SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63453 / December 7, 2010

Admin. Proc. File No. 3-13841

In the Matter of the Application of

MISSION SECURITIES CORPORATION
and
CRAIG M. BIDDICK

c/o Craig M. Biddick
P.O. Box 3038
Rancho Santa Fe, CA 92067

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Conversion and Misuse of Customer Securities

Registered securities association found that registered representative, while associated with member firm, caused member firm to convert and misuse customers' securities. *Held*, association's findings of violations and sanctions are *sustained*.

APPEARANCES:

*Craig M. Biddick, pro se* and for Mission Securities Corporation.

*Marc Menchel*, *Allen Lawhead*, and *Andrew J. Love*, for the Financial Industry Regulation Authority, Inc.

Appeal filed: April 1, 2010
Last brief received: July 12, 2010

## I.

Mission Securities Corporation ("Mission" or the "Firm"), formerly a FINRA member firm, and Craig M. Biddick, formerly a registered representative associated with the Firm, appeal from FINRA disciplinary action.[1] FINRA found that Mission and Biddick (together, "Applicants") converted and misused customer securities in violation of NASD Rules 2330 and 2110.[2] FINRA expelled Mission, barred Biddick in all capacities, and ordered Mission and Biddick to disgorge $38,946.06 in ill-gotten gains and to pay such proceeds, plus interest, to thirteen Mission customers. We base our findings on an independent review of the record.

## II.

The parties do not dispute the core facts in this matter: that Applicants transferred certain securities out of their customers' accounts – without notice or authorization – and then liquidated a portion of those securities to pay the Firm's operating expenses. The parties do dispute, however, the details surrounding why Applicants took these actions. Specifically, Applicants

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[1] On July 26, 2007, we approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although the investigation into this matter was initiated before the consolidation, the complaint was filed afterwards. References to FINRA, therefore, include NASD actions.

[2] As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as FINRA Rule 2010, effective December 15, 2008, and the relevant portions of NASD Rule 2330 were codified as FINRA Rule 2150, effective December 14, 2009. *See* FINRA Regulatory Notice 08-57 (Oct. 2008) (discussing NASD Rule 2110); FINRA Regulatory Notice 09-60 (Oct. 2009) (discussing NASD Rule 2330); *see generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23300 n. 4 (describing rules consolidation). Because the conduct at issue here occurred before the consolidation, we will continue to refer to the NASD Rules.

NASD Rule 2330 prohibits members or persons associated with members from "improper use of a customer's securities or funds." NASD Conduct Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." A violation of any NASD rule constitutes a violation of Rule 2110. *Stephen H. Gluckman*, 54 S.E.C. 175, 185 (1999). NASD Rule 2110 applies to Biddick through NASD General Rule 115 (recodified as FINRA Rule 140), which provides that persons associated with a member have the same duties and obligations as a member.

claim that the customers at issue had abandoned their accounts; that the stock Applicants appropriated from their customers was worthless; and that the Firm had been paying quarterly safekeeping fees on behalf of the customers' accounts. The record does not support these assertions.

## A. Background

Biddick entered the securities industry in July 1993 and was first associated with a firm called Centex Securities. A few years later, while still associated with Centex, Biddick founded Mission Securities. Biddick served as Mission's president, chief executive officer, chief financial officer, and compliance officer. Biddick was also registered with Mission as a general securities representative, general securities principal, and financial and operations principal.

### 1. Mission Acquires Another Firm's Customer Accounts

The customers at issue originally held accounts with Centex Securities, but NASD expelled Centex from the industry in 2002. Although Biddick was no longer associated with Centex when the firm was expelled and the record contains few details about what transpired, certain Centex customer accounts were apparently transferred to Mission, including approximately thirty to forty accounts that held, among other things, shares of Chartwell International, Inc. ("Chartwell") – the security at issue here. By February 2005, however, all but eighteen of these former Centex customers had sold their shares of Chartwell stock.

As for these last eighteen customers, Biddick testified that "I [could]n't get ahold of these 18 people." He explained that, "[w]hen I inherited these accounts, I was given no account documentation." Biddick claimed that he had only addresses and that, as a result, "any correspondence or statements that I sent to these people, it either got to them or it didn't get to them. I had no phone numbers at all to contact these people." Biddick reasoned that his inability to reach his customers meant that their accounts were "abandoned accounts, as far as I'm concerned."

Biddick claimed that the Chartwell stock these customers held was not only worthless, but was also incurring a $5 quarterly safekeeping fee that the Firm had to pay on the customers' behalf.[3] Applicants contend that "over the years" these fees "amounted to approximately $6500." Biddick testified that he eventually "got tired of the bleeding" and made the "business decision" in February 2005 to transfer the Chartwell shares out of the Firm's customer accounts and into an account owned by Mission.

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[3] Biddick testified that the fees originated with the Depository Trust Company, which charged Mission's clearing agent, North American Clearing, Inc. ("North American"), which in turn passed them along to Mission.

**2. Applicants Appropriate Their Customers' Shares**

On February 8, 2005, Biddick sent a facsimile to North American requesting that the clearing firm transfer "all positions [of Chartwell stock] to Mission Securities Segregated Account." North American, however, did not respond to Biddick's initial request, nor did North American respond to numerous subsequent written and oral requests. The record does not indicate why North American failed to respond, but Biddick testified that North American was "not the most efficient clearing firm one would hope for. Nothing got done unless you prodded them." Regardless of the reason for this failure to respond, North American finally complied approximately seven months later, on September 30, 2005, by transferring all 21,061 shares of the customers' Chartwell stock into Mission's "segregated account."

Mission's so-called "segregated account," however, was in reality a Mission proprietary account. A FINRA examiner explained during Applicants' hearing that "segregated accounts" are used for the exclusive benefit of customers, and that such accounts must comply with certain regulatory requirements, including holding the account at a bank and signifying in the account's title that the account is for the exclusive use for customers. Applicants' segregated account, according to the FINRA examiner, met none of these requirements. It was, instead, "a firm account."

Moreover, the record does not support Applicants' claim that the customers abandoned their accounts. Customers testified that they repeatedly spoke with Applicants about their accounts. Customer William Kroske, for example, testified that "Biddick called me [in the summer of 2005] and told me that there were fees [in my account], and I either needed to pay them, or we could sell stock and pay them that way." Customer Kathryn Enders similarly testified that she contacted Applicants after her account was transferred from Centex to Mission. She explained that Mission "charged so many fees . . . over the years [that] I had called from time to time saying, 'Why did I get this charge? Why did I get this charge when I don't do anything?'" A third customer, Jacob Krommenhock, testified that he called Mission after his shares were first transferred to Mission, but that he "was uncomfortable with whomever I was talking with. I've always felt that information was being withheld."

The evidence also contradicts Applicants' assertion that Chartwell stock was worthless at the time they decided to appropriate the stock from their customers. Although Chartwell was a thinly traded stock quoted on the Over-the-Counter Bulletin Board, trading data shows that the daily closing price for Chartwell was between $3.30 and $5 per share for several months before and after Mission acquired the shares from its customers.[4] In fact, Chartwell's closing price was $4.15 on the same day (July 20, 2005) that Applicants faxed one of their requests to North American about transferring the shares to Mission's account, and the closing price was $5 per share three days before the September 30, 2005 transfer finally occurred. Even Mission's own

[4] Prior to a one-for-ten reverse stock split in June 2005, the daily closing price of Chartwell shares had been in a proportionally similar range of between $0.30 to $0.45 per share.

quarterly account statement (in a section listing Mission's assets) valued Chartwell stock at $5 per share on the date Applicants acquired the stock. Curiously, however, a different page of the same account statement (in a section noting Mission's acquisition of Chartwell stock) labeled the Chartwell stock as "worthless" – an internal inconsistency that later raised concerns for FINRA examiners, as discussed below.

The evidence also fails to support Applicants' claims regarding the alleged $5 safekeeping fees. The record contains customer account statements for only one month, June 2005. Although those statements show that each customer incurred a $5 safekeeping debit related to their holdings of Chartwell stock, those fees total only $90, an amount inconsistent with Applicants' claim of incurring $6,500 in safekeeping fees.[5] The record also contains no evidence, other than Biddick's testimony, that Applicants paid these safekeeping fees on their customers' behalf. To the contrary, the account statement for Jacob Krommenhock shows that Mission liquidated part of Krommenhock's money market account to cover the $5 safekeeping fee. And Biddick himself acknowledged at his hearing that certain customers had sufficient cash balances in their account to cover future fees. In fact, when asked whether he had to seize a customer's stock to cover debits in the account, Biddick answered, "No, I didn't. But I wasn't going to sit and do this on a quarterly basis. I mean, let's just make the decision and get it done."

### 3. Customers Discover the Loss of Their Chartwell Stock

Applicants admit that neither Biddick nor any other Mission employee sought or obtained authorization from, or provided notice to, any of the Firm's eighteen customers in advance of the Chartwell shares being transferred out of the customers' accounts. Instead, Applicants' customers learned of the transfer from their account statements for the period ending September 30, 2005, which showed that their Chartwell stock had been delivered to an unspecified recipient and that the stock was "worthless."

Customer Kumar Narasimhan quickly complained. He testified that he had been following Chartwell stock regularly, "almost on – if not on a daily basis, on alternate daily basis I would be checking on the internet price" and saw that Chartwell was trading at approximately $3.50 or $4 per share a few days before Mission transferred the shares out of his account. He

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[5] Notably, the June 2005 account statements also show that Chartwell stock was worth $4 per share. Furthermore, even if we were to assume, *arguendo*, that the customer accounts had been incurring $90 in safekeeping fees every quarter since the beginning of 2002 (the year in which the customers' accounts were transferred from Centex), the total safekeeping fees would still amount to only $1,080 (*i.e.*, 3 years (or 12 quarters) *x* 18 customers *x* $5 safekeeping fee = $1,080).

therefore "could not understand" why the Chartwell stock had been designated as worthless.[6] Narasimhan contacted Mission Securities to ask what had happened, to which Biddick allegedly responded "that these penny stocks could lose value at any time." Biddick later explained during his disciplinary hearing that "I'm not a good market predictor, but in February [2005] I felt the stock was worthless. It had been worthless for years." Narasimhan did not understand this reasoning, however, "because the bulletin board on the internet was giving me a different story."

Unsatisfied with Biddick's explanation that his stock was worthless, Narasimhan filed a complaint with NASD on November 30, 2005, in which he wrote that "I have not been able to get a straight answer from brokerage and they never sought my permission to declare the stocks worthless." Narasimhan also wrote that "[t]he objective appears to be to defraud the investor at the perfect time appropriate." Narasimhan filed a similar complaint with the Commission.

A little more than two weeks after Narasimhan filed these complaints, Biddick returned Narasimhan's shares. Biddick also wrote to Narasimhan, in a letter dated December 22, 2005, that "your Chartwell stock has very little or no value. When a stock such as Chartwell trades 100 shares a month or less, it is viewed by many in the securities industry as worthless." Biddick added that he "would like nothing more than to assist you in selling your shares," but "the stock has little or no volume and is difficult at best to sell."

Customer Krommenhock similarly telephoned Mission to ask why his Chartwell stock had been removed from his account. Krommenhock testified that "whoever answered the phone" explained to him that "[t]here was no volume [in Chartwell], and it was worthless." Krommenhock nevertheless asked Mission to return his stock, to which the person who answered the phone allegedly responded, "that could be done, but there might be a one-time fee involved." In January 2006, Applicants returned Krommenhock's stock, without charging a one-time fee.

Two other customers testified that they also noticed that their Chartwell shares had been designated as worthless, but there is no record of them contacting Mission to inquire about the change in valuation. As customer Kroske testified, "hell, I don't know enough, but I looked at it and I thought worthless must mean that maybe the company went out of business." A few months later, however, Kroske saw that the stock had been put back in his account, valued at $3 per share. Customer Enders similarly testified that, when she saw her account statement listing Chartwell stock as worthless, she "had no reason other than to trust that I was being given accurate information and . . . my understanding was what worthless meant was that it was – it

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[6] Other customers also testified about following the value of Chartwell stock. Kroske, for instance, testified that he contacted Biddick at some point about selling his Chartwell stock when he saw that it was valued at $4 per share, but he "never did hear back." Enders similarly testified that, after noticing her Chartwell stock trading at $4 per share, she called Mission "a couple times and wanted to sell my Chartwell stock, and I was told . . . something to the effect of 'Join the club. Nobody wants to buy Chartwell stock, so there's nobody to sell it to. So tough luck.'"

was of no value, so it's gone." Enders' shares were eventually returned in April 2007. A fifth customer, Gary Duggins, had his shares returned in October 2005 after he requested that they be transferred to an account at a different broker. In total, Biddick returned 4,087 Chartwell shares to these five customers.

#### 4. Applicants Liquidate Their Customers' Stock

As for the Chartwell shares that Applicants did not return to their customers, Applicants began selling those shares out of the Firm's account, without notice to the customers. Applicants then used some of the proceeds from those sales to pay the Firm's general business expenses. For instance, on December 19, 2005 – three days before Biddick wrote to Narasimhan that his shares were of "very little or no value" and "difficult at best to sell" – Applicants sold 500 shares of Chartwell out of the Firm's account at $3.50 per share. Applicants continued to sell Chartwell shares, including another 500 shares on the same day Biddick wrote to Narasimhan and another block of 500 shares a day later, all at $3.50 per share. In total, Applicants liquidated more than half their customers' Chartwell shares – in twenty-five separate sale transactions of 500 shares each between December 19, 2005 and March 3, 2006 at prices ranging from $2.25 to $4 per share – for a total of $38,946.06. Biddick testified that he sold these shares "as a lark" and that he stopped selling the shares only after FINRA asked him to do so.

### B. FINRA's Investigation

In March 2006, FINRA staff conducted an examination of Mission Securities and quickly noticed that the Firm's securities holdings had jumped nearly 600% between June 2005 (when the Firm had reported holdings of $21,144) and September 2005 (when the firm reported holdings of $126,618). A FINRA examiner testified that Biddick claimed during FINRA's examination that one of the Firm's stock holdings had "hit." FINRA staff also noticed the internal inconsistency in the Firm's quarterly account statement in which, as noted above, one portion of the account statement indicated that the Firm had acquired 21,061 shares of "worthless" Chartwell stock, while the portion of the same account statement listing the Firm's assets valued Chartwell stock at $5 per share – all as of the same day, September 30, 2005.

Staff asked Biddick about the source of these shares, and, according to a FINRA examiner, Biddick responded that it "was journaled from customer accounts for tax purposes." When FINRA staff asked Biddick for evidence that the customers had given their consent to the transactions, Biddick provided FINRA with some letters of authorization, but none that had anything to do with the Chartwell transaction. The only other document Applicants produced was a copy of the facsimile Biddick sent to North American asking that the customers' Chartwell shares be transferred into Mission's account.

FINRA subsequently sent Mission a more formal, written request to explain the circumstances around the Chartwell transactions. In that request, FINRA asked whether Biddick determined Chartwell stock was worthless or, if not, who did determine the stock was worthless.

Biddick responded by letter on September 6, 2006 that "I determined Chartwell was essentially worthless. I determined it was worthless [when the Chartwell stock price] went to $ .30 in July 2003 on virtually no volume."[7] He added: "No one at Mission Securities contacted the customers. These accounts had been dormant and inactive since they were transferred to Mission Securities in March 2001." In that same response, Biddick admitted that he was aware Chartwell may have had value, but explained that, "[w]hen I saw [Chartwell] had value on paper I didn't believe the data was valid. I dismissed it as a bad quote and carried the position on the firm's books as zero."

More than a year after FINRA began investigating Applicants, Biddick finally attempted to contact his customers about the appropriation of their property. At the suggestion of his former attorney, Biddick sent his customers a letter in which, according to Biddick's own testimony, he informed them simply: "Please contact your broker. We have important information about your account." The following year, again at the suggestion of his lawyer, Biddick attempted – albeit unsuccessfully – to return his customers' Chartwell stock. Biddick's attempt was allegedly "rebuffed" by the Firm's then-clearing agent, Sterne Agee Clearing, because, Biddick testified, "it's a third party transfer prohibited by the Patriot Act." Biddick added that, "I'd love to have this thing over and done with, give them back their money, give them back their stock, and back at the clock."

FINRA filed a complaint against Applicants on February 4, 2008, and after a two-day hearing in October 2008, a FINRA hearing panel (the "Hearing Panel") found that Applicants converted and misused customer securities in violation of NASD Rules 2330 and 2110. The Hearing Panel expelled Mission and barred Biddick for this misconduct. Applicants appealed to the National Adjudicatory Council ("NAC"), which affirmed the Hearing Panel's finding that Applicants violated NASD Rules 2330 and 2110 by converting and misusing their customers' securities.[8] This appeal followed.

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[7] In contradiction to this response, Applicants now claim on appeal that "the 'worthless' designation was assigned by the [Depository Trust Company], not [Applicants] or its' [sic] clearing agent." Applicants also claim on appeal that, "[a]t the time the decision to transfer the shares was requested (early February 2005) the total aggregate value for all the shares was $582.00" (which translates into a value of less than $0.03 per share). Applicants provide no support for any of these claims. Instead, as discussed herein, the record shows that Chartwell stock had value during the relevant time and that Applicants took advantage of this value by liquidating a portion of their customers' shares for a profit of nearly $39,000. *See supra* Section II.A.4.

[8] The Hearing Panel also found that Biddick caused Mission to operate with insufficient net capital in violation of Section 15(c) of the Securities Exchange Act of 1934, Exchange Act Rule 15c3-1, and NASD Rule 2110, but did not impose any additional sanctions for this misconduct. The Hearing Panel declined to address FINRA's allegations that Applicants

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## III.

Pursuant to Section 19(e) of the Exchange Act, we will sustain FINRA's decision if the record shows by a preponderance of the evidence that Applicants engaged in the alleged violative conduct and that FINRA applied its rules in a manner consistent with the purposes of the Exchange Act.[9] Based on our independent review of the record, we find that the record amply supports FINRA's findings that Applicants violated NASD Rules 2330 and 2110.

Applicants admit that they intentionally transferred 21,061 shares of their customers' Chartwell stock into Mission's account without prior notice to, or approval from, the customers. Applicants also admit that, several months after appropriating their customers' shares, Applicants began liquidating those shares – again without notice – and used a portion of the proceeds to pay for Mission's operating expenses.

Despite these admissions, Applicants contend that their conduct did not amount to conversion because they never intended "to permanently deprive any customer the use of their funds." Applicants claim that they "made every effort to return these shares to these customers," and that the proceeds from the liquidated Chartwell stock "reside with SIPC Receiver of North American Securities."[10] "[I]t can't be emphasized more," Applicants claim, that "the customers have not been harmed in any way by their own admission." We disagree.

The evidence shows that Applicants not only intended to permanently deprive their customers of their property, but did, in fact, deprive their customers of their property. Applicants admit that they took and liquidated their customers' securities to pay operating expenses, without notice or approval. Thirteen customers are still without access to their Chartwell shares, or to the

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[8] (...continued)
failed to alert customers and potential customers that their telephone calls were being recorded by Mission in violation of NASD Rules 3010(b)(2) ("Taping Rule") and 2110. On appeal, the NAC declined to address the Hearing Panel's findings regarding Applicants' alleged net capital violations, stating that, "[i]n light of our findings that respondents converted and misused customer securities in violation of Rules 2330 and 2110, we need not decide whether Biddick caused Mission to be in violation of its net capital requirement." Therefore, although Applicants devote a significant portion of their briefs to arguing that these additional allegations were false, none of these allegations are at issue on appeal.

[9] 15 U.S.C. § 78s(e).

[10] In 2008, a federal court appointed a receiver for North American in connection with a complaint in which the Commission alleged that certain defendants had engaged in illegal activities, including the misuse of customer funds. *See SEC v. N. Am. Clearing, Inc.*, Litigation Rel. No. 20602 (May 28, 2008), 93 SEC Docket 6175 (noting that the Commission had obtained an order appointing a receiver over North American Clearing).

profits Applicants made from selling those shares, and have been so for years. Although Applicants claim they attempted to return to their customers the Chartwell stock Applicants had not yet liquidated, they did so unsuccessfully, two and one half years after FINRA began its examination of Mission and just ten days before Applicants' disciplinary hearing began. Such attempts to undo their misconduct do not negate Applicants' original conversion.[11] Even if we concluded that no customers were harmed, which we do not, Applicants' conduct still "flouts the ethical standards to which members of [the securities] industry must adhere."[12]

Applicants' assertion that their customers did not complain about Applicants' misconduct is similarly without merit. FINRA's "power to enforce its rules is independent of a customer's decision not to complain."[13] Moreover, customers did complain. Several customers questioned why Mission had transferred their Chartwell stock out of their accounts, and customer Narasimhan went so far as to file a formal complaint with both FINRA and the Commission that Applicants were attempting to defraud him.

Applicants alternatively rationalize their appropriation of their customers' Chartwell shares by asserting (for the first time in their Reply Brief) that, although they defrauded their

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[11] *See Joel Eugene Shaw*, 51 S.E.C. 1224, 1225-26 (1994) (finding that representative converted customer funds even though representative repaid those funds after his firm discovered the misconduct); *Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23326 n.93 (rejecting applicants' argument that there can be no violation where no one was harmed by applicants' misconduct).

[12] *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996) (sustaining bar although "the misconduct did not involve direct harm to customers"); *cf. Donner Corp. Int'l*, Exchange Act Rel. No. 55313 (Feb. 20, 2007), 90 SEC Docket 11, 41 n.91 (affirming bar and expulsion despite applicants' claims that "there are no customer complaints and no evidence that anyone was harmed by the two [misleading] reports"); *Barr Fin. Group, Inc.*, 56 S.E.C. 1243, 1262 (2003) (finding cease-and-desist order, bar, and revocation of registration "amply warranted" where, "[a]lthough there is no evidence that any customer lost money as a result of respondents' violations, their actions clearly posed a threat to the investing public"); *Coastline Fin., Inc.*, 54 S.E.C. 388, 396 (1999) (affirming expulsion of firm and permanent bar of president where, "[a]lthough, as the NASD noted, there was no evidence of customer harm, Respondents raised hundreds of thousands of dollars by selling securities through outright falsehoods to forty-eight investors").

[13] *Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000), *pet. for review denied*, 47 F. App'x 198 (3d Cir. 2002) (Table); *see also Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22038 n.23 ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct.").

customers, they did so for the Firm's benefit.[14] As they explain, "Biddick has argued throughout the proceedings that he did not commit what amounts to 'honest services fraud' because his fraud was in the corporate interest (foregoing ongoing safekeeping fees) and therefore was not 'self-dealing' . . . ." In support, Applicants point to the recent U.S. Supreme Court decision in *Skilling v. United States*.[15] FINRA, however, neither accused nor charged Applicants with honest services fraud.[16] Furthermore, neither *Skilling*, nor any other authority of which we are aware, supports Applicants' broader proposition that they are entitled to defraud their customers so long as it is in the Firm's best interest.

Nor does the record support Applicants' contention that their actions were done to avoid safekeeping fees. As discussed earlier, the evidence shows that, to the extent Mission was incurring fees, it was passing them along to its customers, and that at least some customer accounts had sufficient funds to cover future $5 safekeeping fees. Moreover, the record contains evidence of only $90 in total fees related to the customers' Chartwell stock, substantially less than the almost $39,000 Applicants netted from liquidating their customers' shares.

We also reject Applicants' claim that the appropriation of their customers' Chartwell stock conformed with "known standard industry practice with respect to worthless securities." In support of their assertion, Applicants introduced two exhibits, which they claim represent "industry practice as it relates to worthless securities."[17] One exhibit is a letter from Southwest Securities, Inc. notifying a customer that his position in a security was being "deleted from your account" because "[t]he shares have been deemed worthless due to bankruptcy." The other exhibit is an email from Sterne Agee instructing Mission to notify its clients that their accounts were "currently holding a position deemed to be non-transferable for the previous six years and is now eligible for destruction by DTCC." If anything, these documents show that Applicants failed to comply with the very industry standard they claim exists, as both exhibits suggest that

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[14] Because Applicants raise this argument for the first time in their Reply Brief, we do not have the benefit of FINRA's counter-arguments. As discussed herein, however, Applicants' arguments are without merit and do not warrant additional briefing.

[15] 130 S. Ct. 2896 (June 24, 2010).

[16] The U.S. Code criminalizes the use of the mails or wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341 (mail fraud); § 1343 (wire fraud). The honest services statute, in turn, defines "the term 'scheme or artifice to defraud'" to include "a scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346.

[17] We allowed Applicants to introduce these two exhibits on appeal, along with eleven other exhibits, when we granted Applicants' Motion to Adduce Additional Evidence. *Mission Sec. Corp.*, Admin. Proc. File No. 3-13841 (determining "as a discretionary matter to admit all the documents Applicants seek to adduce").

customer notice is a central component of this alleged industry standard. Biddick, in fact, was expressly asked during his disciplinary hearing whether the industry standard that these exhibits supposedly showed included a responsibility to notify clients that their stock had been deemed worthless and was being removed from their accounts. Biddick answered, "Yes, it would. Okay? And I'll fall on my sword. I made a mistake. I should have notified them in writing."

In any event, the record does not support Applicants' underlying claim that the Chartwell shares were worthless at the time Applicants acquired the shares. Transaction data shows that the closing price for Chartwell was between $3.30 and $5 per share for the several months before and after Mission acquired the shares from its customers, and Chartwell's own account statement shows Chartwell stock to have been valued at $5 per share as of the date Applicants acquired their customers' securities.[18]

The record similarly contradicts Applicants' claim that the clients had abandoned their accounts. Several customers testified that they had conversations with Biddick or other Mission employees about their accounts, and Biddick acknowledged that mail he sent to the customers was generally not returned as undeliverable. Moreover, even if some of Applicants' customers had abandoned their accounts, state law establishes specific requirements that holders of abandoned property must take when dealing with such property, most notably escheating the property to the state, rather than keeping the property for oneself, as Applicants did here.[19] Applicants took none of these steps, and their only explanation for why they did not is an unsigned, handwritten note on stationary "From the desk of Craig Biddick" dated September 26, 2008 – the first day of Applicants' disciplinary hearing – which purports to summarize a telephone conversation between Biddick and a Sterne Agee employee named "Eric," who, according to the note, told Biddick that Sterne Agee "never escheats to the state."

Applicants also argue (for the first time in their Reply Brief) that "FINRA's charge against Respondents is too vague, poorly defined, open to interpretation and is based on old statutes."

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[18] Applicants claim that the FINRA examiner testified during the hearing that the Chartwell stock was worthless. This is incorrect. The examiner testified consistently that Chartwell stock had value, stating, for example, that "we checked VISTA, and we checked Bloomberg to see if this security, in fact, had [a] price and had a volume. And it did." In the portion of the transcript to which Applicants cite, the examiner was only summarizing the portion of the Firm's account statement indicating that the shares were worthless, and she noted that this was internally inconsistent with the portion of the same account statement valuing the stock at $5 per share.

[19] *See, e.g.*, Cal. Civ. Proc. Code § 1500 *et seq.*; Accounts-Abandoned or Unclaimed, http://www.sec.gov/answers/escheat.htm (noting that "[a]ll states require financial institutions, including brokerage firms, to report when personal property has been abandoned or unclaimed" and providing that, "[b]efore a brokerage account can be considered abandoned or unclaimed, the firm must make a diligent effort to try to locate the account owner").

Applicants provide no details for this claim, other than to assert that the Supreme Court in *Skilling* "did find" that the "honest services fraud" statute "was unconstitutionally vague and ambiguous." To the contrary, however, the Supreme Court expressly avoided "the due process concerns underlying the vagueness doctrine" in *Skilling* by interpreting the honest services statute as applicable only to bribes and kickbacks.[20] Moreover, the constitutionality of that statute is irrelevant here, as this matter does not involve honest services fraud.

Instead, the standard we use for determining whether pleadings in an administrative proceeding are sufficient is whether "the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation."[21] That standard is met here, as FINRA's complaint specifies that Applicants violated NASD Rules 2330 and 2110 by acquiring and then liquidating their customers' stock without providing notice or compensation. Applicants, who were represented by counsel at their hearing, had a full opportunity to defend themselves against these core factual allegations and have admitted to all of them.[22]

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[20] 130 S. Ct. at 2931 (examining the scope of the statute concerning "honest services fraud" (18 U.S.C. § 1346) and concluding that the statute is limited to misconduct involving bribes and kickbacks).

[21] *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979) (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938)). To the extent that Applicants are claiming FINRA denied them due process, we note that courts have held that self-regulatory organizations such as FINRA are not state actors for purposes of due process claims. *See, e.g., Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (rejecting due process claim by concluding that "NASD is a private actor, not a state actor"), *cert. denied*, 531 U.S. 1069 (2001); *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979) (concluding that NASD is not a state agency); *see also, e.g., Timothy H. Emerson, Jr.*, Exchange Act Rel. No. 60328 (July 17, 2009), 96 SEC Docket 18882, 18892 (noting that "as a general matter, self-regulatory organizations ('SROs') are not state actors and thus are not subject to the Constitution's due process requirements").

[22] *See, e.g., John M.E. Saad*, Exchange Act Rel. No. 62178 (May 26, 2010), 98 SEC Docket 28591, 28598 (finding that applicant had sufficient notice where he "was represented by counsel since at least the time FINRA issued its complaint [and] had a full opportunity to defend himself against these factual allegations, which he admitted"), *appeal filed*, No. 10-1195 (D.C. Cir. July 23, 2010); *William C. Piontek*, 57 S.E.C. 79, 90-91 (2003) (finding that respondent who "understood the issue[s]" and "'was afforded full opportunity' to litigate" them had sufficient notice of the charges against him (quotations and citations omitted)); *Jonathan Feins*, 54 S.E.C. 366, 378 (1999) ("Administrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.").

For these reasons, we conclude that Applicants misused, and ultimately converted, their customers' securities in violation of NASD Rule 2330. As FINRA accurately observed, "[a] clearer prima facie case of misuse and conversion is difficult to imagine." We similarly conclude that Applicants' actions were contrary to the just and equitable principles of trade mandated by NASD Rule 2110.

## IV.

Applicants allege that a wide range of procedural improprieties occurred in this matter. Most of these claims relate to Applicants' assertion that FINRA's proceedings against them were a "mechanism to silence [Applicants'] opposition" to FINRA's creation and policies. Applicants claim that FINRA – and FINRA's Los Angeles office in particular – have "held an animus toward [Biddick] and his firm" and have "a well known history of uneven enforcement with respect to small firms." Applicants assert that FINRA threw "allegation after allegation at Respondents in order to wear Respondents down, and the moment one specious investigation was closed a new one seemed to begin." Applicants claim this harassment continued into their disciplinary hearing, where the hearing officer overseeing their disciplinary hearing (the "Hearing Officer") allegedly "came into and conducted the hearing with overt and unjustified prejudice towards [Applicants]."

We address Applicants' broad claims against FINRA first, and we then turn to Applicants' more specific claims about the Hearing Officer.[23]

### 1. FINRA's Alleged Animus and Impropriety

Applicants' primary complaint against FINRA revolves around allegations that the self-regulatory organization engaged in selective prosecution against Applicants. Applicants claim that FINRA's 2006 examination of Mission "was anything but routine" and allege, without evidentiary support, that FINRA instead undertook an examination of Mission "to intimidate Respondent's [sic] in a continuing unwarranted pattern of harassment" because Applicants had joined The Financial Industry Association, which "had as it's [sic] mission and purpose of [sic] solidifying the interests and representations of small Broker/Dealers."

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[23] Applicants make a passing reference to also being "denied their Constitutional Sixth Amendment Rights." Sixth Amendment protections, however, "are explicitly confined to 'criminal prosecutions.'" *Austin v. United States*, 509 U.S. 602, 608 (1993) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). This is not a criminal prosecution, and Applicants neither explain which right under the Sixth Amendment they were denied nor describe how they were deprived of that right. Our own review of the record uncovered no evidence of any Sixth Amendment violations. And as noted above, Applicants were represented by counsel during the FINRA proceedings.

To prevail on such a claim, Applicants must prove they were "singled out for enforcement action while others similarly situated were not and that [their] selection as a target for enforcement was based on an unjustifiable consideration such as [] race, religion, national origin, or the exercise of constitutionally protected rights."[24] Here, the record shows only that FINRA conducted a fair exam, during which it uncovered Applicants' violation of NASD Rules 2330 and 2110. And to the extent Applicants are arguing malicious prosecution, the record shows only that FINRA had ample cause to bring this action against Applicants.[25]

Applicants also complain that FINRA, along with the Commission, failed to investigate purported price manipulation of Chartwell stock. The relevance of this allegation is unclear. Applicants liquidated their customers' Chartwell shares over several months, yet complain only about manipulation with respect to "a single trade of 100 shares, thirty days after the [Chartwell] transfer took place." Moreover, Applicants provide no evidence that any price manipulation took place, other than to argue – without documentation – that Chartwell shares traded with a $2 spread between the bid and offer price on that single day. Whether or not market manipulation took place, Applicants netted $38,946 from the improper sale of their customers' stock. Applicants cannot avoid blame for their failure to comply with NASD rules by blaming

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[24] *Scott Mathias*, Exchange Act Rel. No. 61120 (Dec. 7, 2009), 97 SEC Docket 23228, 23243-44 (rejecting applicant's claim that NASD engaged in selective prosecution); *see also, e.g., Fog Cutter Capital Group Inc. v. SEC*, 474 F.3d 822, 826 (D.C. Cir. 2007) (holding that, to make a claim of selective prosecution against NASD, respondent must establish that he was part of a protected class under the Equal Protection Clause, "that prosecutors acted with bad intent, [and] that similarly situated individuals outside the protected category were not prosecuted" (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996))); *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992) (setting forth elements of selective prosecution claim); *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13856 n.44 (same), *appeal filed*, No. 09-1550 (3d Cir. Feb. 24, 2009); *CMG Inst'l. Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13813 n.34 (same); *Robert Radano*, Investment Advisers Act Rel. No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7510 n.74 (same).

[25] *Cf. Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006) (stating that a malicious prosecution claim under 42 U.S.C. § 1983 requires a lack of probable cause); *HMS Capital, Inc. v. Lawyers Title Co.*, 12 Cal. Rptr. 3d 786, 793 (Cal. Ct. App. 2004) (stating that a plaintiff establishes a claim of malicious prosecution under California law by showing that an action "(1) was commenced by or at the direction of the defendant, or the defendant continued to prosecute it after discovering it lacked probable cause, and it was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice").

regulators, nor can Applicants diminish the wrongfulness of their actions by claiming that others also engaged in wrongdoing.[26]

Applicants also argue (for the first time in their Reply Brief) that the disciplinary action should be set aside because FINRA and the NAC violate the separation of powers under the U.S. Constitution. In support, Applicants point to the recent U.S. Supreme Court decision, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, in which the Supreme Court held that certain limitations on the removal of members of the Public Company Accounting Oversight Board ("PCAOB") contravened the Constitution's separation of powers.[27] According to Applicants, FINRA is similarly flawed because it "is authorized by and overseen by the Securities [and] Exchange Commission, much like and in the same manner as the Public Company Accounting Oversight Board." Applicants thus claim that "the same infirmities that plague PCAOB plague FINRA" and that, "for this reason alone and because of the blatant abuse of unchecked power wielded by FINRA[,] their order should be overturned."

The Supreme Court's decision in *Free Enterprise Fund*, however, is not as broad as Applicants contend. The Supreme Court held only that the provisions regarding removal of PCAOB members were unconstitutional, but that all other aspects of the PCAOB should remain in effect.[28] Moreover, *Free Enterprise Fund* is not applicable here. FINRA does not exercise federal executive power, and, in fact, the Supreme Court expressly distinguished the PCAOB from self-regulatory organizations when reaching its decision.[29] FINRA is instead registered

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[26] *Cf. Janet Gurley Katz*, Exchange Act Rel. No. 61449 (Feb. 1, 2010), 97 SEC Docket 25074, 25101 ("Katz cannot shift the blame for her violations to others or claim that others' misconduct somehow excuses her own misdeeds"), *appeal filed*, No. 10-1068 (D.C. Cir. Mar. 26, 2010); *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8141 (holding that an applicant "cannot shift the blame for his violations to his firm"); *Donner Corp. Int'l*, Exchange Act Rel. No. 55313 (Feb. 20, 2007), 90 SEC Docket 11, 37 (holding that "a broker-dealer cannot shift its responsibility for compliance with applicable requirements to the NASD"); *Barry C. Wilson*, 52 S.E.C. 1070, 1073 n.12 (1996) (noting that "failings on the part of certain firm personnel do not excuse misconduct by others").

[27] __ U.S. __, __, 130 S. Ct. 3138, 3161 (2010).

[28] *Free Enter. Fund*, 130 S. Ct. at 3161-62 (holding that "[t]he Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions excised" (citations omitted)).

[29] *Id*. at 3147 ("Unlike the self-regulatory organizations . . . the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry.").

under, and operates subject to, Section 15A of the Exchange Act,[30] which the Supreme Court has noted, "supplements the [S]ecurities and Exchange Commission's regulation of the over-the-counter markets by providing a system of cooperative self-regulation."[31] Although Section 15A authorizes the SEC to exercise a "significant oversight function" over registered associations,[32] self-regulatory organizations, such as FINRA, are not "Government-created, Government-appointed entit[ies]."[33] FINRA, therefore, is not "contrary to Article 2 of the Constitution's vesting of executive power in the President," as Applicants contend.

Applicants also complain more specifically about FINRA's actions during the hearing itself. For example, Applicants contend that FINRA, "in an effort to confuse the Hearing Panel[,] proffered exhibits that did not support any allegation and were consequently stricken from the record." Applicants, however, do not explain – nor can we find any evidence that suggests – how these proffered exhibits prejudiced their case, particularly given that the Hearing Officer ruled in Applicants' favor and declined to introduce the documents into evidence.

Applicants also complain that the testimony of a FINRA examiner during their hearing was "replete with inaccuracies and misstatements." Specifically, Applicants claim that the examiner misstated the net capital rule during cross-examination. We have no found evidence, however, of misstatements by the examiner in the record.[34] Moreover, the net capital rule is not at issue on appeal, as FINRA declined to make findings with respect to the rule in its decision.

Applicants also argue that the examiner lied when she testified that Biddick had told FINRA staff he had journaled Chartwell stock for tax reasons. Such a claim is not relevant. The record provides no definitive evidence of what Biddick first told FINRA staff (such as a tape recording), and our finding that Applicants misused customer securities does not depend on this testimony by the examiner.

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[30] 15 U.S.C. § 78*o*-3.

[31] *United States v. NASD*, 422 U.S. 694, 700 n.6 (1975) (statutory citations omitted).

[32] *Id.*

[33] *Free Enter. Fund*, 130 S. Ct. at 3142 (contrasting "expansive powers" granted to the Public Company Accounting Oversight Board with the more limited powers granted to self-regulatory organizations).

[34] In fact, in the one passage to which Applicants cite, the examiner made no statement about the net capital rule at all. She was simply responding to a question from Applicants' counsel about the rule, to which she answered that she did not understand his question and that "I would have to be able to see the rule, actually, to be able to answer that, quite honestly."

**2. The Hearing Officer's Alleged Bias**

We next turn to Applicants' claim that the Hearing Officer displayed "[u]nquestionable overt prejudice" during the hearing. The Applicants hang their assertion of bias largely on a single statement from the Hearing Panel's decision, which stated: "After Centex was expelled from FINRA membership for sales practice violations, Biddick's brother and certain other Centex representatives became associated with Mission."

Applicants claim that "[n]owhere in the transcript has anyone testified that my brother worked for Mission." Applicants' argument is without merit. To prevail on a claim of adjudicatory prejudice, Applicants must meet two prongs: the Hearing Officer's supposed bias must "stem[] from an extrajudicial source *and* result[] in a decision on the merits based on matters other than those gleaned from participation in a case."[35] Applicants meet neither prong. The source of the Hearing Panel's statement, for example, appears to have been Biddick's own testimony. Biddick expressly stated that his brother had an interest in Mission at its inception and that Biddick bought out that interest "around" 1999. Thus, the most that can be said about the Hearing Panel's statement is that the timing of the brother's association may be wrong: Biddick claims his brother was associated with Mission sometime in the 1990s, while the Hearing Panel's decision states it was after Centex was expelled from FINRA membership, which occurred in 2002. But even Applicants are not entirely consistent about when Biddick's brother was associated with the Firm.[36]

Regardless, the Hearing Panel's statement has no bearing on any decision on the merits in this matter, as the statement served only as background in the Hearing Panel's discussion about how Mission came to be formed and was made only in connection with the panel's discussion of the alleged Taping Rule violations, violations that both the Hearing Panel and the NAC declined to reach because of Applicants' "clear violation of Rules 2330 and 2110."

Applicants claim the Hearing Officer also exhibited bias when he "deliberately and with malice quashed most of Respondents [sic] efforts to introduce vital documentation of facts as evidence and testimony from any Respondents [sic] witness." Our review of the record, however, uncovers no evidence of improper conduct by the Hearing Officer. "[A]dverse rulings,

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[35] *Epstein*, 95 SEC Docket at 13860-61 (emphasis added).

[36] As already noted, Biddick testified at his hearing that his brother was associated with Mission "around" 1999. In their opening appellate brief, however, Applicants assert that the brother "dropped his association with the, then [sic] pending approval of the Broker/Dealer in 1997." In their reply brief, Applicants claim that "Biddick's brother was affiliated with Mission Securities for a brief time in 1996."

by themselves, generally do not establish improper bias,"[37] and the Hearing Officer gave Applicants repeated opportunities to introduce relevant evidence, including after Applicants failed to adhere to the Hearing Officer's pre-hearing scheduling order. Moreover, we have allowed Applicants to introduce all the documents they sought to adduce on appeal, and "our *de novo* review, in which we have carefully considered all of the evidence in the case and the transcripts of the proceedings below, 'dissipates even the possibility of unfairness.'"[38]

We similarly find no evidence of bias regarding the Hearing Officer's decision not to allow Applicants' proposed witness. Applicants claim, for example, that the Hearing Officer ruled that certain FINRA officials (whom Applicants wished to call as witnesses) were not subject to FINRA's jurisdiction. To the contrary, the Hearing Officer expressly agreed with Applicants that he had the "inherent authority" to order FINRA employees to testify if they had relevant, material, and non-cumulative information. The Hearing Officer instead denied Applicants' request to call the witnesses because Applicants proffered only that the witnesses would testify about how they had either "declined to advise Respondents about how to comply with the Taping Rule" or told Applicants where to find recording equipment. The Hearing Officer reasonably concluded that none of this proposed testimony was relevant and, to the extent that the evidence might be relevant, Applicants' own "motion makes it clear that Biddick himself is fully competent to testify as to their content, since he was directly involved in each communication."[39] Moreover, because FINRA ultimately declined to make findings regarding Applicants' alleged failure to comply with the Taping Rule, the FINRA officials' proposed testimony has no relevance to the merits of this appeal.

Applicants also sought to call John Busacca, an employee of North American Clearing, to testify as an expert. The Hearing Officer denied their request and, according to Applicants, allegedly stated, while off the record, that "I know Mr. Busacca, and we don't want to hear from Mr. Busacca in this case." Applicants now argue that the Hearing Officer's decisions were infected by a conflict of interest because the Hearing Officer presided as the hearing officer in a subsequent, unrelated disciplinary proceeding against Busacca.[40] Applicants contend that the "Hearing Officer should have disclosed this conflict of interest and recuse [sic] himself

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[37] *Mitchell M. Maynard*, Advisers Act Rel. No. 2875 (May 15, 2009), 95 SEC Docket 16844, 16856 (internal quotations and citation omitted).

[38] *Epstein*, 95 SEC Docket at 13862 (quoting *Robert Tretiak*, 56 S.E.C. 209, 232 (2003)).

[39] *See supra* note 26 and accompanying text (noting that Applicants cannot shift their failure to comply with FINRA rules to regulators).

[40] *See generally John B. Busacca, III*, Exchange Act Rel. No. 63312 (Nov. 12, 2010), __ SEC Docket ___ (sustaining FINRA's finding that Busacca failed to exercise reasonable supervision over North American's back-office operations).

immediately." The mere fact that the Hearing Officer was to preside in Busacca's disciplinary hearing on unrelated violations, however, does not evidence bias in this case against Applicants.

To the contrary, the record indicates that the Hearing Officer's exclusion of Busacca's proposed testimony was a reasonable application of his power to exclude irrelevant or immaterial evidence.[41] For example, Applicants contend that Busacca would have testified about the handling of worthless securities and that "[i]n a perfect world Respondent's [sic] were entitled to have the debits it paid on behalf of clients that were charged by the clearing firms credited back." As discussed earlier, however, Chartwell was not a worthless security and Applicants were not seeking credit for fees. Applicants instead were seizing and then liquidating their customers' shares to pay firm operating costs, and doing so without notice or authorization.

Applicants claim Busacca would also have testified "with respect to returned mail" from the customers and about "the abandoned accounts and the problems caused by such abandonment." As noted earlier, however, the evidence indicates that customers had not abandoned their accounts, and, regardless, state law requires holders of abandoned property to take certain steps that Applicants did not take. Applicants also contend that Busacca would have testified that Applicants' proceeds from selling their customers' shares resided with a receiver and that, as a result, "expos[ed] not one of the firms' [sic] customers to any risk or harm." As already discussed, however, Applicants did cause their customers harm by depriving them of access to their securities or proceeds from Applicants' unauthorized liquidation of Chartwell shares, regardless of whether some proceeds of Applicants' sales may reside with a receiver.[42]

## V.

FINRA expelled Mission, barred Biddick in all capacities, and ordered Mission and Biddick to disgorge $38,946.06 in ill-gotten gains and to pay such proceeds, plus interest, to the thirteen Mission customers to whom Applicants never returned the Chartwell shares.[43] In doing so, FINRA noted that its Sanction Guidelines recommend that FINRA consider a bar for improper use of a customer's securities and, where the misuse involves conversion, that a bar is

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[41] NASD Rule 9263(c) – now recodified as FINRA Rule 9263(a) – provides that a Hearing Officer may exclude irrelevant, immaterial, or unduly repetitious evidence.

[42] Applicants also allege that the Hearing Officer afforded FINRA "a greater advantage in this hearing . . . [because] the Hearing Officer . . . was paid a yearly salary by FINRA of over $1 Million Dollars [sic]." The Hearing Officer's asserted pay standing alone, however, is not evidence of bias, and we see no other evidence of bias in the record. And, as stated above, our *de novo* review "'dissipates even the possibility of unfairness.'" *See supra* note 38 and accompanying text.

[43] According to FINRA, Biddick is no longer associated with a FINRA member firm, and Mission is no longer in business.

the standard sanction, regardless of the amount converted.[44] Exchange Act Section 19(e)(2) directs us to sustain FINRA's sanctions 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.[45] Applicants' conduct was egregious, and we see no basis for setting aside FINRA's imposition of sanctions here.

As we stated in a different case, but is equally applicable in this matter, "respondents' misconduct – and their continued refusal to acknowledge wrongdoing – demonstrates either that they fundamentally misunderstand the regulatory obligations to which they are subject or that they hold those obligations in contempt."[46] Here, Applicants deliberately took their customers' property, without notice, and then sold that property and used the proceeds to pay the Firm's operating expenses. This was not an isolated event, but rather a course of conduct that took place over an entire year. Applicants also attempted to conceal their misconduct by, for example, telling one customer, Narasimhan, that his Chartwell shares had little or no value, while at the same time selling Chartwell stock out of the Firm's account at prices ranging from $2.25 to $4 per share.[47]

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[44] FINRA Sanction Guidelines 38 (2007). The Sanction Guidelines define conversion "generally [a]s 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." *Id*. at n.2. Although the Commission is not bound by FINRA's guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5125, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) .

[45] 15 U.S.C. § 78s(e)(2). Applicants do not specifically contest FINRA's imposition of sanctions, and the record does not show that FINRA's sanctions imposed an undue burden on competition.

[46] *Barr Fin.*, 56 S.E.C. at 1261-62 (affirming bar and expulsion).

[47] *See, e.g.*, *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8989-90 (affirming bar where representative attempted to conceal misconduct by supplying false information during an investigation); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Fox & Co. Invs.*, 58 S.E.C. 873, 896-98 (2005) (finding imposition of a bar to be neither excessive nor oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb*, 54 S.E.C. 917, 928-29 (2000) (sustaining bar where applicant attempted to conceal his misconduct), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

Not only was Applicants' initial conversion of customer property a blatant violation of NASD rules, but Applicants' subsequent justifications are equally troubling. Applicants admit, for instance, that they took their customers' property, but claim they were justified because they did so for the Firm's benefit. Even now, Applicants continue to deny that they did anything wrong. Applicants provide no assurances that they will not repeat their misconduct and, in fact, complain on appeal that FINRA "had no right" to order them to stop selling their customers' converted Chartwell shares.[48]

A bar and expulsion are severe sanctions. Applicants' demonstrated lack of fitness to be in the securities industry, however, supports the remedial purpose to be served by such sanctions. Applicants represent a clear danger to the investing public if they remain in the securities industry, and, as FINRA accurately observed in its decision, "expelling Mission and barring Biddick in all capacities are the only effective remedial sanctions."[49]

We also find FINRA's order that Applicants disgorge their ill-gotten gains and pay those proceeds to the injured customers to be an appropriate remedy. Where a broker-dealer has benefitted from violating FINRA rules, we encourage self regulatory organizations "to use [their] remedial powers to return to investors funds lost in cases where, as here, a professional has acquired a benefit by failing to meet his obligations."[50]

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[48] At some point after FINRA's investigation of Applicants began, FINRA advised Biddick to stop liquidating the Chartwell stock because Mission had exceeded the number of trades it was entitled to execute per year based on its net capital requirements. Biddick testified at his disciplinary hearing that he followed this advice, because "I take the advice of FINRA staff."

[49] *See James C. Dawson*, Advisers Act Rel. No. 3057 (July 23, 2010), 98 SEC Docket 30706 (affirming bar by noting, in part, the Commission's concern "about the possibilities any participation by Dawson in the investment advisory industry would present for future violations, and our concern that Dawson's lack of appreciation for the wrongful nature of his conduct increases the likelihood of recurrence"); *Paz Secs.*, 93 SEC Docket at 5131-33 (holding that a bar was an appropriate sanction, in part, because applicants' "cavalier" attitude "poses a clear risk of future misconduct").

[50] *David Joseph Dambro*, 51 S.E.C. 513, 518 (1993) (affirming restitution order and discussing the "related context of disgorgement"); *see also Michael David Sweeney*, 50 S.E.C. 761, 769 (1991) (noting that the Commission "fully endorse[s]" the policy of payment of disgorgement).

For these reasons, we find that FINRA's decision to expel Mission, to bar Biddick, and to order disgorgement is neither excessive nor oppressive and that the sanctions serve a remedial rather than a punitive purpose.

An appropriate order will issue.[51]

By the Commission (Commissioners CASEY, WALTER, AGUILAR and PAREDES); Chairman SCHAPIRO not participating.

Elizabeth M. Murphy
Secretary

[51] We have considered all of 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
Rel. No. 63453 / December 7, 2010

Admin. Proc. File No. 3-13841

In the Matter of the Application of

MISSION SECURITIES CORPORATION
and
CRAIG M. BIDDICK

c/o Craig M. Biddick
P.O. Box 3038
Rancho Santa Fe, CA 92067

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority against Mission Securities Corporation and Craig M. Biddick be, and hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary