*, Rules of Practice, 60 Fed. Reg. 32,738, 32,753-54 (June 23, 1995)).

Butler also contends that during the time he managed LW's finances the balances in her bank accounts grew in value. Even if this contention were true, it does not negate his actions in converting LW's funds. Cf. *Ralph Calabro*, Exchange Act Release No. 31657, 2015 WL 3439152, at *14 (May 29, 2015) (finding that registered representative's assertion that he initially made money in customer's account did not excuse his excessive trading and stating that the fact "an account makes money does not mean it is free from churning"); *Mark E. O'Leary*, Exchange Act Release No. 8361, 1968 WL 88160, at *6 (July 25, 1968) (stating that "the fact that a customer may have suffered no loss or made money does not excuse the serious fraud shown"), *aff'd*, 424 F.2d 908 (D.C. Cir. 1970).

²⁰ See, e.g., *Mullins*, 2012 WL 423413, at *9 (finding that applicant had the burden of producing evidence, other than his own testimony, to support his claimed defense to conversion charge that he had permission to use charitable foundation property).

testimony that LW gave him gifts or "treats" in order to conceal his conversion of her funds.²¹ Among other things, Butler offered no explanation for his conflicting statements under oath in his OTR testimony and at the hearing.

2. Butler falsified an annuity beneficiary change request form.

We find that Butler completed an annuity beneficiary change request form with false information. He claimed on the form that he was LW's son, even though he was not related to her, removed LW's granddaughters as equal beneficiaries, and designated himself as the 90% beneficiary. He then submitted the form to The Hartford, causing it to change the designated beneficiaries of LW's variable annuity.

Butler's defense is that LW considered him a son and directed him to write "son" on the form. FINRA did not credit Butler's testimony, and FINRA's credibility finding is supported by the record. Even if Butler did write "son" at LW's direction, it would not excuse his action in making the false representation on the form. As a registered representative and insurance agent with almost 40 years' experience, Butler may be charged with understanding the importance of providing accurate information on customer account forms.²² We find that he intentionally falsified the form in order to deceive The Hartford into approving a form it might otherwise have questioned.

C. Butler violated Rule 2010 when he converted LW's funds and falsified a change of beneficiary form.

Rule 2010 requires the observance of "high standards of commercial honor and just and equitable principles of trade"²³ and is "designed to enable [FINRA] to regulate the ethical standards of its members."²⁴ It serves "as an industry backstop for the representation, inherent in

²¹ We typically defer to a fact finder's credibility determinations absent substantial evidence to the contrary. *See, e.g., Mullins*, 2012 WL 423413, at *13 (stating that "we generally defer to [FINRA's] credibility determinations in the absence of substantial evidence to support overturning them"); *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *4 (Oct. 23, 2002) (stating that "[w]e defer to the credibility findings of the NASD" as "[t]he record supports them and contains no substantial contrary evidence").

²² *Cf. Heath*, 586 F.3d at 140 (stating that "[a]s an experienced registered representative, plaintiff may be fairly charged with knowledge of the ethical standards of his profession") (quoting *Crimmins v. Am. Stock Exch., Inc.*, 368 F. Supp. 270, 277 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 568 (2d Cir. 1974)), *aff'g Thomas W. Heath*, Exchange Act Release No. 59223, 2009 WL 56755 (Jan. 9, 2009); *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (stating that "[respondent] had been a registered representative in the securities industry since 1991. Based on those years of experience, he certainly knew that bribery and backdating and altering documents are not ethical and accepted conduct in the securities industry").

²³ *See supra* note 1.

²⁴ *Heath*, 586 F.3d at 132 (discussing NYSE Rule 476, counterpart to NASD Rule 2010). We interpret and apply all SRO just-and-equitable principles of trade rules under the same

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the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession."²⁵ To this end, Rule 2010 sets forth a standard intended to encompass "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."²⁶

Both Butler's conversion of funds and his falsification of the change of beneficiary form are inconsistent with high standards of commercial honor and just and equitable principles of trade. Converting a customer's funds "is extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote."²⁷ Similarly, falsifying documents is a practice that is inconsistent with just and equitable principles of trade.²⁸ Therefore, we conclude that the conduct found by FINRA violated Rule 2010.

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analysis and precedent. *See, e.g., Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at *5 & n.19 (Jan. 6, 2012) (applying *Heath*, 2009 WL 56755, at *4).

²⁵ *DiFrancesco*, 2012 WL 32128, at *5 (quoting *Heath*, 2009 WL 56755, at *4).

²⁶ *Id.* at *5 (quoting *Heath*, 2009 WL 56755, at *5).

²⁷ *Mullins*, 2012 WL 423413, at *18 (internal quotations and citation omitted) (finding that applicant's use of gift certificates and wine, purchased with funds of a charitable foundation, constituted conversion under NASD Rule 2110); *see also, e.g., Grivas*, 2016 WL 1238263, at *4 (finding that applicant's withdrawal of funds to meet regulatory capital requirements constituted conversion under FINRA Rule 2010); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 WL 7873431, at *6 (Dec. 4, 2015) (finding that applicant's use of customer insurance premium payments constituted conversion under FINRA Rule 2010); *Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 WL 6777050, at *3-4 (Nov. 5, 2015) (finding that applicant's actions in directing clearing firm to wire funds to an account of his own consulting firm constituted conversion under FINRA Rule 2010); *Olson*, 2015 WL 5172954, at *2 (finding that applicant's use of corporate credit card to purchase Apple iPods constituted conversion under FINRA Rule 2010).

²⁸ *See, e.g., Olson*, 2015 WL 5172954, at *2 (finding that applicant violated FINRA Rule 2010 by falsifying firm expense report); *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *13-14 (May 27, 2015) (finding that applicant violated NASD Rules 3110 and 2110 by backdating customers' variable annuity records and providing them to FINRA during an examination); *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *5 (Feb. 24, 2012) (finding that applicant violated NASD Rule 2110 by making false statements on disclosure documents to firm); *John M.E. Saad*, Exchange Act Release No. 62178, 2010 WL 2111287, at *5 (May 26, 2010) (finding that applicant violated NASD Rule 2110 by intentionally filing false receipts, submitting a fraudulent expense report, and accepting \$1,144.63 in unentitled reimbursements), *rev'd on other grounds and remanded*, 718 F.3d 904 (D.C. Cir. 2013).

D. FINRA Rule 2010 is, and was applied in a manner, consistent with the Purposes of the Exchange Act.

We find that FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act. Rule 2010 reflects the mandate of Exchange Act Section 15A(b)(6), which requires, among other things, that FINRA design its rules to "promote just and equitable principles of trade."²⁹ This standard "provides more flexibility than prescriptive regulations and legal requirements" and, thus, prohibits dishonest practices even if those practices may not be illegal or violate a specific rule.³⁰ As a result, Rule 2010 is consistent with the purposes of the Exchange Act.

We also find that FINRA applied Rule 2010 in a manner consistent with the purposes of the Exchange Act. FINRA's finding that Butler's conduct violated Rule 2010 was supported by the record and underscores the purpose of Rule 2010 as a tool to prohibit dishonest practices.

IV. Sanctions

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanctions are "excessive or oppressive" or impose an "unnecessary or inappropriate burden on competition."³¹ As part of this review, we consider any aggravating or mitigating factors presented³² and whether the sanctions imposed by FINRA are remedial and not punitive.³³ We sustain the sanctions imposed on Butler because they are neither excessive nor oppressive and are remedial and not punitive.³⁴

²⁹ 15 U.S.C. § 78o-3(b)(6).

³⁰ *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *2 (July 3, 2008); *see also Rule Change Approved Without Modification*, Exchange Act Release No. 58643, 2008 WL 4468749 (Sept. 25, 2008).

³¹ 15 U.S.C. § 78s(e)(2). Butler does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

³² *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

³³ *See PAZ*, 494 F.3d at 1065 (stating that "[t]he purpose of the order [must be] remedial, not penal") (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)).

³⁴ Butler does not question FINRA's determination to impose separate bars for his FINRA Rule 2010 violations. *See Guidelines*, at 4 (stating that "multiple violations may be treated individually such that a sanction is imposed for each violation"). We have previously sustained FINRA's imposition of more than one bar on a single applicant. *See, e.g., Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *5 (Aug. 22, 2008) (upholding separate bars for forging or causing to be forged customer's initials on account applications, in violation

(continued . . .)

A. Conversion

FINRA's Sanction Guidelines state that "a bar is standard" for conversion, "regardless of of [the] amount converted."³⁵ "This approach reflects the judgment that, absent mitigating factors,³⁶ conversion 'poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry."³⁷ "Indeed, conversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money, and one who intentionally misappropriates funds entrusted to him demonstrates a lack of fitness to be in the securities industry."³⁸ We have consistently sustained FINRA's decision to impose a bar for conversion.³⁹ Butler's intentional and unauthorized withdrawals from LW's accounts constitute "the type of dishonesty and disrespect of one's duties as a securities professional that warrants a bar."⁴⁰

We find no mitigating factors and agree with FINRA that aggravating factors further support a bar. As FINRA found, Butler "intentionally took advantage of an elderly woman who trusted him and whose declining mental health caused her to be unable to manage her financial

(. . . continued)

of NASD Rule 2110, and for providing false information to NASD, in violation of NASD Rules 8210 and 2110); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 WL 3228694, at *14 (Nov. 8, 2006) (upholding separate bars for making unsuitable recommendations, in violation of NASD Rules 2310 and 2110, and for unauthorized discretionary trading, in violation of NASD Rules 2510 and 2110); *Guang Lu*, Exchange Act Release No. 51047, 2005 WL 106888, at *8 (Jan. 14, 2005) (upholding separate bars for failing to obtain written authorization before trading in discretionary accounts, in violation of NASD Rules 3050 and 2110, and for providing a false answer on Form U4, in violation of NASD Rule 2110), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006).

³⁵ Guidelines, at 36. We are not bound by the Guidelines, but use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

³⁶ The Guidelines include a list of nonexhaustive aggravating and mitigating factors (*i.e.*, "Principal Considerations") and state that, "as appropriate, Adjudicators should consider case-specific factors in addition to those listed." Guidelines, at 6.

³⁷ *Grivas*, 2016 WL 1238263, at *7 (quoting *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *5 n.27 (Nov. 8, 2007)).

³⁸ *Id.*

³⁹ *See id.* at *7-8; *see also, e.g., Reeves*, 2015 WL 6777050, at *5; *Olson*, 2015 WL 5172954, at *8; *Mullins*, 2012 WL 423413, at *18-20.

⁴⁰ *Grivas*, 2016 WL 1238263, at *8.

affairs."⁴¹ Butler sought to conceal his misconduct from LW, FINRA, and others by, among other things, diverting her account statements to his home address, failing to keep records of his purported expenditures on her behalf, and fabricating his hearing testimony about receiving gifts or "treats" from LW.⁴² His conversion of LW's funds took place over a period of nearly three years and established a pattern of misconduct.⁴³ He gained financially from his wrongdoing.⁴⁴ He has not taken responsibility for his actions⁴⁵ or attempted to make restitution to LW.⁴⁶ Under

⁴¹ See Guidelines, at 7 (listing, as Principal Consideration No. 13, "[w]hether respondent's misconduct was the result of an intentional act, recklessness, or negligence," and listing, as Principal Consideration No. 19, "[t]he level of sophistication of the injured or affected customer"); cf. *Epstein v. SEC*, 416 F. App'x 142, 146 (3d Cir. 2010) (affirming bar where Commission had determined that violations were egregious because they were perpetrated against elderly, unsophisticated, and retired customers).

⁴² See Guidelines, at 6 (listing, as Principal Consideration No. 10, "[w]hether the respondent attempted to conceal his or her misconduct or to lull into activity, mislead, deceive, or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated"); see also, e.g., *Grivas*, 2016 WL 1238263, at *8 (stating that "[a] bar is further supported by the fact that [applicant] attempted to conceal his misconduct and allowed inaccurate records to be maintained and inaccurate statements to be made"); *Olson*, 2015 WL 5172954, at *4 (stating that "we have previously found conversion to have been aggravated when respondents concealed it from their victims" and finding applicant's "deception to be a significant factor supporting a bar" because she concealed her misconduct from her firm for over a month).

⁴³ See Guidelines, at 6-7 (listing, as Principal Consideration No. 9, "[w]hether the respondent engaged in the misconduct over an extended period of time," and listing, as Principal Consideration No. 8, "[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct").

⁴⁴ See *id.* at 7 (listing, as Principal Consideration No. 17, "[w]hether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain").

⁴⁵ See *id.* at 6 (listing, as Principal Consideration No. 2, "[w]hether an individual or member firm accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator"). Instead, he placed blame on Woodbury for not detecting his false representation on the annuity beneficiary change request form sooner and on LW's family members for not appropriately caring for her

⁴⁶ See *id.* (listing, as Principal Consideration No. 4, "[w]hether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct"). We do not consider Butler's August 2012 termination from Woodbury to be mitigating because it did not occur prior to regulatory detection. See Guidelines, at 7 (listing, as Principal Consideration No. 14, "[w]hether the member firm . . . disciplined the respondent for the same misconduct at issue prior to regulatory detection").

the circumstances, we find that Butler is unfit for continued employment in the securities industry.

B. False annuity beneficiary change request form

As to Butler's falsification, for which there is no specific guideline, FINRA concluded that the Guideline regarding Forgery and/or Falsification of Records under FINRA Rule 2010 was most analogous.⁴⁷ For such a violation, the Guidelines recommend a fine between \$5,000 and \$146,000 and a suspension in any or all capacities for up to two years if mitigating factors exist.⁴⁸ In "egregious cases," the Guidelines recommend a bar.⁴⁹

We agree with FINRA that Butler's falsification of the annuity beneficiary change request form was egregious and warrants a bar.⁵⁰ We find no mitigating factors and aggravating factors further support imposition of a bar. In falsifying the form, Butler intentionally exploited LW, who trusted him to take care of her and her finances due to her diminished mental capacity.⁵¹ His falsification was made with an intent to deceive The Hartford into approving a form it otherwise might have questioned,⁵² and it had the potential to result in his financial gain.⁵³ He did not accept responsibility for his misconduct and misled FINRA when he asserted that LW

⁴⁷ See Guidelines, at 37. Butler does not challenge FINRA's application of this guideline to his falsification of the annuity beneficiary change request form. Nevertheless, we find that FINRA reasonably determined that this was the most analogous guideline and that its application to Butler was appropriate. *Braff*, 2012 WL 601003, at *8 (upholding FINRA's application of Guideline governing Forgery and/or Falsification of Records to misconduct involving false statements on disclosure documents).

⁴⁸ See Guidelines, at 37. The Guidelines also state that adjudicators should consider the nature of the document forged or falsified and "[w]hether the Respondent had a good faith, but mistaken, belief of express or implied or authority." *Id.* Butler did not have a good faith, but mistaken, belief of his authority to represent that he was LW's son when he knew that he was not her son. He made the misrepresentation to conceal from The Hartford that he was LW's registered representative.

⁴⁹ See Guidelines, at 37.

⁵⁰ Cf. *The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *14 (Mar. 17, 2016) (stating that "Applicants' production of false records to FINRA would warrant a bar and expulsion by itself"); *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *20 (Sept. 24, 2015) (upholding a bar for misstatements on firm compliance forms); *Ortiz*, 2008 WL 3891311, at *9 (finding a bar appropriate where applicant provided false information in response to an information request).

⁵¹ See *supra* note 41.

⁵² See *supra* note 42.

⁵³ See *supra* note 44.

directed him to write "son" on the form.⁵⁴ These facts demonstrate that he is unfit for the securities industry and a bar is necessary to protect the public.

Butler argues that he "has been involved in the financial industry for approximately 47 years without any type of complaint or allegation of misconduct whatsoever." However, "lack of disciplinary history is not a mitigating factor under FINRA's Sanction Guidelines because, as we have stated, securities professionals 'should not be rewarded for acting in accordance with [their] duties.'"⁵⁵ He also states that he "lost clients who believed, trusted, and depended on him," he "lost his license to do business in 7 states and had contracts terminated by 6 insurance companies all because of this investigation," and he "lost renewal commissions that were part of his retirement plan." We have held that such consequences are not mitigating.⁵⁶

We sustain the restitution order imposed by FINRA.⁵⁷ The Guidelines recommend such an order to restore the status quo ante where an identifiable person suffered a quantifiable loss due to a respondent's misconduct.⁵⁸ We find that Butler's misconduct in converting LW's funds

⁵⁴ See *supra* notes 42 & 45.

⁵⁵ *West*, 2015 WL 137266, at *12 (quoting *Busacca v. SEC*, 449 F. App'x 886, 893 (11th Cir. 2011)); see also *West*, ___ F.3d ___, 2016 WL 386062, at *2 & n.6 (stating that "lack of an aggravating factor—such as a prior disciplinary record—does not establish a mitigating factor," as "securities professionals are required at all times to comply with FINRA's standards of conduct").

⁵⁶ See *Saad*, 2015 WL 5904681, at *6 (stating that "[w]e repeatedly have held that the 'collateral consequences' of misconduct, including loss of employment, reputation, and income, are not mitigating").

⁵⁷ Butler does not challenge FINRA's order that he pay costs totaling \$5,626.05, which we also sustain.

⁵⁸ See Guidelines, at 4 (stating that "Adjudicators may order restitution when an identifiable person, member firm, or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct").

was a proximate cause of her loss of \$170,408.18. Ordering Butler to pay LW restitution for the amount he converted plus prejudgment interest is neither excessive nor oppressive, is remedial and not punitive, and is necessary for the protection of investors.⁵⁹

An appropriate order will issue.⁶⁰

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

⁵⁹ See, e.g., *Reeves*, 2015 WL 6777050, at *6 (upholding restitution order in FINRA conversion case where member suffered a quantifiable loss due to respondent's conduct).

⁶⁰ We have considered all of the parties' contentions and have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion. Butler's request for oral argument is denied. See *West*, __ F.3d __, 2016 WL 386062, at *3 (holding that SEC did not err in failing to hear oral argument on appeal from FINRA disciplinary action pursuant to 17 C.F.R. § 201.451).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 77984 / June 2, 2016

Admin. Proc. File No. 3-16912

In the Matter of the Application of

JOSEPH R. BUTLER

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Joseph R. Butler, and the assessment of costs, is sustained.

By the Commission.

Brent J. Fields
Secretary