SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97860 / July 10, 2023

Admin. Proc. File No. 3-20126

In the Matter of the Application of

MICHAEL JOSEPH CLARKE

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

FINRA found that person associated with member firm converted funds, made material misrepresentations, and issued bad checks; barred him for his violations of FINRA rules; and ordered restitution. *Held*, FINRA's findings of violation are *sustained* in part and *set aside* in part, and the sanctions imposed are *sustained* in part and *modified* in part.

APPEARANCES:

Michael Joseph Clarke, pro se.

Alan Lawhead, *Gary Dernelle*, and *Megan Rauch*, for FINRA.

Appeal filed: October 19, 2020
Last brief received: April 28, 2021

Michael Joseph Clarke, an individual who was associated with a FINRA member firm, seeks review of a FINRA disciplinary action.[1] FINRA found that Clarke violated FINRA Rule 2010 by converting money from three individuals and making material misrepresentations to them to obtain their money in late 2015. For this misconduct, FINRA barred Clarke from association with any FINRA member and ordered that he pay restitution of $612,400, plus prejudgment interest. FINRA also found that Clarke violated Rule 2010 by issuing four bad checks in the conduct of his business between 2013 and 2016, but it declined to impose additional sanctions in light of the bar it imposed for the conversion and misrepresentations.[2]

We sustain FINRA's findings that Clarke violated FINRA Rule 2010 by committing conversion, making material misrepresentations to obtain money, and issuing one bad check. However, we set aside FINRA's finding that Clarke violated Rule 2010 by issuing the other three bad checks because the record contains insufficient evidence that they were business-related. We sustain FINRA's imposition of a bar as a unitary sanction for Clarke's violations of Rule 2010 by converting funds and making material misrepresentations to obtain money, as well as FINRA's determination to require Clarke to pay restitution. But we reduce the total restitution amount to $563,110 to reflect payments Clarke made to the three individuals. We sustain all other aspects of FINRA's restitution order, including its imposition of prejudgment interest on the restitution amount, as modified, and its provision that the restitution amount shall be offset by any documented payments or adjustments resulting from a civil action filed by two of the individuals against Clarke.

I. Background

Clarke entered the securities industry in 1982 and first registered with FINRA in 1986.[3] Clarke was associated with Whitaker Securities LLC from March 2008 to February 2010; Tradition Asiel Securities Inc. from November 2010 to September 2015; MARV Capital Inc. from October 2015 to July 2016; and Avatar Capital Group LLC from July 2016 to September 2020.[4] As described below, FINRA's Department of Enforcement ("Enforcement") later alleged that Clarke committed conversion and made material misrepresentations to obtain money in late 2015, when he was associated with MARV, and that he issued bad checks and authorized failed electronic payments between 2013 and 2016, when he was associated with Tradition, MARV, and Avatar.

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1 *Dep't of Enf't v. Clarke*, Complaint No. 2016050938301 (NAC Sept. 17, 2020), https://www.finra.org/sites/default/files/2020-09/NAC_2016050938301_CLARKE_091720.pdf.

2 FINRA also ordered Clarke to pay hearing costs, and he has not challenged that order.

3 *See* BrokerCheck Report for Michael Joseph Clarke, https://files.brokercheck.finra.org/individual/individual_1078211.pdf. We take official notice of this report pursuant to Commission Rule of Practice 323. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records and citing Rule of Practice 323, 17 C.F.R. § 201.323).

4 BrokerCheck Report for Michael Joseph Clarke.

A. Clarke obtained money, used funds for unauthorized purposes, and did not repay amounts he had promised to repay.

From at least 1996 to 2016, Clarke ran an outside ticket brokering business, buying and reselling sports and concert tickets. To cover the cost of buying tickets, he often borrowed money from others, including from colleagues at FINRA member firms. When Clarke borrowed this money, he always represented to the lenders that the purpose of the funds was to buy tickets, that he had contacts who would supply the tickets, and that he had buyers lined up to purchase the tickets. But Clarke at times did not use the borrowed money to purchase tickets.

1. Clarke had a history of borrowing money and was disciplined for allegedly failing to repay loans.

While at Whitaker and before the events alleged in Enforcement's complaint, Clarke borrowed money for his ticket brokering business from at least five coworkers and two employees of Whitaker clients. Although Clarke testified that, as far as he knew, he fully repaid the loans, Whitaker's Chief Compliance Officer testified that Clarke had failed to fully repay certain loans and passed bad checks to his creditors.

In February 2010, Whitaker discharged Clarke, reporting on a Uniform Termination Notice for Securities Industry Registration ("Form U5") that it had done so due to allegations that he "had not repaid all of the monies he borrowed from non-customers to conduct his outside business, may have used such borrowed funds for other non-disclosed purposes, and may have issued checks for repayment to one or more such lenders drawn on a closed account." Whitaker also stated on the Form U5 that it "had reason to believe that the allegations were true."

In April 2011, Clarke entered into a deferral of prosecution agreement with the Kings County, New York, District Attorney's Office regarding similar alleged conduct between 2006 and 2010. According to the agreement, three individuals had provided Clarke money based on his "representations that the money would be used for, among other things, investments in deals arranged by Mr. Clarke in his supposed capacity as a broker and dealer in tickets for seats at events." In the agreement, the District Attorney's Office stated that it had reason to believe Clarke's representations "may have been false and/or fraudulent when he made them," because "he lacked the capacity to arrange and execute the supposed deals, and did not intend" to do so, and that "this conduct may provide grounds for criminal charges," including felony charges, against Clarke. The District Attorney's Office agreed not to prosecute Clarke if he repaid the three individuals. Clarke did not admit that he was criminally culpable for this conduct.

Clarke joined Tradition after Whitaker discharged him. Although Clarke's supervisor told him to shut down his outside ticket brokering business when he joined Tradition, he continued to operate the business—and continued borrowing money to support it. For example, from March 2015 to June 2015, Clarke borrowed $169,800 from his friend J.G. to buy tickets.

While Clarke was at Tradition, he also borrowed hundreds of thousands of dollars from his former colleague P.O. On February 3, 2015, P.O. sent Clarke an email seeking repayment of an outstanding $300,000 loan and complaining that Clarke had stopped communicating with him. On February 10, 2015, P.O. followed up with an email to Clarke stating that he would take

legal action against Clarke. Clarke testified at the FINRA hearing in this case that he did not remember reading P.O.'s emails but that he believed he owed P.O. hundreds of thousands of dollars as of October 2015, when he joined MARV.[5] Clarke also acknowledged that he owed J.G. some money at that time.

2. While at MARV, Clarke obtained money for his ticket brokering business but used it for other purposes.

a. Clarke borrowed $325,400 from MARV's principals and their associate.

The conversion and misrepresentation charges alleged in Enforcement's complaint concern Clarke's outside business dealings with MARV's principals—Maneesh Awasthi and Virupaksha Raparthi—and their business associate—A.G.—which began after Clarke became associated with MARV in October 2015. Between October and November 2015, Awasthi, Raparthi, and A.G. respectively lent Clarke $61,500, $218,600, and $45,300, so that Clarke could buy tickets for resale.

Before obtaining these funds, Clarke promised to use the money to purchase event tickets and told Awasthi, Raparthi, and A.G. that he had purchasers lined up to buy the tickets. He also promised to return the principal in the near future, plus interest of $10,000 for Awasthi, $33,590 for Raparthi, and $5,700 for A.G. Awasthi, Raparthi, and A.G. testified that they would not have loaned Clarke the money (or in Awasthi's case would have considered doing so only on different terms) if Clarke had told them he would use it to repay other creditors or pay personal expenses.

Clarke deposited or transferred almost all of these loaned funds into an already overdrawn account. The first deposit into this account occurred on October 19, 2015, and within a week Clarke began using this account to pay preexisting creditors, including P.O. and J.G. By the end of October 2015, he had transferred more than $180,000 from this account to preexisting creditors, even though it had no other source of funding during this period. Clarke also used the loaned funds in this account to make substantial cash withdrawals, transfer money to a joint account he shared with his daughter, and pay for personal expenses such as food and groceries.

In his testimony, Clarke acknowledged that he had used some of the loaned money to pay for personal expenses, but he said he mostly used it to pay for tickets. But other than Clarke's testimony, the record contains no evidence that he used any of the loaned funds to buy tickets. Although Clarke testified that some of the debit entries on his bank account records reflected ticket purchases, the entries themselves do not state what the funds were used to purchase. Also, other than Clarke's own testimony, the record contains no evidence that he resold the tickets he had promised to buy. Indeed, Clarke could not produce any records he kept in 2015 to 2016 for

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[5] Clarke testified that, at times, P.O. owed him money. But Clarke did not document the purported loans, specify their amount, or claim that they exceeded or even approached what he owed P.O. in late 2015. Clarke also testified that he did not owe P.O. hundreds of thousands of dollars, but Clarke did not specify how much he owed P.O. or reconcile this testimony with his other testimony that he believed he owed P.O. hundreds of thousands of dollars in October 2015.

his ticket brokering business. Clarke also testified that P.O., who had passed away by the time of the hearing, "held on to some" of the loaned funds for safekeeping. But Clarke did not explain why he needed someone to hold the funds for him or why he would ask P.O. to do so, given that Clarke owed P.O. hundreds of thousands of dollars at that time, and P.O. had threatened to sue him earlier that year.

b. Raparthi then provided Clarke an additional $312,000.

In November 2015, Clarke told Raparthi about a supposed opportunity to pay $400,000 to acquire six licenses that would provide permanent rights to purchase U.S. Open Tennis Championship tickets at face value, which could then be resold for substantial profits. Clarke stipulated that he told Raparthi that he would place the funds in escrow until the licenses were purchased. Based on these representations, Raparthi provided Clarke with $200,000 to purchase three of the tennis licenses for Raparthi, as well as a loan of $112,000 to partially finance Clarke's purchase of the other three tennis licenses.

On November 12, 2015, Raparthi transferred the $312,000 to the same account described above, which contained no funds other than what remained of the loans from Awasthi, Raparthi, and A.G. Clarke did not place Raparthi's funds in escrow or purchase the tennis licenses. Instead, on the same day that Raparthi transferred the $312,000 to Clarke's account, Clarke transferred $225,000 from this account to preexisting creditor P.O. Although Clarke testified that he transferred the money to P.O. because they were working together to purchase the tennis licenses, a FINRA investigator testified that P.O. said he was not involved in the purchase of the licenses (and P.O did not testify because he had passed away). Other than Clarke's own statements, the record contains no evidence that he gave the money to P.O. to facilitate the purchase of the supposed tennis licenses, that Clarke negotiated to purchase them, or that they even existed.

Soon after receiving Raparthi's $312,000, Clarke also used the account described above to pay preexisting creditor J.G. $16,000, transfer money to his joint account with his daughter, and pay for personal expenses. Clarke stipulated that he never purchased the tennis licenses, never placed the funds in escrow, and never returned the $312,000 to Raparthi.

c. Clarke repaid a fraction of what he owed Awasthi, Raparthi, and A.G.

Starting in late 2015, Clarke provided Awasthi, Raparthi, and A.G. with various reasons why he had not repaid their loans. For example, in December 2015, Clarke texted Raparthi that money had been sent to another person's account in Florida, but the bank's policies prevented the money from being transferred to Clarke. Later, in February 2016, Clarke texted A.G. to say that he would be picking up cash from Florida to repay the loan. When A.G. asked Clarke whether he got the money from Florida, Clarke texted back: "Down here now. Leaving to drive up in am. [sic] Keep you posted." But when confronted at the hearing with evidence that he was in New York at the time, Clarke admitted that he probably was not in Florida when he sent this text to A.G., and there is no evidence in the record that he was actually there.

Also in February 2016, Clarke and Raparthi signed a loan agreement, which identified the amounts that Clarke owed Raparthi. In the agreement, Clarke also "affirm[ed] that the $312,000" Raparthi paid for the tennis licenses "ha[d] been deposited in a mutual escrow IOLA account with [Clarke's] Attorney." Clarke testified that this statement was untrue.

Clarke repaid some of the money he owed. In January and February 2016, for example, Clarke made interest payments to Awasthi, Raparthi, and A.G.[6] In April 2016, Clarke also authorized Awasthi and Raparthi to withhold $25,000 of his commissions from MARV as repayment, which they divided with A.G. But that same month Clarke also gave Awasthi and Raparthi blank checks and gave Raparthi and A.G. checks that each far exceeded Clarke's account balance.[7] When Raparthi tried to deposit his check in September 2016, it was returned unpaid due to nonsufficient funds.

Clarke did not repay the rest of the money he owed Awasthi, Raparthi, and A.G. In his testimony, Clarke offered various reasons for this failure. But other than his own testimony, Clarke introduced no evidence that he had ever even bought, let alone resold, the promised tickets. Clarke also testified that he delayed payment as of February 2016 because he had repaid Awasthi and Raparthi for some smaller loans. Raparthi confirmed that he had loaned Clarke smaller amounts to buy tickets for resale and that Clarke had repaid these loans. But Clarke did not explain why these repayments would have absolved him from repaying the larger loans.

Clarke also offered various excuses for failing to return the $312,000 that Raparthi had advanced him for the tennis licenses in November 2015. Clarke testified that Raparthi asked him to return the money in April and May of 2016, but Clarke responded that he had given his word to the seller and could not back out of the purchase. Yet, Clarke also testified that the purchase was delayed because the family supposedly selling the licenses wanted a higher price. Clarke did not explain why he was obligated to go through with the transaction, even though the terms of the purchase had changed. Clarke also testified that he had no documentation confirming his negotiations for the licenses.

At the time of the hearing in February 2019, Clarke testified that he still had not repaid Awasthi, Raparthi, and A.G., citing the fact that Awasthi and Raparthi had withheld an unspecified amount of additional commissions from him. Awasthi and Raparthi confirmed that they had withheld an additional $50,000 to $60,000 in commissions Clarke earned at MARV, and that the withheld commissions were in MARV's account as of the date of the hearing. The amount of the withheld commissions was substantially less than the sum of the outstanding debts Clarke owed Awasthi, Raparthi, and A.G.

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[6] Clarke paid the agreed-upon interest of $10,000 to Awasthi, $33,590 to Raparthi, and $5,700 to A.G.

[7] Clarke gave Raparthi a check for $218,600 and A.G. a check for $45,300. But at the time Clarke's account contained less than $7,000.

3. After Clarke left MARV, he joined Avatar and continued to borrow money from coworkers.

Clarke resigned from MARV in July 2016 and joined Avatar shortly thereafter.[8] When Clarke joined Avatar, he agreed not to conduct business with employees of the firm unless he obtained prior written approval. Nonetheless, the record confirms that he continued borrowing money from coworkers.

B. Between 2013 and 2016, Clarke wrote checks and authorized payments that failed to clear.

Clarke stipulated that on 60 occasions between February 25, 2013, and September 12, 2016, he wrote checks and authorized electronic payments that failed to clear due to nonsufficient funds. Clarke stipulated that, for all but ten of these declined payments, the relevant account had a negative balance when the check was returned or the payment failed. The record does not reflect the purpose of Clarke's failed checks and electronic payments, other than the $218,600 check to repay Raparthi's ticket-brokering loan discussed above.[9]

C. FINRA found that Clarke violated Rule 2010 by converting funds, making material misrepresentations to obtain funds, and issuing bad checks; barred him from associating with any FINRA member; and ordered that he pay restitution.

On June 15, 2018, Enforcement filed a complaint against Clarke alleging that he had violated FINRA Rule 2010 by converting money from Awasthi, Raparthi, and A.G.; making misrepresentations to them to induce them to provide funds; and issuing checks and authorizing electronic transfers that failed to clear 60 times when he knew or should have known that he lacked sufficient funds to cover the transactions. Clarke and Enforcement subsequently entered into 43 joint stipulations. A four-day hearing was held in February 2019, at which various witnesses testified, including Clarke, Awasthi, Raparthi, A.G., Whitaker's CCO, and a FINRA investigator. The hearing panel found that Clarke had violated FINRA Rule 2010 by converting Awasthi's, Raparthi's, and A.G.'s funds, making misrepresentations to them to obtain their funds, and either writing checks or authorizing electronic transfers that failed to clear on 60 occasions.

The hearing panel imposed a bar for the conversion and misrepresentation violations, considering them together because they involved the same misconduct. For these violations, the

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[8] Clarke complains that after his separation from MARV, the firm stated on the initial Form U5 disclosing his departure that he was fired, even though he resigned. But Awasthi and Raparthi testified that Clarke resigned before they could fire him. To the extent that Clarke argues that the content of the initial Form U5 undermines the credibility of Awasthi's or Raparthi's testimony, we reject that argument. Much of Awasthi's and Raparthi's testimony was corroborated by other evidence, and their testimony was internally consistent. In any event, Clarke's BrokerCheck report reflects that, at some point, MARV reported that he voluntarily resigned.

[9] *See supra* Section I.A.2.c.

hearing panel also ordered Clarke to pay a total of $612,400 in restitution to Awasthi, Raparthi, and A.G., with prejudgment interest accruing from the dates by which it determined that Clarke had received the funds from each individual. Separately, the hearing panel barred Clarke for writing bad checks and authorizing failed electronic transfers.

Clarke appealed to FINRA's National Adjudicatory Council ("NAC"), which affirmed in part and modified in part the hearing panel's findings and modified the sanctions. Specifically, the NAC affirmed the hearing panel's findings that Clarke violated Rule 2010 by converting funds and making material misrepresentations to obtain funds. The NAC modified the hearing panel's finding that Clarke violated Rule 2010 on 60 occasions by issuing bad checks and authorizing failed electronic transfers. The NAC found instead that Clarke violated Rule 2010 only as to four checks that failed to clear between October 2014 and September 2016, when Clarke was associated with Tradition, MARV, and Avatar, because there was insufficient evidence that the other checks and transfers were business-related, as required under Rule 2010.

Like the hearing panel, the NAC imposed a unitary sanction of a bar and restitution of $612,400, with prejudgment interest, for the conversion and misrepresentation violations. The NAC's restitution order provided for an offset of the restitution amount by any documented payments or adjustments resulting from a civil matter filed by Raparthi and A.G. against Clarke in state court in New York. The NAC also determined that the appropriate sanction for Clarke's writing of four bad checks was a six-month suspension and a $10,000 fine, but the NAC did not impose these additional sanctions in light of the bar it had imposed for Clarke's other violations. This appeal followed.[10]

II. Analysis

We review a FINRA disciplinary action to determine (1) whether the applicant engaged in the conduct FINRA found, (2) whether that conduct violated the rules specified in FINRA's determination, and (3) whether those rules are, and were applied in a manner, consistent with the purposes of the Securities Exchange Act of 1934.[11] We base our findings on an independent review of the record and apply a preponderance-of-the-evidence standard.[12]

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[10] Clarke, who is pro se, filed an application for review, but he did not file a formal opening brief in this appeal. Rather, he set out his arguments in an email that he sent to the Commission on the deadline for filing his opening brief. *See Michael Joseph Clarke*, Exchange Act Release No. 91277, 2021 WL 870702 (Mar. 8, 2021) (granting Clarke an extension of time for filing his opening brief). We have treated Clarke's email as his opening brief. FINRA has not objected to our consideration of Clarke's email, and it filed a brief in response to the arguments Clarke made in his email. To the extent that Clarke raised arguments in his application for review but failed to support them in his email, we deem Clarke to have waived them. *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c).

[11] Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1).

[12] *E.g.*, *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, *9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

Applying this framework, we sustain FINRA's findings that Clarke violated FINRA Rule 2010 by converting funds from Awasthi, Raparthi, and A.G. and by making material misrepresentations to induce those individuals to provide these funds to him. We also sustain FINRA's finding that Clarke violated Rule 2010 by issuing a $218,600 bad check to Raparthi. But we set aside FINRA's findings of violation with respect to the other three bad checks because the record contains insufficient evidence that Clarke issued them in the conduct of his business, as required under Rule 2010.

A. Clarke engaged in the conduct FINRA found with respect to the conversion, material misrepresentations, and a bad check.

1. Clarke used Awasthi's, Raparthi's, and A.G.'s funds for unauthorized purposes.

We find that Awasthi, Raparthi, and A.G. provided Clarke with a total of $325,400 in loans so that Clarke could buy event tickets for resale, but Clarke used this money for unauthorized purposes—namely, to repay preexisting creditors and pay other personal expenses. Clarke admitted in his testimony that he used at least some of these funds to pay personal expenses. Documentary evidence also establishes that soon after the bulk of the loan proceeds was transferred into a previously overdrawn account between October 19 and November 5, 2015, Clarke started using the account to repay preexisting creditors and pay other personal expenses.

We do not credit Clarke's testimony that he generally used the loaned money to buy tickets for resale as he represented he would. Clarke's bank account records show that he used the money for the above unauthorized purposes, and Clarke produced no records showing that he used the money to buy the event tickets, let alone that he resold them to anyone. We also reject as implausible Clarke's testimony that he provided loan proceeds to P.O. for safekeeping, rather than to repay the debt he owed P.O., given that P.O. had threatened to sue Clarke regarding that debt earlier that year and there was no documentation of the alleged safekeeping arrangement.

We find further that Raparthi provided Clarke with a separate payment of $312,000 for Clarke to place in escrow pending the purchase of tennis licenses, and Clarke used these funds for unauthorized purposes. As Clarke stipulated, he never placed these funds in escrow and never used them to purchase the tennis licenses. Instead, Clarke used these funds to pay personal expenses and repay preexisting creditors. We do not credit Clarke's testimony that he was trying to negotiate the purchase of the tennis licenses and that he transferred some of this additional money to P.O. because P.O. was involved in that purchase. Clarke provided only the first name of the person with whom he supposedly negotiated and had no records memorializing the supposed negotiations, Clarke did not explain P.O.'s supposed role in the purchase, and FINRA's investigator testified that P.O. told her that he was not involved.[13]

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[13] In his brief, Clarke asserts that P.O. deceived the investigator, but Clarke does not identify which of P.O.'s statements to the FINRA investigator were supposedly untrue or explain why they should be disbelieved, other than through vague attacks on P.O.'s character. In light of this and the entirety of the record, we credit P.O.'s statement to the FINRA investigator that he was not involved in the purchase of the tennis licenses, as well as his contemporaneous emails to

(*continued*…)

We also find that Clarke intentionally used the funds from Awasthi, Raparthi, and A.G. for unauthorized purposes. His repeated use of the money for unauthorized purposes demonstrates that it was deliberate. Clarke's failure to repay the money and attempts to conceal his unauthorized use of the money by offering false excuses for why he could not repay it further supports our conclusion that he intentionally used it for unauthorized purposes.[14]

2. Clarke obtained funds from Awasthi, Raparthi, and A.G. by means of misrepresentations.

We find that Clarke misrepresented to Awasthi, Raparthi, and A.G. that he would use $325,400 in loans to buy event tickets for resale when he actually intended to use the money to repay preexisting creditors and pay personal expenses. Despite telling them that he would use the money to buy event tickets, Clarke began using the money for unauthorized purposes very soon after receiving the funds. And he accepted several tranches of money after he had already started using the earlier tranches for unauthorized purposes.

We find further that Clarke misrepresented to Raparthi that he would use Raparthi's separate payment of $312,000 to purchase tennis licenses and that he would place that payment in escrow pending the purchase of those licenses. Clarke never put the funds in escrow, and he transferred over half of the money to a preexisting creditor on the same day he received it. Clarke's lack of records about his supposed pre-loan negotiations for the tennis licenses, as well as his vague statements regarding the details of those negotiations, support our determination that Clarke never intended to use Raparthi's money to purchase the licenses.

Finally, we find that Clarke made these misrepresentations so that Awasthi, Raparthi, and A.G. would provide the funds. The record shows that Awasthi, Raparthi, and A.G. provided the funds on the terms they did based on Clarke's misrepresentations.

3. Clarke issued one check in the conduct of his business when he knew or should have known his account lacked sufficient funds.

We find that the $218,600 check Clarke issued to Raparthi in April 2016 to repay the loan for buying tickets for resale was issued in the conduct of the ticket brokering business in which Clarke represented he was engaged. We also find that Clarke knew or should have known

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Clarke in February 2015 regarding the funds Clarke owed him. We find that Clarke's allegation that P.O. also owed Clarke money when he passed away, even if true, does not undermine the credibility of these emails or this statement.

[14] *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *6 n.17 (June 2, 2016) ("Butler's concealment of his conversion further demonstrates that he acted intentionally."); *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *8 (Jan. 9, 2015) (holding that associated person's "concealment of his actions from his customer and his deceit further demonstrate deliberate intent and bad faith"), *aff'd*, 641 F. App'x 27 (2d Cir. 2016); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *9 (Feb. 10, 2012) (holding that associated person's "failure to repay the funds until forced to do so . . . serves as evidence that his conversion of the property was intentional").

that his account lacked sufficient funds to cover the transaction. The daily balance for his account in April 2016 never exceeded $7,000. Clarke should have been paying particularly close attention to his account balance by April 2016 because he had issued checks and authorized electronic transfers that failed to clear approximately 50 times during the preceding three years.[15] Indeed, the check bounced when Raparthi later tried to deposit it.

Nonetheless, we find that the preponderance of the evidence does not show that the other three bad checks were business-related. Although Clarke issued two of these checks to his coworkers, the record does not reflect why he did so. The record also does not establish that Clarke issued the third bounced check to repay a business-related rather than personal loan.

B. Clarke's conduct violated FINRA Rule 2010.

FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." The rule applies to associated persons of FINRA member firms,[16] and to all business-related conduct, regardless of whether it involves securities or customers.[17] Misconduct that does not involve securities or customers may indicate that the associated person is unfit and that the person may engage in misconduct involving securities or customers in the future.[18] Rule 2010 also prohibits unethical and bad faith conduct even if it is not illegal and does not violate another FINRA rule.[19]

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[15] *Cf. John Gordon Simek*, Exchange Act Release No. 27528, 1989 WL 259962, at *7 (Dec. 12, 1989) (upholding finding that associated person should have known that his account lacked sufficient funds to cover bad checks because "[i]nstead of keeping a current ledger of his checking account activity, he assertedly relied on telephone calls to or from his bank to keep himself apprised of his account balance," which was a "plainly inadequate" system).

[16] *See* FINRA Rule 0140(a) (providing that associated persons "shall have the same duties and obligations as a member under the Rules").

[17] *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *7 (Sept. 30, 2016) ("Rule 2010 applies to business-related conduct that is inconsistent with just and equitable principles of trade, and neither Rule 2010 nor FINRA's definition of conversion is limited to misconduct involving firm customers or securities."); *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *5 (Mar. 29, 2016) (holding that conduct at issue need not "relate to the associated person's customers or to a securities transaction in order to be covered by Rule 2010" (footnotes omitted)); *Denise M. Olson*, Exchange Act Release No. 75838, 2015 WL 5172954, at *2 & n.8 (Sept. 3, 2015) (finding violation of Rule 2010 based on falsification of expense reports and conversion from FINRA member firm); *Thomas E. Jackson*, Exchange Act Release No. 11476, 1975 WL 160390, at *1-2 (June 16, 1975) (finding that applicant violated FINRA Rule 2010 predecessor by forging signatures on insurance applications to obtain unearned commissions from his firm).

[18] *Grivas*, 2016 WL 1238263, at *5.

[19] *See Heath v. SEC*, 586 F.3d 122, 131-32 (2d Cir. 2009) (noting that rules like FINRA Rule 2010 are "concerned with enforcing ethical standards of practice in the securities industry," and noting with approval longstanding precedent that these rules apply to more than just

(*continued*…)

1. Clarke committed conversion and thereby violated FINRA Rule 2010.

We have repeatedly held that conversion violates FINRA Rule 2010.[20] And an associated person's intentional use of funds for unauthorized purposes constitutes conversion, even when the owner of the funds voluntarily granted the associated person some control over them.[21] Here, Awasthi, Raparthi, and A.G. loaned Clarke funds to purchase tickets for resale, and Raparthi also provided Clarke with funds to place in escrow pending the purchase of tennis licenses. They provided Clarke the funds as part of Clarke's supposed ticket brokering business. But Clarke instead intentionally used the funds for unauthorized purposes, such as repaying preexisting creditors and paying other personal expenses. Clarke committed conversion even though Awasthi, Raparthi, and A.G. willingly gave him the money, as he did not use the money as he represented he would.[22]

Clarke makes several factual assertions relating to the money he obtained but does not explain how these assertions might undermine FINRA's findings of violations. As explained below, they do not.

First, Clarke asserts that before his employment with MARV ended, he met with Awasthi and stated that if MARV paid his outstanding commissions, Clarke would reimburse Awasthi and Raparthi. But Clarke's supposed offer or intention to repay the money does not excuse his unauthorized use of it.[23] Clarke had already misused the money when he offered to repay it. Moreover, Clarke converted far more money than the commissions that MARV withheld, and

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"unlawful act[s]"); *Butler*, 2016 WL 3087507, at *7 (noting that Rule 2010 "prohibits dishonest practices even if those practices may not be illegal or violate a specific rule").

[20] *E.g.*, *Akindemowo*, 2016 WL 5571625, at *7; *Butler*, 2016 WL 3087507, at *7; *Grivas*, 2016 WL 1238263, at *4; *Mullins*, 2012 WL 423413, at *11.

[21] *Akindemowo*, 2016 WL 5571625, at *7 (holding that an associated person committed conversion by representing that he would invest funds, and funds were transferred for that purpose, but he instead used the funds to pay personal expenses); *Butler*, 2016 WL 3087507, at *6 (finding that unauthorized transfer of funds from joint account to a personal account constituted conversion because "the use of funds was not authorized"); *Alfred R. Reeves, III*, Exchange Act Release No. 76376, 2015 WL 6777050, at *3-4 (Nov. 5, 2015) (finding that applicant committed conversion because he "continued to intentionally exercise unauthorized ownership over" funds transferred into his account that were not his).

[22] *See supra* note 21 and accompanying text.

[23] *See Mullins*, 2012 WL 423413, at *9 (finding violation of Rule 2010 based on conversion, despite applicant's claim that he always intended to repay the funds); *cf. Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *5 (Oct. 23, 2002) (finding that applicant's "repayment of the funds" does not "justif[y] his misuse of [another individual's] credit card numbers"); *Henry E. Vail*, Exchange Act Release No. 35872, 1995 WL 380152, at *1-2 (June 20, 1995) (finding misappropriation even though applicant eventually repaid the funds, where he "made no attempt to repay [the funds] for five months, and indeed appears to have done so only because criminal charges had been filed").

MARV only began withholding commissions after he failed to return the converted funds. And regardless of whether MARV owed Clarke commissions, he was not entitled to engage in "self-help" by converting funds or retaining the converted funds.[24]

Second, Clarke asserts that Awasthi, Raparthi, and A.G. "made profits on at least seven or eight deals." But these separate transactions are irrelevant to our analysis because FINRA found that Clarke violated Rule 2010 by misusing other funds he did not repay.

Third, Clarke asserts that the loans extended by Awasthi, Raparthi, and A.G. might not be enforceable under New York state law.[25] But the question before us is not whether the loans would be enforceable, but rather whether Clarke "observe[d] high standards of commercial honor and just and equitable principles of trade" when he intentionally used the loaned funds for unauthorized purposes. Like FINRA, we find that he did not.[26]

2. Clarke made material misrepresentations to obtain funds and thereby violated FINRA Rule 2010.

Making material misrepresentations to obtain funds is inconsistent with just and equitable principles of trade and therefore violates FINRA Rule 2010.[27] As explained above, Clarke misrepresented to Awasthi, Raparthi, and A.G. that he would use funds for specific business purposes and that he would put specific funds in escrow. Clarke's misrepresentations were material because there is a substantial likelihood that a reasonable lender or investor would view Clarke's intended use of the funds as significantly altering the total mix of information available about the loan or investment.[28] An unsecured personal loan to an individual to repay preexisting

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[24] *Olson*, 2015 WL 5172954, at *4; *cf. John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *8 (June 14, 2013) (holding that associated person "was required to ensure that his own conduct was consistent with high standards of commercial honor and just and equitable principles of trade regardless of whether others engaged in misbehavior").

[25] In a state court proceeding, Clarke has argued that the loans extended by Awasthi, Raparthi, and A.G. were usurious. *See Raparthi v. Clarke*, No. 654875/2016 (N.Y. Sup. Ct. filed Sept. 14, 2016).

[26] To the extent Clarke contends that these arguments also excuse his misrepresentations, we reject that argument for reasons similar to those provided above.

[27] *Cf. Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *9 (Feb. 20, 2007) (holding that material "[m]isrepresentations and omissions are . . . inconsistent with just and equitable principles of trade and violate" Rule 2010 predecessor, in the context of conduct that also violated antifraud provisions under federal law); *Dane S. Faber*, Exchange Act Release No. 49216, 2004 WL 239507, at *4 (Feb. 10, 2004) (same).

[28] *See, e.g., Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *15 (Sept. 28, 2017) (finding information that "relates directly to the use of the investor's money" to be material (quoting *SEC v. Johnson*, No. 01-7874, 2001 WL 37114666, at *4 (S.D. Fla. Dec. 31, 2001) (report and recommendation), *adopted*, 2002 WL 35633450 (S.D. Fla. Jan. 18, 2002))); *Akindemowo*, 2016 WL 5571625, at *6 (finding that misstatements about how funds would be

(*continued*…)

creditors and pay other personal expenses has a very different risk profile than a loan for a supposedly profitable ticket-brokering venture or to purchase supposedly profit-generating tennis licenses.[29]

3. Clarke violated FINRA Rule 2010 by issuing one check when he knew or should have known he lacked sufficient funds to cover it.

An associated person violates FINRA Rule 2010 by issuing a check in the conduct of that person's business when that person knows or should know that the account from which the check is written lacks sufficient funds to cover the check.[30] Clarke violated FINRA Rule 2010 when he issued the check to Raparthi for $218,600 at a time when there was less than $7,000 in the account, and ultimately that check bounced.

We find insufficient evidence that the other three checks that FINRA identified were issued in the conduct of Clarke's business and therefore set aside FINRA's finding that Clarke violated FINRA Rule 2010 by issuing those checks.

C. FINRA Rule 2010 is, and was applied, consistent with the purposes of the Exchange Act.

FINRA Rule 2010 is consistent with the purposes of the Exchange Act because it reflects the Exchange Act's requirement that FINRA enact rules to "promote just and equitable principles of trade" and "protect investors and the public interest."[31] We also find that the rule was applied in a manner consistent with the purposes of the Exchange Act. Committing conversion, making material misrepresentations to obtain funds, and issuing a check in the conduct of an associated person's business, when that person knows or should know that the account lacks sufficient funds to cover it, violate just and equitable principles of trade. Prohibiting these acts protects investors and the public interest. FINRA acted consistently with the purposes of the Exchange Act by holding Clarke liable for committing these violations.

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invested were material because "a reasonable investor would want to know how their funds were actually being used").

[29] *Cf. Ahmed*, 2017 WL 4335036, at *15 ("That so much money from new investors was being used to repay existing investors, rather than for investments that would improve the company and make it more likely that their Notes would be repaid, would have been material to a reasonable investor's assessment of the riskiness of the investment.").

[30] *See, e.g.*, *George R. Beall*, Exchange Act Release No. 28059, 1990 WL 1104076, at *1 (May 25, 1990) (holding that associated person's issuance of two bad checks to his firm to finance his personal trading account was "clearly inconsistent with just and equitable principles of trade" when he was aware he lacked sufficient funds to cover the checks); *Simek*, 1989 WL 259962, at *7 (affirming finding that applicant "engaged in conduct inconsistent with just and equitable principles of trade when he wrote several checks at times when he should have known that his checking account did not have the necessary funds to cover them").

[31] Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6); *accord Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *3 n.8 (Apr. 3, 2020).

FINRA's application of Rule 2010 to Clarke's misconduct was also consistent with the purposes of the Exchange Act because FINRA provided Clarke with the "fair procedure" that the Exchange Act requires when it disciplines a person associated with a member firm.[32] Clarke asserts that Enforcement "brought in people to create something that didn't really happen," its witnesses "never told all the facts," and individuals who did not testify would have presented evidence casting him in a better light. We reject these arguments.

Our Rule of Practice governing the content of briefs provides that "[e]ach exception to the findings or conclusions being reviewed" "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 statutes, decisions and other authorities as may be relevant."[33] But Clarke provides no support for his suggestion that Enforcement elicited false witness testimony—and we find none—and he also generally fails to identify the testimony that he contends was incomplete, misleading, or false.[34]

In any case, bank records, emails, text messages, testimony from other individuals, and Clarke's own stipulations and testimonial admissions corroborated much of the testimony from Enforcement's witnesses. And Clarke, who was represented by counsel at the FINRA hearing, had the opportunity to cross-examine the witnesses who testified, call his own witnesses, and present his own testimony and evidence at the hearing.[35] Clarke's claim that Enforcement did not call the right witnesses also fails because Enforcement was not required to make Clarke's case for him.[36] The record contains no evidence that Clarke made any attempt to call the individuals that he claims would have provided beneficial testimony or even that he asked them to provide declarations.[37]

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32 Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8).

33 Rule of Practice 450(b), 17 C.F.R. § 201.450(b).

34 To the extent Clarke challenges particular witness testimony, we address those arguments where relevant. Clarke also generally attacks the credibility of witnesses J.M., B.L., and an Avatar colleague, but we need not address these challenges because we do not rely on their testimony in our analysis.

35 *Cf. Michael Pino*, Exchange Act Release No. 74903, 2015 WL 2125692, at *9 (May 7, 2015) (finding applicant was provided with a fair proceeding where he "had an opportunity to testify on his own behalf, to call witnesses, and to cross-examine FINRA's witnesses"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *6 (Dec. 22, 2008) (same).

36 *See John Montelbano*, Exchange Act Release No. 47227, 2003 WL 147562, at *13 n.58 (Jan. 22, 2003) (rejecting applicant's complaints about FINRA predecessor's "failure to have various other persons testify," as "it is a respondent's obligation, not the [FINRA predecessor's], to marshal all the evidence in his defense").

37 *See Mullins*, 2012 WL 423413, at *10 & n.40 (noting the lack of evidence in the record that the applicants made any attempt to reach out to the allegedly relevant witness, through her attorney, "to ask her to provide an exonerating statement"); *Montelbano*, 2003 WL 147562,

(*continued*…)

III. Sanctions

Under Exchange Act Section 19(e)(2), we sustain FINRA sanctions unless we find that, giving due regard to the public interest and the protection of investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[38] We consider evidence of any aggravating or mitigating factors, as well as whether the sanctions serve remedial rather than punitive purposes.[39] Although they are not binding on us, FINRA's Sanction Guidelines serve as a benchmark in our review.[40]

We sustain the bar FINRA imposed on Clarke as a unitary sanction for his conversion and material misrepresentations. We also agree with FINRA that restitution is appropriate for these violations. But because restitution is meant only to restore the status quo ante, we decrease the amount of restitution by the payments Clarke made to Awasthi, Raparthi, and A.G.[41]

A. The bar that FINRA imposed is neither excessive nor oppressive.

Like FINRA, we consider the conversion and material misrepresentation violations together because they arose from the same misconduct.[42] The FINRA Sanction Guidelines recommend that a bar be imposed for conversion, "regardless of [the] amount converted."[43] We agree that, absent mitigating factors, conversion warrants a bar because such conduct presents a substantial risk to investors and the market and "is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money."[44] In addition, the Sanction Guidelines recommend that a bar should be strongly considered for an

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at *13 n.58 (noting that the record did not show that the applicant "tried to secure the appearance of any individual").

38 15 U.S.C. § 78s(e)(2). Clarke does not assert, nor do we find, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

39 *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

40 *E.g.*, *Plunkett*, 2013 WL 2898033, at *11 & n.68.

41 The NAC considered the appropriate sanctions for the violations stemming from Clarke's issuance of bad checks but declined to impose them in light of the bar. As a result, "the question of whether these sanctions are excessive or oppressive is not before us." *Mullins*, 2012 WL 423413, at *20 n.96.

42 *Id.* at *18; *see also* FINRA Sanction Guidelines, at 4 (Mar. 2019) (recognizing that it may be appropriate to aggregate or batch similar violations when determining sanctions), https://www.finra.org/sites/default/files/2020-10/2019_Sanctions_Guidelines.pdf. Because FINRA applied the 2019 version of the Sanction Guidelines, and Clarke has not challenged this application, we cite the 2019 version of the Sanction Guidelines in our opinion.

43 FINRA Sanction Guidelines, at 36.

44 *Olson*, 2015 WL 5172954, at *3.

intentional or reckless misrepresentation.[45] We, like FINRA, find that Clarke's affirmative misrepresentations to obtain funds were intentional because he knew his own intended use of the money when he asked for it yet deliberately and repeatedly misstated his intended use so that he could obtain it.[46] Clarke's efforts to conceal the status of Awasthi's, Raparthi's, and A.G.'s funds is further evidence that his misrepresentations were intentional.[47]

We also find the presence of several aggravating factors. Clarke's misconduct was intentional, resulted in monetary gain to Clarke, and caused substantial monetary injury to Awasthi, Raparthi, and A.G.[48] Clarke attempted to conceal his conduct from MARV, its principals, and A.G. and to lull them into inactivity by offering numerous excuses for his failures to repay the money—claiming that repayments would happen soon, issuing checks that Clarke could not cover to Raparthi and A.G., and issuing blank checks to Awasthi and Raparthi.[49] In addition, the size of the transactions was substantial, totaling over half a million dollars.[50]

We do not find any mitigating circumstances in the record. Clarke states that, since allegations were made against him in 2016, he has "lost commissions, customers" and subsequently his ability to associate with any FINRA member. But any such losses are merely collateral or direct consequences of Clarke's misconduct, not mitigating circumstances.[51] Clarke also states that he has lost family members, friends, and colleagues "[d]uring these years of

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45 FINRA Sanction Guidelines, at 89.

46 *See Anthony Fields*, Exchange Act Release No. 74344, 2015 WL 728005, at *16 (Feb. 20, 2015) ("We find that Fields's misrepresentations about AFA and Platinum were knowing and intentionally calculated to deceive others. As their sole proprietor, Fields inescapably had first-hand, personal knowledge about the size and extent of their operations and the falsity of his representations concerning them.").

47 *See Butler*, 2016 WL 3087507, at *6 n.17 (stating that "Butler's concealment of his conversion further demonstrates that he acted intentionally"); *West*, 2015 WL 137266, at *8 (holding that associated person's "concealment of his actions from his customer and his deceit . . . demonstrate deliberate intent and bad faith").

48 *See* FINRA Sanction Guidelines, at 7-8 (Principal Considerations in Determining Sanctions Nos. 11, 13, 16).

49 *See id.* at 7 (Principal Considerations in Determining Sanctions No. 10).

50 *See id.* at 8 (Principal Considerations in Determining Sanctions No. 17). FINRA also found that Clarke had engaged in a pattern of misconduct over an extended period of time because he also obtained loans from colleagues and others to buy tickets for resale, but then failed to timely or ever repay those loans, while at Whitaker, Tradition, and Avatar. *See* FINRA Sanction Guidelines, at 7-8 (Principal Considerations in Determining Sanctions Nos. 8, 9, 17). Although we may consider uncharged conduct in assessing appropriate sanctions, *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *6 & n.22 (Feb. 24, 2012), we need not and do not rely on the uncharged conduct in sustaining the bar. The record amply demonstrates that Clarke presents a threat to investors based on the charged misconduct at MARV.

51 *See Olson*, 2015 WL 5172954, at *5 n.29 (holding that collateral consequences of misconduct, such as the loss of income, are not mitigating).

allegations." While these losses are unfortunate, Clarke has not explained how they explain, excuse, or even relate to his misconduct. Clarke made misrepresentations to and collected money from Awasthi, Raparthi, and A.G. on several different occasions and used it for unauthorized purposes. Clarke then made a variety of false excuses regarding why the payments were delayed but would come soon, offered additional false excuses at the hearing, and has never admitted his misconduct. Under these circumstances, Clarke's personal circumstances do not mitigate his unauthorized use of the funds or his misrepresentations to obtain them.[52]

We also do not find it mitigating that Clarke alleges that the loans from Awasthi, Raparthi, and A.G. are usurious under New York law. Clarke obtained through misrepresentations funds that he later misused. In any case, Clarke himself proposed the terms of the loans. Nor is it mitigating that Clarke repaid, with interest, one or more of these individuals for other loans, because payment of one loan does not excuse obtaining other funds on false pretenses and misusing them or abrogate the obligation to repay them.[53] Similarly, it is not mitigating that Clarke paid the interest and a small amount of the principal on the loans at issue here, as he left the majority of the principal outstanding.[54] And it is not mitigating that MARV withheld some of Clarke's commissions, as it did so only after Clarke obtained funds based on false assurances, misspent them, and repeatedly failed to repay them to MARV's principals and A.G.

Clarke also argues that he reimbursed certain customers, his customers trust him, and he is skilled at brokering municipal bonds. But Clarke's alleged relationships with particular customers do not mitigate his misconduct or lessen the need for a bar.[55] Nor is it mitigating that Clarke's misconduct did not involve customers.[56] "[I]t is the deception and fraud in the handling

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52 *Cf. John M.E. Saad*, Exchange Act Release No. 76118, 2015 WL 5904681, at *6 (Oct. 8, 2015) (rejecting argument that stress was mitigating where applicant's intentional, deceptive course of action was not behavior traditionally associated with stress), *pet. for rev. denied in relevant part*, 873 F.3d 297, 303 (D.C. Cir. 2017).

53 *Cf. Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 WL 4026291, at *15 n.72 (Nov. 20, 2009) (finding that "the fact that [respondent] did not also engage in other misconduct is not a mitigating circumstance"); *Faber*, 2004 WL 239507, at *7 n.33 (finding that "undert[aking] all efforts to stop" additional potentially violative conduct did not mitigate violations at issue).

54 *Cf. Manoff*, 2002 WL 31769236, at *3-5 (upholding bar of applicant, even though he eventually repaid funds); *Vail*, 1995 WL 380152, at *2-3 (same).

55 *See Dratel Grp.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *16 (Mar. 17, 2016) (holding that letters and testimony about associated person's "general honesty and integrity" were not mitigating because "'we look beyond the interests of particular investors in assessing the need for sanctions, to the protection of investors generally'" (quoting *James C. Dawson*, Investment Advisers Act Release No. 3057, 2010 WL 2886183, at *4 (July 23, 2010))).

56 *See Olson*, 2015 WL 5172954, at *7 (finding that applicant's "misconduct was no less serious because it did not involve customers" (quotation omitted)); *see also Leonard John*

(*continued*…)

of others' property that endangers the integrity of the securities industry, and that threat remains the same whether the victim is a trusting employer or trusting client."[57] The threat is no less when the victims are trusting colleagues. Clarke's actions "betray a dishonest character that is wholly inconsistent with the high standards demanded of securities professionals" and "demonstrate that he cannot be entrusted with firm or customer money."[58]

Thus, we find many aggravating factors and no mitigating factors. We conclude that imposing a bar is appropriately remedial and not excessive or oppressive. Barring Clarke will protect the public by reducing his ability to cause further harm to colleagues or firms or to engage in misconduct when dealing with a customer or a security.[59]

B. We modify FINRA's restitution order.

As explained in FINRA's Sanction Guidelines, "[r]estitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss."[60] The Sanction Guidelines also provide that "[a]djudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct," and restitution should be calculated "based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence."[61]

We find that restitution is appropriate because Clarke's violations of Rule 2010 through conversion and material misrepresentations proximately caused quantifiable losses to Awasthi, Raparthi, and A.G. Clarke's use of the funds for unauthorized purposes proximately caused their loss of the funds, as he could not return funds he already spent by repaying preexisting creditors and paying other personal expenses. And Clarke's misrepresentations proximately caused the loss of the funds loaned by Awasthi, Raparthi, and A.G. to purchase tickets for resale, as they all testified that they would not have loaned the money (or in Awasthi's case, would have considered doing so only on different terms) if they had known how Clarke actually intended to spend it. Raparthi also testified that he provided additional money to Clarke based on Clarke's misrepresentation that he would place it in escrow pending the purchase of tennis licenses. Accordingly, this misrepresentation proximately caused Raparthi's loss of this additional money.

Ialeggio, Exchange Act Release No. 40028, 1998 WL 268957, at *3 (May 27, 1998) ("[T]hat [the applicant] abused only his employer's trust is not mitigative.").

57 *Saad*, 873 F.3d at 303.

58 *Saad*, 2015 WL 5904681, at *7.

59 *See Springsteen-Abbott v. SEC*, 989 F.3d 4, 9 (D.C. Cir. 2021) ("[I]f imposed to 'protect the public,' an industry bar is 'remedial.'" (quoting *Saad v. SEC*, 980 F.3d 103, 107-08 (D.C. Cir. 2020))); *see also Grivas*, 2016 WL 1238263, at *5 (noting that, even if particular misconduct does not involve a security, in the future it "could very well involve securities").

60 FINRA Sanction Guidelines, at 4 (General Principles Applicable to All Sanction Determinations No. 5).

61 *Id.*

We reject Clarke's argument that restitution is inappropriate because some of the loans are allegedly not enforceable under New York state law. The question before us is not whether the loans are enforceable under state law, but rather whether Clarke's violations of FINRA Rule 2010 proximately caused a quantifiable loss to identifiable persons.[62]

Although we sustain FINRA's decision to impose restitution, we reduce the amount of restitution FINRA ordered.[63] In particular, we deduct the interest Clarke paid to Awasthi, Raparthi, and A.G., because the purpose of restitution is to restore the status quo ante, not to provide the benefit of the bargain.[64] As modified, the total amount of restitution is $563,110.[65]

In all other respects, the terms of the NAC's restitution order shall remain the same. Clarke has not specifically challenged the other terms of the restitution order, so we deem any objection to them, including FINRA's imposition of prejudgment interest, forfeited.[66] In any event, given the time-value of money, imposing prejudgment interest is consistent with restoring the status quo ante.[67] We also sustain FINRA's determination that the restitution amount shall be offset by any documented payments or adjustments resulting from the civil action filed by Raparthi and A.G. against Clarke in New York Supreme Court.

Because this restitution is inherently proportional to the violation, it is remedial and not excessive, oppressive, or punitive.[68] Accordingly, we find that the modified sanction imposed on

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62 *See id.*

63 *See* Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2) (providing that we may "reduce" any sanction that "is excessive or oppressive").

64 *Cf. Ahmed*, 2017 WL 4335036, at *25 (upholding restitution order that "properly accounted for the principal invested by each investor as well as the principal returned and the interest paid to each investor" and thereby "restores victims to the position they would have been in had they not been subject to Respondents' misconduct").

65 This sum comprises $43,167 to Awasthi, $488,676 to Raparthi, and $31,267 to A.G.

66 *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring briefs to raise and argue "[e]ach exception to the findings or conclusions"); *Newport Coast Sec.*, 2020 WL 1659292, at *3 (finding that arguments not raised to the NAC or Commission were forfeited).

67 *See Newport Coast Sec.*, 2020 WL 1659292, at *15 (upholding restitution order that imposed prejudgment interest); *cf. Terence Michael Coxon*, Exchange Act Release No. 48385, 2003 WL 21991359, at *14 (Aug. 21, 2003) (noting that prejudgment interest should generally be awarded on disgorgement, in part "to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims"), *aff'd*, 137 F. App'x 975 (9th Cir. 2005). The NAC set forth the method for calculating the prejudgment interest owed, including the interest rate and the accrual dates. Clarke has not challenged that calculation method, and we see no reason to alter it. The NAC's calculation method should be applied to the restitution amounts as modified.

68 *See Newport Coast Sec.*, 2020 WL 1659292, at *15 (finding that restitution order "restore[d] customers to the position they would have been in if they had not been subject to [applicant's] misconduct" and therefore was "remedial and neither excessive nor oppressive");

(*continued*…)

Clarke is neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.[69]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

Ahmed, 2017 WL 4335036, at *25-27 (upholding restitution order that restores the status quo ante because it "redresses the harm Respondents caused"); *cf. United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011) (holding, in the context of the U.S. Constitution's Excessive Fines Clause, that restitution of "the amount of the victim's loss" is not excessive because it "is inherently proportional, insofar as the point of restitution is to restore the victim to the status quo ante").

[69] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97860 / July 10, 2023

Admin. Proc. File No. 3-20126

In the Matter of the Application of

MICHAEL JOSEPH CLARKE

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART, SETTING ASIDE IN PART, AND MODIFYING IN PART DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that FINRA's findings that Michael Joseph Clarke violated FINRA Rule 2010 by converting funds, making material misrepresentations, and issuing one bad check are sustained; that FINRA's findings that Clarke violated FINRA Rule 2010 by issuing three additional bad checks are set aside; and that FINRA's sanctions are sustained, except that the total restitution amount, excluding prejudgment interest, is reduced to $563,110, as described in the Commission's opinion.

By the Commission.

Vanessa A. Countryman
Secretary