BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Austin Wayne Morton Spiro, OK, Respondent.	DECISION Complaint No. 2016052347901 Dated: May 15, 2019

FINRA staff did not prove by a preponderance of evidence that a registered representative engaged in conversion. Held, findings affirmed and case dismissed.

Appearances

For the Complainant: Jonathan I. Golomb, Esq., Michael J. Rogal, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Jon-Jorge Aras, Esq.

Decision

The Department of Enforcement ("Enforcement") appeals findings in a March 14, 2018 Hearing Panel decision that FINRA staff did not prove by a preponderance of evidence that Austin Wayne Morton ("Morton") twice converted funds belonging to GR**,** an elderly acquaintance and onetime customer with cerebrovascular disease. After reviewing the entire record, we affirm these findings.

I. Procedural Background

A. Enforcement's Complaint

Enforcement filed a two-cause complaint commencing a disciplinary action against Morton on February 24, 2017.

The complaint's first cause of action alleged that Morton converted funds belonging to GR on two different occasions—once in September 2016, and once in October 2016. Specifically, Enforcement claimed that Morton stole $20,000 from GR after GR withdrew, while in Morton's presence, $22,000 in cash from his bank account in September 2016. Enforcement further claimed that GR granted Morton an undocumented $6,000 loan in October 2016, but Morton stole an additional $16,000 after Morton wrote in the order instructions on an otherwise blank check signed by GR and cashed it for $22,000. Enforcement claimed these two acts constituted conversion, of $36,000, in violation of FINRA Rule 2010.

The complaint's second cause of action alleged that Morton took $2,000, from the $22,000 in cash that GR withdrew from his bank account in September 2016, as compensation for assisting GR with locating and surrendering an annuity. Enforcement claimed this effort constituted an undisclosed outside business activity for which Morton did not provide written notice to his FINRA member, and consequently, Morton violated FINRA Rules 3270 and 2010.

B. The Disciplinary Hearing

On April 24, 2017, Morton filed an answer in which he denied engaging in any misconduct. The Hearing Panel held a two-day hearing on December 5 and 6, 2017. Six witnesses testified during the hearing.[1]

Morton testified both during Enforcement's case and in his defense. He testified concerning his long-standing relationship with GR and the events in September and October 2016, which mostly only he and GR witnessed, that are at issue in this case. Morton, consistent with his answer, denied all allegations of wrongdoing.

Two witnesses testified about their interactions or conversations with GR and Morton concerning the transactions that are at issue in this case. The first witness, KF, is GR's daughter. She testified about the assistance Morton provided GR with locating and surrendering an annuity; her claim that Morton admitted taking $2,000 from GR as compensation for providing that service; and a written complaint that she filed on GR's behalf with Edward Jones, the FINRA member with which Morton was registered at the time of the events at issue.

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[1] GR did not testify. As we discuss below, *infra* Part II.B., two doctors diagnosed GR with vascular dementia in 2012, and he entered an assisted-living facility in November 2016. GR, who at the time of the hearing was 83 years old, possessed little or no recollection of the happenings that resulted with Enforcement filing a disciplinary action against Morton.

The second witness, Katherine Ferguson ("Ferguson"), is an Edward Jones compliance investigator and investigated KF's written complaint. She testified about interviews she conducted with GR, KF, and Morton and the decision of Edward Jones to terminate Morton for accepting a loan from GR.

The final three witnesses who testified at the hearing included RH, GR's friend and neighbor; Shalene Woods ("Woods"), Morton's branch office assistant; and Sean FitzPatrick ("FitzPatrick"), an Enforcement case manager who testified about Morton's financial condition in 2016, evidence of which Enforcement put forward to suggest that Morton possessed the motive to steal from GR.

C. The Hearing Panel's Decision

The Hearing Panel issued its decision on March 14, 2018. A majority of the Hearing Panel found that Enforcement failed to meet its evidentiary burden and did not prove by a preponderance of the evidence that Morton engaged in the misconduct alleged in the complaint's two causes of action.

With respect to the first cause of action, the Hearing Panel majority concluded that Enforcement failed to prove that Morton stole $20,000 from GR when GR withdrew $22,000 in cash from his bank account in September 2016. The Hearing Panel majority also decided that Enforcement failed to prove that Morton converted $16,000 when he cashed, in October 2016, a $22,000 check that GR undeniably signed. Enforcement pleaded that $6,000 of that sum constituted an undocumented loan from GR to Morton, and the Hearing Panel majority found that Enforcement did not provide any reliable evidence to discredit Morton's testimony that he possessed a "good-faith" belief that the entire sum, $22,000, constituted a loan. In reaching these conclusions, the Hearing Panel majority's decision underscored the reality that Enforcement's case, without GR's testimony, rested largely on tenuous inferential connections, unconvincing circumstantial evidence, and unreliable hearsay.

A majority of the Hearing Panel concluded also that Enforcement failed to prove that Morton took $2,000 from GR as compensation for an undisclosed outside business activity, as Enforcement alleged in the complaint's second cause of action. Specifically, the Hearing Panel majority found there was no evidence Morton removed $2,000 from the $22,000 in cash that GR withdrew from his bank account in September 2016.

In dismissing all claims of misconduct leveled by Enforcement against Morton, the Hearing Panel noted that its decision should not be construed to signal an approval of Morton's conduct under the circumstances presented. Instead, the Hearing Panel concluded, Enforcement did not prove the allegations in the complaint, as was its burden, by a preponderance of evidence.

D. Enforcement's Appeal

On March 22, 2018, Enforcement filed a notice of appeal requesting that we review the Hearing Panel majority's findings that Enforcement did not meet its burden of proving that

Morton converted $36,000 from GR, as Enforcement alleged in the complaint's first cause of action.

Enforcement, however, did not appeal the Hearing Panel majority's decision to dismiss Enforcement's claim that Morton took $2,000 from GR as compensation for an undisclosed outside business activity. We therefore do not revisit the dismissal of the complaint's second cause of action in this decision.

II. Facts

A. Morton

Morton lived in Spiro, Oklahoma. He is a graduate of Northeastern State University, from which he earned a bachelor's degree in chemistry and biology. Before his employment in the securities industry, he worked as a high school teacher and coach for fourteen years.

Morton became an Edwards Jones financial advisor in September 2011. At all relevant times, he worked in the firm's Sallislaw, Oklahoma branch office, and he was registered through the firm as a general securities representative. Morton had an active client base of about 350 households with assets of approximately $35 to $40 million. He earned $106,821 as an Edward Jones financial advisor in 2016.

Morton testified, and the evidence confirms, that Morton was, at the time of the events at issue, a frequent gambler, betting on horse races both online and at horse tracks. Morton described his gambling as a hobby that he engaged in with his father, and there is no evidence that he engaged in any illegal betting activities.

Morton reported his gambling on his federal income tax returns. He reported an equal amount of gambling winnings and losses, $143,037, on his federal income tax return for the year 2016, and his net gambling losses for the year were $4,680. When viewed in their totality, Morton's wagers suggest they constituted a hefty sum. For example, the evidence shows that he bet more than $157,000 with one online vendor in 2016 alone. As Morton testified, and other evidence corroborates, however, he usually bet in small sums of no more than $500, and he regularly took winnings both online and at the racetrack.[2] Morton testified that he bet within his means, and he kept running totals of both his wagers and his winnings and losses from gambling. Notably, there is no evidence that indicates Morton incurred any losses or debt because of his gambling that he was unable to pay.

Morton testified that, having twice been the victim of banking fraud, he preferred to conduct his personal business in cash, and he did not keep large sums of money on deposit in a

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[2] For example, Morton took more than $111,138 in cash winnings from two racetracks in 2016.

bank account.[3] He instead kept cash and cashier's checks in his home safe home and deposited funds to his bank account when needed. Bank statements that Morton provided to Enforcement for the first 10 months of 2016 show that he frequently made cash deposits of varying amounts to his bank account.[4] Morton nevertheless did not monitor his bank balances carefully. Morton's bank account frequently ended the month with a negative balance, and he often incurred overdraft fees and fees for maintaining nonsufficient funds.[5]

The State of Oklahoma issued two tax warrants against Morton's home—one in 2015, and a second in 2016. Morton paid the first warrant, for $1,606, on April 21, 2016, and he paid the second warrant, for $4,055, on September 13, 2016.

B. GR

GR was born in December 1933, and he received a high school education. He was a retired rancher and small business owner at the time of the events at issue here. Until November 2016, he too lived in Spiro, Oklahoma.

GR began to experience confusion in early 2011, and he would often forget where things were. After heart surgery later that year, his physical and cognitive state deteriorated. In December 2012, two doctors diagnosed GR with vascular dementia. Both doctors told KF that she should organize her father's affairs because he would no longer be able to care for himself.

The first doctor expressed his view, in writing, that GR "is unable to understand the implications of his care and unable to care for his financial affairs." The doctor therefore recommended, "a guardian be found to monitor and manage his finances." The second doctor similarly noted in his written diagnosis that GR's dementia "causes him to be unable to attend to his finances and well being [sic]." He declared GR "incompetent" and recommended also, "a suitable guardian be found for him."

After rehabilitating at a nursing facility in early 2013, GR returned to live at home with his second wife.[6] His condition, however, continued to deteriorate. GR became angry and

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[3] Morton testified that he does not have any credit cards or carry any credit card debt.

[4] In April 2016, for example, Morton made cash deposits totaling more than $8,000. He also deposited two cashier's checks that month totaling $39,000.

[5] During the first 10 months of 2016, the largest negative month-end balance, in June, was $426.61. During the same ten-month period, he incurred overdraft fees of $840 and nonsufficient funds fees of $196.

[6] GR's first wife, KF's mother, died in 2005.

frustrated, stopped taking his medications and eating properly, and began to distrust his second wife, who divorced him in mid-2016.[7]

KF, who lived approximately 80 minutes from GR, spoke with him by telephone about every 10 days and visited him once a month. KF testified that she believed it would have been obvious to anyone who knew GR that he suffered from dementia as he repeated himself a lot and lived in the past. She acknowledged, however, that he had good days when he would be clearer and more engaged than other days.[8]

In early August 2016, GR withdrew $10,000 in cash from his bank account to purchase a car for his sister. The car GR purchased for his sister cost $7,000.[9] GR placed the remaining $3,000 in cash in a bedroom drawer and, apparently, forgot about it. KF later found the money and helped GR deposit the money in his bank account.

By the fall of 2016, GR, who now lived alone, regularly fell asleep with the garage door open, which left his car and his home accessible to others, and he often became lost while driving just blocks from his home.[10] Despite the concerns expressed by his doctors in 2012, GR did not have a guardian, and he managed his finances without assistance from anyone else until November 2016, when KF placed GR in an assisted-living facility.[11] At the time of the hearing in this matter, GR no longer engaged with others and thus was not able to testify.

C. GR Opens an Edward Jones Account

GR trusted and thought highly of Morton. GR and Morton's grandfather were good friends, and Morton had known GR since Morton was five years old.

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7 GR and his second wife kept separate finances while they were married.

8 KF testified that GR's second wife did not believe that GR had memory issues and instead believed he was fully capable of handling his own affairs.

9 There is no evidence that Morton was aware of either GR's $10,000 cash withdrawal or that GR used the funds to purchase a car for his sister.

10 RH, who also had a key to GR's home, testified he checked on GR daily and ensured that the door to GR's home was locked whenever GR left the garage door open.

11 KF assumed power of attorney for GR's affairs when her mother died in 2005. KF, however, exercised this power only in limited circumstances, for example, when GR was rehabilitating in a nursing home in early 2013. GR made it very clear to KF that he wanted to control his finances, and KF largely respected and acceded to his wishes.

In December 2014, GR opened an Edward Jones IRA account for which Morton served as the financial advisor.[12] At that time, GR had an estimated net worth of $300,000 and limited experience investing in stocks or bonds. GR effected an IRA rollover of $21,694.30 from Principal Financial Group to fund his Edward Jones account. GR purchased a few stocks and held some cash in the account, but he added no additional funds to the account. GR named KF as a beneficiary of his Edward Jones account, but she testified that she was not aware of the account until after GR closed it in September 2016.[13]

GR occasionally visited with Morton at his Edward Jones branch office, often without an appointment, and they sometimes had lunch together. Morton felt that he and GR were good friends.[14] Although GR was fond of retelling old stories and appeared lonely, Morton testified he was unaware that GR suffered from dementia or memory loss until after both of the transactions that are the focus of Enforcement's conversion claim.[15]

D. Morton Helps GR Locate and Surrender an Annuity

When GR opened his Edward Jones account, GR told Morton that he held $200,000 at another firm, but GR did not know what the product he bought was and could not recall the name of the firm—"some outfit in Texas"—through which he purchased it.[16] GR asked Morton to help him get his money back.

With the limited information that GR possessed, Morton helped GR locate the money, which was in the form an annuity.[17] The annuity, however, had a long surrender charge, and

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12 GR's second wife was already an Edward Jones customer, and Morton was her financial advisor.

13 KF did not have or exercise power of attorney over GR's Edward Jones account.

14 Morton testified, and other evidence confirms, that Morton gave GR commission discounts. Morton testified he did this, without GR knowing, because Morton treated GR as he would his own grandfather.

15 Contrary to her testimony that she was unaware of GR's Edward Jones account until after he closed it, KF telephoned Woods, Morton's branch office assistant, on September 2, 2016, and she informed Woods that GR was taking medicine for his "memory." KF also told Woods that GR sometimes got lost, but he "can get it back quick." Woods recorded these facts in the customer relationship notes she entered for GR's account that day. Woods testified, however, that she had not noticed any issues with GR's memory during the year that she had been interacting with him as Morton's assistant.

16 GR believed the product he purchased was a life insurance policy.

17 The process, Morton testified, took about 18 months.

Morton advised GR that, if he did not need the money, he should wait and surrender the annuity later. GR nevertheless felt that the firm through which he had purchased the annuity had lied to him, and he decided to surrender the annuity immediately.

Morton helped GR complete the forms necessary for him to surrender the annuity, and he told GR to expect a check from the annuity company in 30 days.[18] On February 11, 2016, the annuity company issued GR a check for $182,348.17. He paid a surrender charge of $21,040.09.[19]

With KF's assistance and encouragement, GR invested the annuity proceeds in two bank issued certificates of deposit. KF testified that GR felt that he owed Morton for his time and effort, and both GR and KF offered to pay Morton for helping GR locate and surrender the annuity. Morton, however, declined their offers of compensation because, as KF recalls he said, Edward Jones did not permit him to accept such payments.[20]

E. GR Closes His Edward Jones Account

In early September 2016, Morton met with GR to discuss his Edward Jones account. Because of new Department of Labor rules, Morton testified, Edward Jones requested that its financial advisors discuss with their customers the option of a "flex account," for which customers would pay a yearly fee instead of traditional commission charges.

On September 13, 2016, however, GR stopped by Morton's Edward Jones branch office, without an appointment, and he informed Morton that he decided to liquidate his Edward Jones account. Morton testified that he advised GR about the tax consequences of closing his IRA account and recommended that GR only withdraw from the account the sum of money he needed.

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[18] Morton's client relationship notes for January 14, 2016, state that GR told Morton he did not know what he planned to do with the money. The notes further indicate that Morton did not "push" GR and told him only to let Morton know if he needed any further assistance.

[19] On March 15, 2016, in another indication that she was aware GR had an account at Edward Jones at a time earlier than she claimed in her testimony, KF called Morton and asked him to help recoup the charges GR incurred when GR surrendered his annuity. Morton suggested that KF pursue an action with the State of Oklahoma because, given GR's age and the product he had purchased, Morton suspected GR had been the victim of elder abuse.

[20] The firm's written procedures allowed financial advisors to charge fees for approved special services, but it required that a client pay these fees first to the firm.

GR nevertheless persisted, and he requested that Morton close his Edward Jones account. GR told Morton that his sister was in the hospital, he had been taking care of her bills, and he wanted to buy her a different car.[21]

Consistent with GR's request, Morton placed orders to sell the securities held in GR's Edward Jones account. Edward Jones closed his account with the firm after it distributed $22,359.11 to GR's bank account on September 16, 2016.

F. Morton Takes GR to the Bank, and GR Withdraws a Large Sum of Cash

Morton testified that, also on September 13, 2016, after GR informed Morton he wished to close his Edward Jones account, GR told Morton that he had divorced his second wife and he was concerned about her having access to his money. Morton testified that he told GR his ex-wife was not a beneficiary of his Edward Jones account, and GR then asked Morton, "what about my other money?"[22] Morton testified that he informed GR that it depended on whether GR had "transfer-on-death" instructions on file with his bank. GR told Morton that he was not sure whether he did, and he asked Morton to go to the bank with him. Morton therefore drove GR to the bank in Morton's car.

Morton testified that, on their way to the bank, GR told Morton he was also contemplating the purchase of a 1940s collector's car. Morton testified that, when they entered the bank, GR informed Morton for the first time that he intended to withdraw money from his bank account, presumably to purchase a car for his sister and a collector's car for himself.

At the bank, GR confirmed that he did not have transfer-on-death instructions on file for his bank account. The bank manager therefore drafted the necessary paperwork, which GR executed, effectively naming KF as the beneficiary of his bank account at the time of GR's death.

GR then made a $22,000 cash withdrawal.[23] After counting the cash for GR, the bank teller placed it in a white plastic bag. At approximately 1:00 p.m., GR and Morton left the bank,

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[21] On September 13, 2016, Morton entered in the customer relationship notes for GR's account: "[GR] dropped by and said he wanted to cash out . . . his sister is in hospital and hes [sic] watching her place every day or two . . . may buy her a different car." (Ellipses in original). On the same day, based on her own interaction with GR, Woods made a similar notation for GR's account: "Needs to CASH-out & CLOSE account. Sister is in Hospital. He is taking care of her home & may need to buy her a different car."

[22] The customer relationship notes for GR's Edward Jones account indicate that GR first told Morton in May 2015 that GR and his second wife were having marital problems. The notes state that Morton at that time confirmed for GR the beneficiaries listed for GR's account.

[23] GR signed the withdrawal slip necessary to effect the withdrawal. Morton testified that he did not direct or request GR's cash withdrawal and was simply an onlooker to the transaction.

and GR sat in the passenger's seat of Morton's car. Before returning to Morton's Edward Jones office, however, GR and Morton stopped for lunch, as they had planned. Morton testified that GR said to Morton that he did not want to carry the white plastic bag with him during lunch, so GR placed the bag in the glove box of Morton's car, and Morton locked the glove box.

After lunch, Morton drove GR back to Morton's office, at some point unlocking the glove box so GR could retrieve the white plastic bag, which Morton testified GR then kept between his legs on the passenger's seat. Morton testified that, when they returned to Morton's office, Morton parked behind GR's truck and GR got out of Morton's car with the white plastic bag and into his truck.

Beginning with an appointment at 2:30 p.m., Morton spent the rest of his afternoon meeting with customers at his office. Morton testified that he did not, at any time, touch or take possession of any part of GR's $22,000 in cash.

Following GR's cash withdrawal, there were several cash deposits to Morton's bank account in September—$6,200 on September 13, 2016, $3,300 on September 16, 2016, $3,600 on September 19, 2016, and $800 on September 30, 2016—a total of $13,900. Morton, however, testified that each of these deposits represented cash that he had in his or his father's home safe.[24] He also testified that his father made the $6,200 cash deposit into Morton's bank account on September 13, 2016, so that Morton could pay an outstanding tax warrant. Indeed, the evidence shows this deposit was made at a time when Morton was meeting with clients in his office, some 30 miles from the bank.

G. GR Gives Morton a Signed Check

Morton visited GR's home on October 9, 2016. Morton claims that, during his visit, GR agreed to loan Morton $22,000 for one year at six percent interest so that Morton and his daughter could both have eye surgery. GR signed an otherwise blank check drawn on his bank account, and Morton completed the rest of the information. Morton made the check payable to himself for $22,000.[25]

RH, GR's friend and neighbor, witnessed some of the events that occurred at GR's house on October 9, 2016. He testified that he knocked on GR's door and entered to find GR and Morton talking. Sometime thereafter, GR went into his bedroom and returned with his checkbook.

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[24] FitzPatrick, the Enforcement case manager, testified that Enforcement does not know the source of any of these deposits.

[25] Morton admitted that, except for GR's signature, all of the handwriting on the check is his.

RH testified that GR handed the checkbook to Morton, and GR said to Morton words to the effect, "I signed the check. Just fill it out." A few minutes later, Morton said to GR, "I got it filled it out. What do you want me to do with the checkbook?" GR instructed Morton to leave the checkbook on the counter, which is where RH saw Morton place it. After RH, GR, and Morton conversed for about 10 minutes, Morton received a phone call and left GR's house with the check that GR signed.[26]

On October 10, 2016, Morton cashed the $22,000 check at GR's bank.[27]

H. KF Reviews GR's Bank Statements and Questions Two Large Transactions

On October 19, 2016, while visiting GR, KF reviewed GR's recent bank statements, and she discovered two large deductions, each for $22,000, from GR's bank account. When KF asked GR what the two transactions were, he looked at the bank statements and said, "I don't know. . . . But I remember it having something to do with [Morton]."

KF and GR met with Morton at Morton's house later that day. Both KF and Morton testified that GR was quiet and reserved during their meeting, and GR told KF and Morton to talk to each other.[28]

Morton explained to KF the series of events that resulted with GR withdrawing cash, $22,000, from his bank account on September 13, 2016. Morton told KF that he last saw the cash in a white plastic bag that GR held when he got out of Morton's car and into GR's truck in the parking lot of Morton's office. Morton told KF that Morton did not take or accept any of the cash.[29]

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[26] RH testified that he never examined the check or discussed it with GR, and he does not know why GR gave the check to Morton.

[27] Morton testified that he cashed the check at GR's bank because he had already scheduled his eye surgery, and the check would have been subject to a ten-day hold at his own bank.

[28] KF testified, when she and GR met with Morton, GR had no recollection of the $22,000 cash withdrawal nor any understanding of the $22,000 check.

[29] KF testified that Morton admitted GR gave him $2,000, from the $22,000 in cash that GR withdrew, to repay Morton for helping GR locate and surrender the annuity. Specifically, KF testified that she asked Morton, "How much did dad pay you?" Per KF, Morton replied, "I can't remember for sure. It's in a file at the office." Later in their conversation, she claims, Morton told her he took $2,000 from GR.

The Hearing Panel majority, however, "decline[d] to credit KF's recollection over Morton's." Morton denied ever taking any cash from GR, and he testified that KF simply mistook what he said. According to Morton, KF asked Morton whether GR had tried to give him $2,000, and Morton replied that GR tried on several occasions to give him $2,000, at his office.

With respect to the $22,000 check that GR gave Morton on October 9, 2016, Morton told KF that GR agreed to lend Morton this money, for one year at six percent interest, to help Morton cover some medical expenses.[30] Both KF and Morton testified that Morton admitted the loan was undocumented, but he offered to have loan documents drafted to KF's satisfaction.[31] KF testified that she declined Morton's offer and told him she would have the appropriate loan documents drafted for him to sign.[32] Whatever the terms of the loan, however, Morton never repaid it.[33]

Morton testified that he first learned of GR's memory issues from KF when they met at Morton's house on October 19, 2016. When Morton returned to his office the next day, he asked Woods whether she had noticed any changes in GR's demeanor. Woods, Morton testified, told him then about the notations she made in GR's customer relationship notes concerning her conversation with KF and KF's disclosure that GR was taking medicine for his memory.[34]

I. KF Complains to Edward Jones

On October 27, 2016, KF emailed a written complaint to Edward Jones about Morton and concerning the two $22,000 transactions that are at issue in this appeal. As to the circumstances surrounding GR's $22,000 cash withdrawal on September 13, 2019, KF mostly recounted the events of that day as Morton explained them to her during their meeting on October 19, 2019. GR, KF wrote, did not remember any details from that day other than recalling that he owed Morton "some fees for helping him retrieve some money from an early withdrawal on an annuity from another institution." KF explained that she and GR, who was 82 years old and with

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[30] KF testified that GR had loaned money to other people, but never in amounts as large as $22,000.

[31] Morton testified that he also offered to rescind the loan, but KF told him that was not necessary as long as the loan did not go beyond a year.

[32] After their meeting, KF texted Morton, "I've decided I want to be there when dad signs the note, so I'll have it drawn up." KF testified that she nevertheless did not intend to document the loan and lied to Morton when she suggested otherwise. The terms of the loan thus were not documented.

[33] Morton provided two texts he sent to KF that he claims show he offered in February 2017 to repay GR for the money Morton borrowed from him. KF, however, never acknowledged these offers.

[34] Woods testified that her notes would not have been apparent to Morton unless he searched for them because Edward Jones's systems did not display this information on the first page of a customer's account information.

dementia, had searched GR's truck and home extensively, but they were unable to locate the money.

With respect to the $22,000 check that GR gave Morton on October 9, 2013, KF wrote, "Dad signed a personal check and [Morton] filled it out," and she explained that Morton cashed the check at GR's bank. KF further stated that Morton told her he had borrowed the money from GR for one year at six percent interest. KF's written complaint, however, provided no information about the understanding that GR had of the check or its purpose.

J. Edward Jones Conducts an Investigation

Edward Jones commenced an investigation after receiving KF's written complaint. Ferguson, the Edward Jones compliance investigator, spoke with GR, KF, and Morton during the investigation.

Ferguson interviewed GR by telephone on November 4, 2016.[35] Ferguson's notes of their conversation state that GR told Ferguson he had written Morton a "blank check," and he "wanted to be at [the] bank with [Morton] when he cashed the check," but Morton "just took the money." GR also said, however, that he loaned Morton money, but he believed the amount of the loan was only $6,000.[36] Finally, Ferguson asked GR whether the amount that Morton borrowed from GR was instead $22,000, and GR replied, "no it was $44K that [Morton] took from him." Ferguson construed GR's statements to mean that Morton had in fact borrowed $44,000 from GR.

Ferguson interviewed GR by telephone a second time on November 9, 2016, with KF also participating.[37] Ferguson's notes from this second call indicate that she asked GR to explain the circumstances surrounding the $22,000 cash withdrawal that he made on September 13, 2016. GR told Ferguson that Morton "needed to borrow money," and GR "thought [Morton] was going to borrow $6K," but [Morton] "wrote the check for $22,000 and [GR] didn't know it was going to be that much." When Ferguson asked GR to explain the $22,000 cash withdrawal again, GR explained that he told Morton he would loan him money, but "[GR] didn't realize that

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[35] During Ferguson's November 4, 2016 telephone conversation with GR, GR told Ferguson that he wanted Ferguson to talk to his daughter, KF. KF got on the phone, and she explained that she was looking for an assisted living facility for GR because "he is confused." Ferguson, however, told KF that she could not talk to KF since she was not an authorized party on GR's account. KF told Ferguson that she had power of attorney to handle GR's affairs, and Ferguson asked her to fax a copy to Edward Jones.

[36] KF testified that GR never mentioned giving Morton a $6,000 loan until after she filed a complaint with Edward Jones.

[37] KF provided Edward Jones with a copy of the power of attorney before this second call.

it would be [two] checks."[38] Finally, when Ferguson asked GR about the $22,000 cash withdrawal a third time, GR responded, "he wrote [Morton] a check and [Morton] went to the bank without him."

Unable to get clear answers from GR, Ferguson asked KF to explain what she understood had occurred. KF explained to Ferguson that she and GR "looked everywhere" for the $22,000 in cash, but GR didn't remember where the cash went "or really even going to the bank." KF then recounted for Ferguson the conversation KF had with Morton at Morton's house on October 19, 2016, and Morton's claim that he borrowed $22,000 from GR for one year at six percent interest.

Ferguson twice spoke with Morton on November 16, 2016—once in person, and once by telephone. During their conversations, Morton recalled the events before and after GR's $22,000 cash withdrawal on September 13, 2016. He stated that GR came to Morton's office, without an appointment, and asked to close his Edward Jones account so that he could buy his sister a car. While discussing GR's request, Morton explained, GR expressed concern about his ex-wife getting access to GR's assets. Morton told GR that GR's ex-wife was not a beneficiary of GR's Edward Jones account, but GR asked Morton to accompany him to the bank because GR was not sure about his ex-wife's access to his bank account. Morton said he accompanied GR to the bank to help GR update his account information, but Morton was unaware that GR also intended to withdraw cash from the bank until they arrived there. Morton recalled that the bank teller put the cash in a white plastic bag; the bag was locked in his car's glove box while he and GR ate lunch; and GR left with the bag when they returned to Morton's office after lunch. Morton steadfastly denied taking any portion of the $22,000 in cash that GR withdrew that day.

About the $22,000 check, Morton stated that he had been at GR's home, and Morton mentioned to GR that both he and his daughter needed eye surgery—cataract surgery for him, and Lasik surgery for his daughter.[39] Morton claimed that GR offered to give him the money, but Morton proposed that GR lend him the money instead, with the agreement that Morton would repay GR in one year at six percent interest.[40] Morton admitted that GR had signed an otherwise blank check, and Morton completed the rest of it, including the amount. Morton did

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[38] GR told Ferguson that Morton borrowed the money to pay a builder for water damage at Morton's house. KF later told Ferguson, however, that her father "was not involved" with the "story about the builder."

[39] Morton stated he had received a verbal estimate, but no written quote, for both surgeries.

[40] Morton claimed that he had the "conditions" of the loan on the notes page of his phone, but he never shared them with GR or KF because he understood that KF was going to have loan documents drafted for Morton to sign.

not deny cashing the check, and he claimed that he still had the $22,000 he obtained when he cashed the check at his home in a safe.[41]

K. Edward Jones Fires Morton

Edward Jones dismissed Morton on November 18, 2016.[42] The Uniform Termination Notice for Securities Industry Registration ("Form U5") the firm filed when it terminated Morton indicated, "Client's daughter (POA) alleges her father's financial advisor borrowed funds on October 9, 2016." In the comments explaining Morton's termination, Edward Jones stated: "On Sunday 10-9-16, [GR] signed a check drawn on his personal bank account and gave it to Mr. Morton. Mr. Morton had filled out the remainder of the check. The check was made payable . . . for $22,000. . . . Mr. Morton characterized this transaction as a loan from [GR] to Mr. Morton."

III. Discussion

This appeal concerns Enforcement's claims that Morton twice converted funds belonging to GR. A majority of the Hearing Panel found that Enforcement failed to carry its evidentiary burden in proving that Morton engaged in ether of the two acts of conversion alleged in the complaint's first cause of action. The Hearing Panel majority's decision rested on its assessment that Enforcement's case, given GR's inability to testify at the hearing, depended largely on tenuous inferential connections made from unpersuasive circumstantial evidence and unreliable hearsay.

We agree with the Hearing Panel majority's assessment of the evidence and affirm its findings. This case requires us to answer the specific question of whether Morton engaged in two acts of conversion. We conclude, based on the record that confronts us, Enforcement did not carry its evidentiary burden to prove, under a preponderance of the evidence standard, that Morton converted GR's funds.

A. FINRA's Definition of Conversion

FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[43] "[C]onduct that reflects negatively on an applicant's ability to comply with regulatory

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41 Morton told Ferguson that he cancelled his eye surgery when KF filed a written complaint with Edward Jones.

42 Morton has not associated with any FINRA member since Edward Jones terminated his association with that firm.

43 FINRA Rule 2010 applies also to persons associated with a member under FINRA Rule 0140(a), which provides, "Persons associated with a member shall have the same duties and obligations as a member under the Rules."

requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008). Conversion, which is broadly defined as "'an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it,'" is conduct that violates FINRA Rule 2010. *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012) (quoting *FINRA Sanction Guidelines* 38 (2007)).

B. The Burden and Standard of Proof

The burden of proof rests with Enforcement. *Dep't of Enforcement v. Holaday*, Complaint No. 2012032519101, 2016 FINRA Discip. LEXIS 64, at *10 (FINRA NAC Oct. 3, 2016). This burden includes the burden of production—the burden of going forward with proof of Enforcement's claims—and the burden of persuasion—the burden of persuading the trier of fact. *See Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986) ("The 'burden' in a civil case involves not one but *two* elements . . . .").

Preponderance of the evidence is the standard of proof in FINRA disciplinary proceedings. *David M. Levine*, 57 S.E.C. 50, 73 n. 42 (2003). This standard is equivalent to a "more likely than not" standard. *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011). In other words, "[t]he preponderance of the evidence standard requires the party with the burden of proof to support its position with the greater weight of the evidence."[44] *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006).

That does not mean, however, we will simply weigh mechanically the probative evidence offered by Enforcement against Morton. *See Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (citing *In re Winship*, 397 U.S. 358, 371 n.3 (1970)). Instead, we must make a judgment about the persuasiveness of the evidence presented and decide whether it is more likely than not Morton engaged in the two acts of conversion Enforcement alleged in the complaint's first cause of action. *See id.*

C. Enforcement Did Not Carry Its Burden of Proof

1. Enforcement Did Not Prove Morton Stole $20,000 in Cash from GR

The Hearing Panel majority found that Enforcement did not carry its evidentiary burden of proving that Morton stole $20,000 in cash from GR on September 13, 2016. We affirm the Hearing Panel majority's findings.

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[44] If the evidence is evenly balanced, Enforcement has not met its burden under the preponderance of the evidence standard. *See Lightning Lube v. Witco Corp.*, 802 F. Supp. 1180, 1186 (D.N.J. 1992) ("If the evidence is in equipoise, the burden has not been met.").

In reaching this conclusion, we highlight first that there is no direct evidence that Morton took or exercised ownership of any of portion of the $22,000 in cash that GR withdrew from his bank account on September 13, 2016. Although Enforcement asserts in its opening appeal brief that GR departed Morton's company that day without the cash he withdrew from the bank, and that GR told Ferguson, the Edward Jones compliance investigator, Morton took it, these claims find no support in the record.[45] Morton testified consistently, and without contradiction, both during Edward Jones's investigation and in this matter, GR departed Morton's car possessing all of the cash GR withdrew from the bank on September 13, 2016.[46] Moreover, far from claiming that Morton took his cash, the evidence instead shows that GR, when asked about the $22,000 cash withdrawal in October and November of 2016 by both KF and Ferguson, had no recollection of it, or "even going to the bank."

Unable to produce direct evidence of Morton's alleged conversion, and confronted with Morton's consistent denials of any wrongdoing, Enforcement argued to the Hearing Panel that several pieces of circumstantial evidence proved Morton stole $20,000 from the $22,000 in cash GR withdrew from the bank on September 13, 2016. Of course, circumstantial evidence is permissible in FINRA disciplinary proceedings. *See John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at *12 n.9 (July 25, 2008) ("[T]he Supreme Court has held

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[45] Elsewhere in its opening appeal brief, Enforcement contends that KF "testified consistently over time that her father told her he left the money in Morton's glove box." If Enforcement meant to argue that GR told KF he exited Morton's car without the money, this claim too finds no support in the record, including KF's testimony.

[46] It is the job of the fact finder to assess a witness's credibility. *United States v. Osyp Firishchak*, 468 F.3d 1015, 1026 (7th Cir. 2006). The Hearing Panel majority's decision appears to give equal weight to the testimony of the witnesses who testified, including Morton, but contains no explicit determinations of witness credibility. To the extent this judgment represents an implicit finding that the witnesses were credible, we find no evidence in this record to overturn this finding, nor has Enforcement offered any. *See Dep't of Enforcement v. Leopold*, Complaint No. 2007011489301, 2012 FINRA Discip. LEXIS 2, at *21 (FINRA NAC Feb. 24, 2012) ("[T]he Hearing Panel is silent as to any credibility determinations it may have made regarding the other aspects of Leopold's testimony. In the absence of any countervailing testimony or evidence, we credit the entirety of his testimony."); *see also Onstad v. Shalala*, 999 F.2d 1232, 1234 (8th Cir. 1993) ("What weight to give competing testimony is a credibility issue, one properly left to the fact-finder."). Although Enforcement argues the Hearing Panel majority erred by giving "undue weight" to Morton's "self-serving testimony," the fact that testimony is self-serving is not by itself a basis for rejecting it. *See U.S. Gypsum Co. v. Lafarge N. Am., Inc.*, 508 F. Supp. 2d 601, 626 (N.D. Ill. 2007) ("Most affidavits and much testimony are self-serving."); *see also White v. Smith*, 696 F.3d 740, 749 n.8 (8th Cir. 2012) ("[S]elf-serving testimony is appropriately considered when it is plausible, unchallenged, and not circumstantially rebutted. . . . Here, defendants were not able to demonstrate any inconsistencies with the testimony or show a clear issue of credibility." (internal quotation marks and citation omitted)).

that circumstantial evidence can be more than sufficient to satisfy the burden of proof in civil actions." (internal quotation marks omitted)). Nevertheless, "the probative value of circumstantial evidence depends entirely on the strength of the inferences that can be drawn from the proven circumstances." *Mosier v. Stonefield Josephson, Inc.*, 815 F.3d 1161, 1171 (9th Cir. 2016).

The Hearing Panel majority concluded that the circumstantial evidence Enforcement presented in support of its claims was unpersuasive and the inferential connections Enforcement drew from the evidence were "tenuous." In this appeal, Enforcement argues that the Hearing Panel majority failed to give sufficient weight to circumstantial evidence showing Morton's "motive and opportunity" to steal. We disagree. Like the Hearing Panel majority, we find that the circumstantial evidence Enforcement mustered does not lead to a conclusion that it was more likely than not that Morton took $20,000 from GR on September 13, 2016.

First, Enforcement claims that Morton had a compelling motive to convert funds from GR because he was "strapped for cash" due to his frequent gambling. The Hearing Panel majority, however, found that the evidence did not support an inference that Morton's gambling left him in financial distress. We concur with the Hearing Panel's assessment of the evidence. Although there is no doubt that Morton was a frequent gambler, a fact he never denied, there is no convincing evidence that this caused him to be strapped for cash. Morton testified that he bet within his means, and other evidence corroborates that he bet in small sums of no more than $500. The evidence shows he took winnings both online and at the racetrack, and there is no evidence that he incurred or faced gambling debts that he was unable to pay during the year 2016. That Morton ended the year with a net loss of $4,680 from gambling does not create a strong enough inference to conclude that Morton's gambling caused him such financial pain that he would likely steal from GR.[47]

Second, Enforcement points us towards a number of cash deposits made to Morton's bank account in September 2016, after GR withdrew $22,000 in cash from his own bank while in Morton's presence. The sum of cash deposited—$13,900—was however less than the sum of cash Enforcement claimed Morton stole from GR.[48] In addition, Morton's uncontroverted testimony, which other evidence supports, established that Morton's father made the first of

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[47] In its opening appeal brief, Enforcement argues that it was merely a "fortuity" that Morton ended 2016 down only $4,680 from his gambling, as "each bet was unpredictable." While we agree with Enforcement that Morton could not have known what losses he might incur each time he placed a bet, Enforcement did not proffer any evidence of the losses Morton actually incurred from any individual bet or whether such losses exposed him to a material gambling debt at any specific point in time, including during September 2016.

[48] In addition to the $13,900 in cash deposits made to Morton's bank account in September 2016, other funds deposited to the account included direct deposits from Edward Jones totaling more than $6,700 and funds received from an online betting service totaling more than $5,300.

these cash deposits with his own funds, when Morton was meeting with clients in his office 30 miles away.[49]

Indeed, as FitzPatrick admitted in his testimony, Enforcement does not know the source of any of the cash deposits made to Morton's bank account in September 2016. Given Morton's gambling winnings, his avowed preference for dealing in cash, and his prior pattern of depositing cash in his bank account when he needed funds—facts that Enforcement does not contest and pointedly highlights in its opening appeal brief—we cannot conclude that Morton's cash deposits in September 2016 were extraordinary, or reliable evidence that he converted GR's funds.[50]

Finally, Enforcement suggests that Morton stole cash from GR to resolve what it characterized as his strained financial condition. In this respect, Enforcement notes that Morton's bank account was frequently over drawn, he twice faced large tax bills, and he missed payments on his car and mortgage. As the evidence shows, however, although Morton apparently did not carefully monitor the balances in his bank account, he did not overextend his account by more than $426.61 in 2016, and the daily balance in the account, more often than not, was positive. As to Morton's tax bills, there is no dispute that Morton faced two tax warrants issued by the State of Oklahoma in 2015 and 2016. Nevertheless, he paid the first of these warrants on April 21, 2016, months before the events with which we are concerned here, and Morton's uncontroverted testimony established that he paid the other tax warrant on September 13, 2016, after Morton's father made a $6,200 cash deposit to Morton's bank account with funds that came from his father's safe. Lastly, while it is true that Morton missed several car payments in early 2016, those missed payments were resolved no later than April 2016. Although we carefully considered the fact that Morton missed mortgage payments in August and September of $800, we nevertheless find that the weight of the circumstantial evidence offered by Enforcement does not lead us to conclude that Morton's financial condition in September 2016 was such that he predictably helped himself to GR's cash.

Our task in this appeal is to consider the evidence based on a preponderance of the evidence standard, which incorporates a prerequisite that the facts meet a minimum level of reliability. *See Singletary v. D.C.*, 766 F.3d 66, 73 (D.C. Cir. 2014) ("Courts have found that the preponderance standard itself incorporates a requirement that evidence must meet a minimum

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[49] In its opening appeal brief, Enforcement implicitly abandons an earlier claim, which it included in its complaint, that the $6,200 deposit made to Morton's bank account on September 13, 2016, was evidence of Morton's conversion.

[50] Enforcement claims that it would not have made sense for Morton to deposit all of the money he allegedly stole from GR at any one time, and therefore Morton spaced his deposits in smaller amounts to "obscure his misconduct." Nevertheless, as Enforcement admits elsewhere in its opening appeal brief, Morton used cash extensively and often made cash deposits, in amounts ranging from $420 to $16,200, to his bank account during the first 10 months of 2016. Because cash deposits were commonplace for Morton, we find we are unable to infer any particular deceptive motive from them.

threshold of reliability."). We must make a decision based on a preponderance of the probabilities, as opposed to a mere possibility, that Morton stole $20,000 in cash from GR. *See Fedorcyzk v. Caribbean Cruise Lines*, 82 F.3d 69, 74 (3d Cir. 1996) ("Circumstantial evidence when used to reason deductively in civil cases is defined as a preponderance of probabilities according to the common experiences of mankind." (internal quotation marks omitted)). Enforcement cannot satisfy its evidentiary burden with guess or conjecture.[51] *See Lightning Lube*, 802 F. Supp. at 1186; *see also Singletary*, 766 F.3d at 73 ("[T]he government cannot meet its burden, even under only a preponderance standard, with evidence that is speculative, unsupported, and unreliable." (quoting *United States v. Rivalta*, 892 F.2d 223, 230 (2d Cir. 1989)).

Based on this record, we conclude that Enforcement has not proven by a preponderance of the evidence that Morton converted $20,000 from the $22,000 in cash that GR withdrew from his bank account on September 13, 2016.[52] In reaching this conclusion, we recognize that Morton had the opportunity to take GR's cash.[53] We nevertheless find that this fact is insufficient to alter the balance of evidence to a degree that we may find Morton liable for conversion. *See Holaday*, 2016 FINRA Discip. LEXIS 64, at *13-14 ("We acknowledge that Holaday had the opportunity to forge the account forms . . . . But this finding is insufficient to

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[51] Enforcement argues that Morton "contrived" a story that GR told him he wished to close his Edward Jones account to buy his sister a "different" car. Enforcement bases this argument on evidence that GR purchased his sister a $7,000 car in August 2016. There is no evidence, however, that Morton knew of the August 2016 purchase. In addition, a notation Woods made to GR's customer relationship notes corroborated GR's stated reason to Morton for closing his account. We do not infer from the evidence that Morton manufactured GR's explanation for closing his account.

[52] Our decision is influenced, in part, by the Hearing Panel majority's finding that Morton did not take $2,000 from GR's $22,000 cash withdrawal as compensation for an undisclosed outside business activity, a finding that Enforcement chose not to appeal. As the Hearing Panel's decision noted, this finding left the Hearing Panel in the odd position of having to decide whether Morton converted all of GR's cash withdrawal, which Enforcement did not allege, or none of it. The Hearing Panel majority concluded that Morton took none of it. Based on the record before us, and the evidentiary burden that it is Enforcement's to carry, we agree with this conclusion.

[53] Enforcement claims that GR's dementia heightened Morton's opportunity to steal from GR. Morton testified, however, that he was not aware of the fact that GR suffered from any debilitative memory issues or dementia until after the events that are at issue in this case. Woods too testified that she had not seen any diminishment in GR's mental acuity. Although KF called Woods on September 2, 2016, to advise her that GR was taking medicine for his memory, KF also stated that GR "can get it back quick." When taken with KF's testimony that GR had good days and bad days, and her admission that GR's second wife denied that GR suffered from memory issues, we cannot conclude from this record that GR's diminished state caused Morton to prey upon him.

hold Holaday liable . . . ."). Given GR's dementia, and the fact that he mislaid a large sum of cash the month before the September cash withdrawal at issue here, it is equally plausible that GR simply lost or misplaced the money he withdrew from the bank.

2. Enforcement Did Not Prove Morton Took an Additional $16,000 from GR Without Authorization

The Hearing Panel majority also found that Enforcement did not prove, by a preponderance of the evidence, that Morton converted $16,000 from a $22,000 check GR gave him on October 9, 2016. We affirm these findings.

As we note above, FINRA defines conversion as an unauthorized taking of property by one who is not entitled to possess it. The uncontroverted evidence established that, on October 9, 2016, GR gave Morton a signed, but otherwise blank, check and told Morton to complete the remaining information. Morton completed the check, making the check payable to himself for $22,000.

We also know, based on Enforcement's pleadings, that Enforcement does not dispute at least a portion of the funds for which Morton wrote the check constituted an undocumented loan from GR to Morton.[54] Given these facts, it is undisputed GR authorized the check and entitled Morton to possess, at a minimum, some of the money that backed it.

As the Hearing Panel's decision noted, correctly, Enforcement essentially asks us to determine the amount of the loan that GR authorized. Enforcement declares that GR only authorized a loan of $6,000, and Morton converted the remainder of the total—$16,000.

Based on this record, we cannot conclude that Enforcement has met its burden of proof. The sole evidence to support Enforcement's claim that GR's loan to Morton was limited to $6,000 comes from GR. GR, however, did not testify at the hearing, and any recounting in this proceeding of his prior statements is hearsay. Although hearsay evidence is permissible in FINRA disciplinary proceedings, we must evaluate its probative value and reliability, as well as the fairness of its use, by considering factors such as the type of hearsay at issue, whether the out of court statements were signed and sworn, rather than oral and unsworn, and whether the hearsay is corroborated. *See Charles D. Toms*, 50 S.E.C. 1142, 1145 (1992).

After considering these factors, we conclude GR's statements that he only loaned Morton $6,000 are unreliable, and they cannot serve as the basis of proving the sum of the loan that Enforcement avers GR authorized. First, GR's statements, as relayed to the Hearing Panel by KF and Ferguson, were oral statements that he did not give under oath. Second, there is no other evidence that corroborates GR's claim that he authorized a loan to Morton of only $6,000.

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[54] Absent specified conditions, FINRA Rule 3240 generally prohibits a person associated with a FINRA member from borrowing money from a customer. As of October 9, 2016, however, GR was no longer a customer of Morton or Edward Jones.

Finally, there are further indicia that his statements are untrustworthy. For instance, when KF first asked him about the $22,000 check, on October 19, 2016, just 10 days after he signed it, GR had no recollection of the transaction other than to state, "I remember it having something to do with [Morton]."[55] Moreover, KF's written complaint, which she filed with Edward Jones on October 27, 2016, made no mention of the fact that GR claimed he authorized a loan of only $6,000; in fact, the complaint provided no information about GR's perception of the $22,000 check or his understanding of its purpose. Lastly, although Ferguson spoke to GR twice about the $22,000 check, on November 4 and 9, 2016, his statements to her were filled with inconsistencies. For example, during Ferguson's November 4, 2016 interview of GR, he told her that Morton wanted to borrow $6,000, but he also left Ferguson with the impression that he had in fact lent Morton $44,000, twice the amount of the $22,000 check. Similarly, during their November 9, 2016 discussion, GR told Ferguson "he thought [Morton] was going to borrow $6K," but he made this statement in response to questions about the $22,000 cash withdrawal from his bank account on September 13, 2016, and he also claimed that he wrote Morton two checks, not one. Notably, during the interviews that Ferguson conducted of GR, KF told Ferguson, among other things, that GR was "confused," suffering with dementia, and had offered a purpose for the loan that she suggested was not true.

We are left therefore only with Morton's testimony, which the Hearing Panel majority concluded conveyed his "good-faith" belief that the amount of the loan in question was $22,000, not $6,000. We recognize that, in a case like this, involving an allegation of conversion, Morton would ordinarily bear the burden of proving any affirmative defenses to Enforcement's complaint, including those put forth concerning his authority to possess $22,000 from GR's October 9, 2019 check. *See Mullins*, 2012 SEC LEXIS 464, at *34 & n.35 ("J. Mullins has not produced any evidence, other than his own testimony, to support his statement that Mrs. Weil gave him permission to use the gift certificates, and it is his burden to do so."). Here, however, Enforcement claimed as part of its case that Morton was authorized to possess GR's check and that $6,000 represented an undocumented loan. Because Enforcement embraced these critical facts, but failed to establish the amount of the loan between GR and Morton with reliable evidence, we find that it would be improper to shift to Morton the burden of establishing the amount of the loan by producing additional evidence that Enforcement expressly acknowledges he cannot produce. *Cf. United States v. Rhine*, 583 F.3d 878, 890 (5th Cir. 2009) ("The government . . . seeks to shift the burden to [defendant], insisting that he must prove the negative fact . . . ."); *cf. also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1024 (1st Cir. 1979) (Bownes, J., concurring and dissenting) ("The burden of proof remains with the plaintiff; the burden which shifts to defendant is that of meeting the presumption or inference . . . which flows from plaintiff's prima facie case. . . . Defendant is not required to prove a negative." (citation omitted)).

In summary, Enforcement failed to prove the amount of the undocumented loan GR gave to Morton, and we are left unable to find that Morton, more likely than not, converted *any* sum of

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[55] He also had no understanding of the check when KF and GR met with Morton that evening.

money from the $22,000 check that GR signed on October 9, 2016. We thus affirm the Hearing Panel majority's findings that Enforcement did not prove, by a preponderance of the evidence, that Morton converted $16,000 from GR's $22,000 check.

IV. Conclusion

We affirm the Hearing Panel's findings that Enforcement failed to sustain its evidentiary burden. We find that Enforcement did not prove by a preponderance of the evidence Morton converted funds belonging to GR on either of the two distinct occasions alleged in the complaint's first cause of action. We therefore dismiss this matter.

Like the Hearing Panel, in this decision we do not intend to suggest that we endorse Morton's conduct or his dealings with GR. We recognize that the financial exploitation of seniors and other vulnerable adults is a serious and far too prevalent problem.[56] This case, however, given the specificity of Enforcement's claims, requires us to answer the exact question of whether Morton engaged in two acts of conversion, as opposed to his having engaged in any unethical conduct generally. Given this question, and the limitations of the record that we find before us, we conclude only that Enforcement has not carried its evidentiary burden and proven that it is more likely than not that Morton converted GR's funds.

On behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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[56] FINRA proposed new and amended rules in 2015 to combat the financial exploitation of seniors and other vulnerable adults. *See FINRA Regulatory Notice 15-37* (Oct. 2015). The Commission approved these rules in 2017, and they became effective on February 5, 2018. *See FINRA Regulatory Notice 17-11* (Mar. 2017). New FINRA Rule 2165 permits FINRA members to place temporary holds on disbursement of funds or securities from the accounts of specified customers where there is a reasonable belief of financial exploitation of these customers. *See* FINRA Rule 2165. Amended FINRA Rule 4512 requires FINRA members to make reasonable efforts to obtain the name of and contact information for a trusted person for a customer's account. *See* FINRA Rule 4512.