

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PETER J. FETHERSTON  
(CRD No. 2108610),

Respondent.

Disciplinary Proceeding  
No. 2020065396501

Hearing Officer–BDC

**EXTENDED HEARING  
PANEL DECISION FOLLOWING  
REMAND**

October 22, 2025

**For failing to respond to a FINRA request for information, as alleged in cause three, Peter J. Fetherston is barred in all capacities from associating with any FINRA member firm. The majority of the Extended Hearing Panel finds the Department of Enforcement failed to prove that Fetherston converted or improperly used customer funds or that he provided false or misleading information, documents, and testimony to FINRA staff. The Panel Majority therefore dismisses causes one and two. The Hearing Officer dissents from the majority’s decision to dismiss causes one and two.**

*Appearances*

For the Complainant: Robert Miller, Esq., Michelle Galloway, Esq., and John Luburic, Esq.,  
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Clifford B. Olshaker, Esq.

**DECISION ON REMAND**

**I. Introduction**

On September 26, 2023, a FINRA Extended Hearing Panel (the “Panel”) issued a decision finding that Respondent Peter J. Fetherston partially failed to respond to a FINRA request for information.<sup>1</sup> The Panel suspended Fetherston for four months. The Panel found that FINRA’s Department of Enforcement failed to prove that Fetherston converted or improperly

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<sup>1</sup> *Dep’t of Enforcement v. Fetherston*, No. 2020065396501, 2023 FINRA Discip. LEXIS 14 (OHO Sept. 26, 2023), *remanded*, 2024 FINRA Discip. LEXIS 27 (NAC Dec. 9, 2024).

used customer funds or that he provided false or misleading information, documents, and testimony to FINRA staff and dismissed those allegations.

Enforcement appealed to the National Adjudicatory Council (“NAC”) and, on December 9, 2024, the NAC remanded the matter to the Panel.<sup>2</sup>

## II. The Initial Panel Decision

The Complaint charged Fetherston with converting and making improper use of customer funds (cause one), giving a false explanation of the events during his on-the-record testimony (“OTR”), and submitting a fabricated document—a scanned copy of a handwritten note purportedly signed by the customers (“the Note”)—to Enforcement (cause two). Enforcement also charged Fetherston with failing to respond to a written request it issued to him during the investigation asking him to identify the medical expenses he purportedly paid with the funds he received from the customers (cause three).

In its initial decision, the Panel found that, while associated with FINRA member firm, Fetherston received three checks made payable to him personally totaling \$89,000 from two long-time customers, WG and SG (collectively “the Gs”), a married couple.<sup>3</sup> Shortly afterward, Fetherston’s member firm employer, Principal Securities Inc. (“Principal”), conducted an internal investigation into his activities related to mutual fund purchases and sales by several of his customers. Upon concluding that Fetherston’s mutual fund-related activities violated firm policy, it discharged him.<sup>4</sup> The Gs were among those customers impacted by Fetherston’s conduct, and the firm reimbursed them for the costs they had incurred related to Fetherston’s mutual fund purchases and sales in the Gs’ accounts.<sup>5</sup>

The Panel further found that, during a call relating to that reimbursement, the Gs notified the firm that they had given Fetherston three checks made payable to him. The Gs told the firm that one of the checks was to pay for commissions Fetherston said they owed, and the remaining two were so he could buy investments for them, although they claimed not to know what investments he planned to purchase.<sup>6</sup> After speaking with the Gs, the firm contacted Fetherston. He told the firm that he invested the funds in a “fixed investment” but had no proof of it. In fact, Fetherston had deposited the checks into his personal checking account and used the funds to pay his personal expenses.<sup>7</sup> The firm concluded that Fetherston had not invested the funds through

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<sup>2</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27.

<sup>3</sup> *Fetherston*, 2023 FINRA Discip. LEXIS 14, at \*1.

<sup>4</sup> *Id.* at \*15.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*17–19.

<sup>7</sup> *Id.* at \*2, \*37.

the firm or otherwise but instead had converted the Gs' funds. It then reimbursed the Gs for the full amount of the checks they had given to Fetherston.<sup>8</sup>

Next, the firm disclosed the situation to FINRA, and Enforcement launched an investigation into Fetherston's conduct. During the investigation, FINRA interviewed the Gs as well as Fetherston, and issued information and document requests to him.<sup>9</sup> The Gs told Enforcement the same story they told the firm. Fetherston, however, told FINRA a different story than the one he told the firm, and his story changed throughout FINRA's investigation and at the hearing.<sup>10</sup> Ultimately, Fetherston asserted that he received the funds as a loan and produced to FINRA the Note, on his former firm's stationery, purportedly signed by the Gs.<sup>11</sup> The Note stated that they gave Fetherston the checks to pay his medical expenses and associated costs and that he could repay the funds "in some fashion at a later date to be determined but," it added, they "are flexible and will contact him when ready."<sup>12</sup>

The Gs declined either to testify at the hearing or provide an affidavit.<sup>13</sup> During FINRA staff's interviews with them, the Gs stated that they feared Fetherston would retaliate against them and thought he was prone to rage and capable of physical violence. WG pointed out that Fetherston knew where he and his wife lived and, after the incident involving the three checks came to light, Fetherston arrived at their home unannounced and tried to see them. But, WG said, they were scared, would not let him in, and wrote to him asking that he leave them alone. At the time, WG was experiencing serious chronic health problems, was on a leave of absence from his job for health reasons, and was undergoing a series of brain surgeries.<sup>14</sup> Also, the Gs said they had read that Fetherston previously had been arrested for assault and intimidating a witness. For these reasons, the Gs explained, they could not subject themselves to any further risk.<sup>15</sup>

Although the Panel found that Fetherston lacked credibility and concluded that his story contained many inconsistencies and implausible explanations, it found that the Gs' statements did not address numerous questions and issues relevant to assessing the credibility of their story.<sup>16</sup> Because the Gs did not testify, the parties and the Panel were unable to question them about these subjects.

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<sup>8</sup> *Id.* at \*20.

<sup>9</sup> *Id.* at \*22–30.

<sup>10</sup> *Id.* at \*30–31.

<sup>11</sup> *Id.* at \*3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*51.

<sup>14</sup> *Id.* at \*23.

<sup>15</sup> *Id.* at \*29.

<sup>16</sup> *Id.* at \*54–56.

In sum, the Panel found the record was devoid of essential evidence it needed to evaluate the Gs' hearsay statements in context.<sup>17</sup> The Panel found that Enforcement failed to prove, by a preponderance of the evidence, that Fetherston converted or improperly used the Gs' funds or that he testified falsely about the circumstances involving his receipt and use of the funds.<sup>18</sup> As a result, the Panel dismissed the charges relating to those allegations. It also dismissed the charge that Fetherston submitted a fabricated note to FINRA. Although the evidence left the Panel with doubts about the Note's authenticity, it nonetheless declined to find the Note was fake.<sup>19</sup>

The Panel did find, however, that Fetherston violated FINRA Rules by failing to respond to Enforcement's request during the investigation that he identify the medical expenses he purportedly paid with the funds the Gs gave him.<sup>20</sup> Fetherston's attorney objected to the request on privilege grounds, and Fetherston did not provide the requested information. The Panel found the objection meritless.<sup>21</sup>

In determining the appropriately remedial sanction, the Panel viewed Fetherston's response as a partial, rather than complete, failure, and found that Fetherston substantially complied with the request.<sup>22</sup> Based on the relevant aggravating and mitigating evidence, the Panel suspended Fetherston for four months in all capacities from associating with any FINRA member firm.<sup>23</sup>

### **III. The Appeal and Remand**

On October 20, 2023, Enforcement filed a Notice of Appeal to the NAC. Enforcement asserted that the Panel erred by dismissing causes one and two based on its conclusions that: (1) the Gs' hearsay statements were not corroborated by other evidence, including Fetherston's statements to the firm; (2) Enforcement did not prove that Fetherston fabricated the Note; and (3) Enforcement did not prove the first two causes of action by a preponderance of the evidence. Enforcement also appealed the sanction imposed by the Panel for cause three.<sup>24</sup>

On December 9, 2024, the NAC issued a decision reversing, in part, the Panel's decision and remanding this matter to the Office of Hearing Officers for further proceedings.<sup>25</sup> The NAC directed the Panel to reconsider its findings related to the reliability of the Gs' hearsay statements

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<sup>17</sup> *Id.* at \*7.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*64.

<sup>20</sup> *Id.* at \*8–9.

<sup>21</sup> *Id.* at \*9.

<sup>22</sup> *Id.* at \*75, \*83.

<sup>23</sup> *Id.* at \*84.

<sup>24</sup> Department of Enforcement's Notice of Appeal (Oct. 20, 2023).

<sup>25</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27.

and to reconsider whether Fetherston’s general lack of credibility provides further evidence of his liability under causes one (conversion and improper use of funds) and two (providing false or misleading information, documents and testimony).<sup>26</sup>

Under cause one, the NAC directed the Panel to reconsider Fetherston’s liability for conversion and, in doing so, to focus on the proper burden of proof—preponderance of the evidence.<sup>27</sup> The NAC suggested that the Panel misapplied the burden of proof by demanding a level of certainty not required when properly applying the standard.<sup>28</sup> The NAC also instructed the Panel to consider whether the Gs’ hearsay statements that they gave three checks to Fetherston for investment purposes (and not as a gift or a loan) were corroborated by conversations that Fetherston had with Principal and, if so, how that corroboration affects the reliability of the statements.<sup>29</sup> The NAC’s remand decision directed the Panel to consider the following as corroborating (or explain why it does not find each corroborating): (1) when initially confronted by Principal’s compliance officer, Fetherston never claimed the Gs’ checks were a gift or a loan and instead, “acknowledged that he had not invested the money and agreed to repay the firm”;<sup>30</sup> and (2) that Fetherston’s conversations with the compliance officer occurred less than three months after he received the final check from the Gs while, by contrast, Fetherston first claimed that the checks were a gift or a loan approximately six months later.<sup>31</sup>

The NAC also directed the Panel to consider other evidence pointing to Fetherston’s guilt and the Gs’ reliability. Specifically, the NAC directed the Panel to consider: (1) evidence that the Gs were not sophisticated investors and they “trusted Fetherston in a professional capacity and, therefore, may not have doubted his direction to write checks made out to him personally”;<sup>32</sup> (2) evidence that the Gs consistently told both FINRA and the firm’s compliance officer that they gave the three checks to Fetherston for investment purposes;<sup>33</sup> (3) evidence that the Gs’ “relatively modest delay” in telling Principal about the three checks may have been due to health issues and thus did not undermine the reliability of their statements;<sup>34</sup> (4) evidence relating to why the Gs’ statements were verbal and not written, including that they communicated with Fetherston primarily by telephone or in person and also that Principal promptly reimbursed them, eliminating the need for them to make a written complaint;<sup>35</sup> and (5) evidence that the Gs

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<sup>26</sup> *Id.* at \*25–26, \*33.

<sup>27</sup> *Id.* at \*24–25.

<sup>28</sup> *Id.* at \*24.

<sup>29</sup> *Id.* at \*27.

<sup>30</sup> *Id.* at \*26.

<sup>31</sup> *Id.* at \*27–28.

<sup>32</sup> *Id.* at \*29, \*32.

<sup>33</sup> *Id.* at \*32–33.

<sup>34</sup> *Id.* at \*30, \*32–33.

<sup>35</sup> *Id.* at \*31–33.

“consistently stated over the course of nearly three years that they felt threatened by Fetherston and feared retaliation if they testified.”<sup>36</sup>

The NAC stated that, if after considering this additional evidence, the Panel still has concerns about the reliability of the Gs’ statements, the Panel must explain those concerns to specify the probative weight, if any, that it accords to those statements, and to address how that weight impacts the rest of its analysis.<sup>37</sup>

As to Fetherston’s general lack of credibility and whether his implausible testimony provides further evidence of his liability, the NAC instructed the Panel that a “factfinder may infer culpability from incredible testimony, at least when there otherwise is evidence of misconduct.”<sup>38</sup> The NAC directed the Panel to explain whether it views Fetherston’s testimony on the following points as evidence of misconduct: (1) Fetherston changed his story about the purpose of the Gs’ checks and the customers’ financial circumstances;<sup>39</sup> (2) Fetherston provided vague and inconsistent testimony on “important details,” including why he delayed in producing the Note that purported to document the Gs’ intent to give him a gift or a loan, how the Gs determined the amounts of the checks, and why the Gs would loan him \$89,000 at a time when WG and the Gs’ daughter were experiencing health issues;<sup>40</sup> (3) Fetherston’s “uncorroborated” and “implausible” claim that the Gs “felt such sympathy for him that they gave him an open-ended loan of \$89,000, only to place his career in jeopardy several months later by falsely claiming this money was for their investments”;<sup>41</sup> and (4) Fetherston’s “lengthy delays” in telling FINRA the checks were a loan or a gift and in disclosing the purported Note from the Gs—evidence which, if credited, would have exculpated him of serious misconduct—and his failure to provide a credible explanation for those delays.<sup>42</sup>

As to cause two, because the Panel’s dismissal of this cause was based on its factual findings and legal conclusions relating to the charge of conversion, the NAC directed the Panel to reconsider Fetherston’s liability under cause two based on the same considerations discussed above.<sup>43</sup> As to cause three, the NAC held that the Panel erred in concluding that Fetherston “substantially complied” with FINRA’s information request and directed it to redetermine

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<sup>36</sup> *Id.* at \*32.

<sup>37</sup> *Id.* at \*25.

<sup>38</sup> *Id.* at \*33.

<sup>39</sup> *Id.* at \*34.

<sup>40</sup> *Id.* at \*35.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*37.

<sup>43</sup> *Id.* at \*37–38.

sanctions “without according mitigation based on substantial compliance.”<sup>44</sup> Additionally, the NAC held that the Panel applied the wrong standard when determining that Fetherston was not entitled to mitigation based on reliance on counsel.<sup>45</sup> On remand, the NAC directed the Panel to reevaluate whether Fetherston was entitled to mitigation using the standard articulated in Principal Consideration No. 7 of the FINRA Sanction Guidelines.<sup>46</sup>

#### **IV. Majority Decision on Remand**

After reconsideration of the record, a majority of the Panel (“Panel Majority”) finds that Enforcement failed to prove by a preponderance of the evidence that Fetherston converted or improperly used the Gs’ funds or that he provided false or misleading information, documents, and testimony to FINRA staff. Causes one and two are therefore dismissed.<sup>47</sup> As discussed in the dissent attached to this decision, the Hearing Officer dissents from the Panel Majority’s decision as to causes one and two.

As to cause three, the entire Panel finds that Fetherston violated FINRA Rules 8210 and 2010 by failing to respond to Enforcement’s request during the investigation that he identify the medical expenses he purportedly paid with the funds the Gs gave him, as alleged in cause three. In determining the appropriately remedial sanction, the Panel viewed Fetherston’s response as a partial, rather than complete, failure and considered that Fetherston’s responses were often untimely, he gave varying explanations about the circumstances surrounding his receipt and use of the Gs’ funds, and Enforcement had to exert substantial pressure to obtain his responses. On remand, the Panel finds that Fetherston did not substantially comply with FINRA’s request for information related to his purported medical expenses and accordingly bars Fetherston in all capacities.

#### **A. Findings of Fact**

##### **1. The Gs’ Relationship with Fetherston**

In 2008, Fetherston met the Gs through a mutual friend.<sup>48</sup> Around 2011 or 2012, they became his customers.<sup>49</sup> In October 2017, Fetherston was arrested and charged in Massachusetts

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<sup>44</sup> *Id.* at \*41–42, \*44.

<sup>45</sup> *Id.* at \*42.

<sup>46</sup> *Id.* at \*43.

<sup>47</sup> FINRA hearing panels in disciplinary cases include two industry members who meet the criteria established in FINRA Rules 9231 and 9232 and one hearing officer from FINRA’s Office of Hearing Officers. While this case was pending appeal before the NAC, the Hearing Officer appointed to the Panel left FINRA. Accordingly, when the NAC remanded this case, the Chief Hearing Officer appointed a replacement Hearing Officer in accordance with FINRA’s Rules.

<sup>48</sup> Hearing Transcript (“Tr.”) 269, 639.

<sup>49</sup> Tr. 639–40.

with assault and battery and witness intimidation.<sup>50</sup> As a result, the firm with which Fetherston was associated at the time discharged him effective November 15, 2017.<sup>51</sup>

After several months, in March 2018, he became associated with Principal.<sup>52</sup> Upon joining Principal, Fetherston sent out mailers to solicit clients.<sup>53</sup> The Gs received one of those mailers. They had remained customers of Fetherston's former firm after the firm terminated Fetherston,<sup>54</sup> and they also had an account at another FINRA member firm.<sup>55</sup> In February 2019, after receiving the mailer, the Gs contacted Fetherston and met with him to discuss their financial plans.<sup>56</sup> This was the first communication between them since Fetherston's termination two years prior.<sup>57</sup> At the February 2019 meeting, Fetherston learned that WG was on a leave of absence from work due to his worsened condition with Parkinson's disease.<sup>58</sup>

A month later, in March 2019, the Gs transferred at least some of their accounts to Fetherston at Principal<sup>59</sup> and opened four brokerage accounts:<sup>60</sup> three in WG's name<sup>61</sup> and a joint account for WG and his wife, SG.<sup>62</sup> Although Fetherston knew that WG suffered from a chronic health condition, and was on a leave of absence due to his condition, the new account forms simply noted that WG was employed as an analyst and identified his employer, a large financial institution.<sup>63</sup> One of the related forms, a Rollover Analysis Form, did acknowledge that WG was "no longer a full time employee at his employer" and stated that he "wants more control over his assets."<sup>64</sup>

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<sup>50</sup> CX-1, at 15–17.

<sup>51</sup> CX-1, at 5, 7, 14–15, 17; Tr. 427–28, 645. In January 2018, at Fetherston's request, the charges against him were dismissed for failure to prosecute because the alleged victim refused to testify. CX-1, at 15; Tr. 427–28, 658.

<sup>52</sup> Complaint ("Compl.") ¶¶ 1, 6; Answer ("Ans.") ¶¶ 1, 6; CX-1, at 4, 7.

<sup>53</sup> Tr. 663–64.

<sup>54</sup> Tr. 436.

<sup>55</sup> Tr. 666–67.

<sup>56</sup> Tr. 270, 454–55, 664; CX-36, at 2; *see also* CX-15, at 11.

<sup>57</sup> Tr. 439–41.

<sup>58</sup> Tr. 456.

<sup>59</sup> Tr. 171, 270.

<sup>60</sup> Tr. 457–58.

<sup>61</sup> CX-30, at 3; CX-32; CX-33.

<sup>62</sup> CX-31.

<sup>63</sup> CX-30, at 1; CX-31, at 1; CX-32, at 1; CX-33, at 1. *See also* Tr. 642 (Fetherston describing WG as working in information technology on an operations team at a large financial institution).

<sup>64</sup> CX-30, at 21.

The new account forms also reflected that SG was a teacher's assistant;<sup>65</sup> the Gs' estimated combined net worth was \$2.7 million;<sup>66</sup> their estimated combined annual income was \$120,000;<sup>67</sup> they had at least 11 years of investment experience;<sup>68</sup> and they owned mutual funds, stocks, a qualified/retirement plan, and a "money market."<sup>69</sup> The new account forms for two of WG's accounts and the joint account reflected a high risk tolerance and a growth objective.<sup>70</sup> The new account form for WG's third account reflected a moderate risk tolerance and an investment objective of income and growth.<sup>71</sup> The accounts were nondiscretionary.<sup>72</sup>

When the Gs first opened a brokerage account at Principal, they deposited funds into the account by sending a check made payable to Principal.<sup>73</sup> When they made additional investments at Principal, they deposited more checks at Principal rather than using cash in the account or proceeds from the sales of other securities.<sup>74</sup>

## **2. Principal Investigates Fetherston's Activities**

In November 2019, Principal began investigating Fetherston's activities after discovering that several of his customers, including the Gs, had bought mutual fund shares and sold them shortly afterward.<sup>75</sup> A compliance advisor ("Compliance Advisor") associated with Principal helped on the investigation into Fetherston's conduct.<sup>76</sup>

In connection with its investigation, Principal asked Fetherston to provide information about his dealings with the Gs. On January 7, 2020, Fetherston told Principal, and later testified at the hearing, that WG's health situation had worsened dramatically by the fall of 2019;<sup>77</sup> the same was true for the Gs' daughter, their sole child.<sup>78</sup> Fetherston said "the client wanted to lower his overall risk in the market, acquire some tax deferral and efficiency and set up guaranteed income in the future for he and his family to face rising income needs and possibly a death

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<sup>65</sup> CX-31, at 1.

<sup>66</sup> CX-31, at 2.

<sup>67</sup> CX-31, at 2.

<sup>68</sup> CX-30, at 2; CX-31, at 2; CX-32, at 2; CX-33, at 2.

<sup>69</sup> CX-30, at 3; CX-31, at 3; CX-32, at 3; CX-33, at 3.

<sup>70</sup> CX-30, at 2; CX-31, at 2; CX-33, at 2.

<sup>71</sup> CX-32, at 2.

<sup>72</sup> Tr. 777–80.

<sup>73</sup> Tr. 168–69.

<sup>74</sup> Tr. 171.

<sup>75</sup> Tr. 63.

<sup>76</sup> Tr. 60–62, 64.

<sup>77</sup> CX-15, at 15; Tr. 490–91.

<sup>78</sup> Tr. 641.

benefit if he does not survive.”<sup>79</sup> Fetherston explained that WG “is now facing multiple brain surgeries and his daughter is having major mental health issues.”<sup>80</sup> As a result, WG “wanted to keep his cash in banks that he already had as another precaution to lifestyle changes potentially.”<sup>81</sup> Fetherston also wrote that when he met with the Gs in February 2019, WG said he was expecting about \$200,000 from his brother resulting from his deceased mother’s estate, which had not yet fully settled.<sup>82</sup>

Based on its investigation, Principal concluded that Fetherston had not followed Principal’s “policies and procedures regarding some replacement and switch transactions.”<sup>83</sup> Accordingly, Principal discharged him on January 23, 2020.<sup>84</sup> Afterward, Principal decided “proactively” to send reimbursement checks to the affected customers.<sup>85</sup> The reimbursed customers included the Gs, who received \$26,623.83 from Principal to compensate them for improper fees they incurred and for missed breakpoints.<sup>86</sup>

Around February 24, 2020, after receiving the reimbursement check from Principal, the Gs telephoned the Compliance Advisor.<sup>87</sup> He summarized their conversation in a memorandum that day.<sup>88</sup> According to the memorandum, the Gs knew that Fetherston was no longer with Principal, and they asked why they received the reimbursement check. He told them that Principal had reviewed their accounts and found transactions that did not meet its guidelines. Further, the Gs asked if they risked losing their money, and the Compliance Advisor told them that they had several investments with Principal, and while some were subject to market risk, they would not lose any of it to Fetherston.

The Gs then told the Compliance Advisor that they had written multiple checks payable to Fetherston. They could not remember the number of checks or the amounts. But they estimated they gave him five checks—one of which was for financial planning services, and the others were for investments. They said they would do some research and get back to the Compliance Advisor, but it might take a few weeks because WG was about to have brain

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<sup>79</sup> CX-15, at 15.

<sup>80</sup> CX-15, at 15.

<sup>81</sup> CX-15, at 15.

<sup>82</sup> CX-15, at 11.

<sup>83</sup> CX-1, at 4, 17–18.

<sup>84</sup> Tr. 66; CX-1, at 4.

<sup>85</sup> Tr. 66–67.

<sup>86</sup> CX-16; Tr. 68–69. “Breakpoint discounts are volume discounts on the sales loads charged to investors who purchase mutual fund shares.” *Dep’t of Enforcement v. Mehringer*, No. 2014041868001, 2020 FINRA Discip. LEXIS 27, at \*27 n.21 (NAC June 15, 2020) (citing Sales Charges and Breakpoints, <https://www.finra.org/rules-guidance/key-topics/mutual-funds>).

<sup>87</sup> Tr. 70.

<sup>88</sup> CX-18; Tr. 78, 81.

surgery. Finally, the Gs told the Compliance Advisor that Fetherston would likely call them in the next few days, and they did not know what to do. The Compliance Advisor replied that if he were the Gs, he would not answer the call.<sup>89</sup>

The Gs telephoned the Compliance Advisor later that same day, February 24. The Compliance Advisor testified that the Gs informed him that they found three checks made payable to Fetherston. The Compliance Advisor asked them to send him the checks, which they did the next day.<sup>90</sup> The checks were written over a three-month period in the fall of 2019 and totaled \$89,000. The first check, dated September 12, was in the amount of \$19,000.<sup>91</sup> The second check was dated November 4, in the amount of \$30,000.<sup>92</sup> And the third check, dated December 3, was in the amount of \$40,000.<sup>93</sup> According to the Compliance Advisor, the Gs told him on February 24, 2020, that they gave the \$19,000 check to Fetherston for commissions relating to financial planning<sup>94</sup> and that the last two checks were for investment.<sup>95</sup>

On November 4, 2019, the same day the Gs wrote the second check to Fetherston, WG wrote a check for \$320,000 made payable, not to Fetherston, but to Principal Life Insurance Company.<sup>96</sup> This check represented the initial premium for a Principal Deferred Income Annuity.<sup>97</sup> The annuity application identifies Fetherston as the marketer and bears his purported signature.<sup>98</sup> It also reflects that WG's estimated annual income was \$90,000 and that he had 30 years of investment experience.<sup>99</sup>

There are no notes in evidence detailing the Compliance Advisor's second call with the Gs on February 24. But three days later, he emailed Principal's Chief Compliance Officer ("CCO") summarizing the situation involving the Gs and Fetherston.<sup>100</sup> The Compliance Advisor wrote that during the second call on February 24—after the Gs located the three checks—he

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<sup>89</sup> CX-18, at 1; Tr. 78.

<sup>90</sup> Tr. 84–85, 159; CX-19.

<sup>91</sup> CX-19, at 5.

<sup>92</sup> CX-19, at 3.

<sup>93</sup> CX-19, at 7.

<sup>94</sup> Tr. 86–87.

<sup>95</sup> Tr. 88–89.

<sup>96</sup> CX-35, at 36.

<sup>97</sup> CX-35, at 1; Tr. 389–90, 479.

<sup>98</sup> CX-35, at 4.

<sup>99</sup> CX-35, at 6. The application also showed that his investment/financial objective was income; that his risk tolerance was moderate; that he had a \$2 million net worth; and that he had \$400,000 in illiquid assets (variable annuities) and liquid assets totaling \$1.6 million, which included, among other things, \$1 million in mutual funds and \$300,000 under the category "individual stocks, bonds, ETF's."

<sup>100</sup> CX-21, at 1–2; Tr. 106.

“asked if they could tell [him] what kind of investment the money was for, but they did not know.”<sup>101</sup> The Compliance Advisor then asked “if they had provided money to Fetherston directly before he was with our Firm and they did not know.”<sup>102</sup> His email to the CCO noted that WG’s “speech was notably impacted” by his Parkinson’s disease.<sup>103</sup>

### **3. Fetherston Lies to Principal About His Use of the Gs’ Funds**

After finding no evidence that the Gs’ funds had been invested through Principal, the Compliance Advisor telephoned Fetherston on February 26, 2020. The Compliance Advisor recounted their conversation at the hearing. He asked Fetherston where he had invested the Gs’ funds from the three checks. Fetherston said, “simply that they had been put into a fixed investment.”<sup>104</sup> The Compliance Advisor pressed Fetherston about whether he had any statements, confirmations, or receipts showing that he had invested the funds. Fetherston responded that he had no documentation. He was also unable to recall when he made the investment, or the amount invested.<sup>105</sup> Fetherston did not suggest the funds were a loan or a gift.<sup>106</sup>

At that point, the Compliance Advisor told Fetherston that if he had invested the funds, there would be documentation of it. “I understand,” Fetherston replied,<sup>107</sup> and then expressed concern about how this matter could impact his career.<sup>108</sup> The discussion moved on to the subject of repayment. The Compliance Advisor testified that Fetherston did not object to repaying the funds and stated he would try to do so as soon as possible,<sup>109</sup> effectively conceding that he had not invested the Gs’ funds.

Two days later, on February 28, 2020, having concluded that Fetherston engaged in embezzlement and collusion,<sup>110</sup> Principal issued an \$89,000 reimbursement check to the Gs.<sup>111</sup>

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<sup>101</sup> CX-21, at 2.

<sup>102</sup> CX-21, at 2.

<sup>103</sup> CX-21, at 2.

<sup>104</sup> Tr. 93.

<sup>105</sup> Tr. 93.

<sup>106</sup> Tr. 193.

<sup>107</sup> Tr. 94, 186–87.

<sup>108</sup> Tr. 97.

<sup>109</sup> Tr. 97.

<sup>110</sup> Tr. 125–27; CX-22, at 3, 5.

<sup>111</sup> Tr. 118–19, 128; CX-21, at 1; CX-23; CX-24, at 2.

Then, on March 4, 2020, Fetherston called the Compliance Advisor to discuss the repayment of the funds.<sup>112</sup> During that call, Fetherston did not further explain why the Gs gave him the checks or his intended use of the funds,<sup>113</sup> nor did he describe the funds as a loan.<sup>114</sup> Fetherston never repaid the funds to Principal.<sup>115</sup>

At the hearing, Fetherston confirmed the essential details of the Compliance Advisor's version.<sup>116</sup> He also explained that he characterized the investment as a fixed investment "because putting money in a checking account or a savings account is a fixed investment."<sup>117</sup> Even so, Fetherston admitted not telling the Compliance Advisor that he had deposited the funds into his own checking account.<sup>118</sup>

In sum, the Compliance Advisor testified that at no time did Fetherston tell him that: (1) the purpose of the funds was other than for a fixed investment; (2) the Gs gifted or loaned him the funds for personal use or to pay medical expenses; or (3) the Gs had signed a document relating to the \$89,000 they gave him.<sup>119</sup>

On March 5, 2020, Principal filed a Form U5 (Uniform Termination Notice for Securities Industry Registration) with FINRA disclosing the reason it terminated Fetherston. According to the Form U5, the Gs complained that "they provided multiple checks made payable directly to the representative for what he said were for commissions and investments" and that Principal had settled the complaint for \$89,000.<sup>120</sup> This filing triggered an investigation by FINRA into whether Fetherston had misappropriated the Gs' funds.<sup>121</sup>

#### **4. FINRA Interviews the Gs**

FINRA staff interviewed the Gs on several occasions. Over the course of these interviews, the Gs told the staff largely the same story they had told the Compliance Advisor.

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<sup>112</sup> Tr. 142–43.

<sup>113</sup> Tr. 143–44.

<sup>114</sup> Tr. 144.

<sup>115</sup> Tr. 191.

<sup>116</sup> Tr. 499–500, 503–05, 682–84.

<sup>117</sup> Tr. 683.

<sup>118</sup> Tr. 717–18.

<sup>119</sup> Tr. 95–97, 192–93.

<sup>120</sup> CX-1, at 21.

<sup>121</sup> Tr. 210, 409–10. The investigation led to the filing of this disciplinary proceeding. Tr. 409–10.

### **a. The March 19, 2020 Interview**

On March 19, 2020, a FINRA investigator (“Investigator 1”)<sup>122</sup> interviewed the Gs by telephone. Afterward, she created an undated memorandum summarizing what the Gs told her and placed it in the investigative file.<sup>123</sup> The memorandum largely matches the story the Gs told the Compliance Advisor a few weeks earlier but includes more details. The memorandum reflects that the Gs told Investigator 1 the following: WG was 56 years old and a business analyst but was no longer working because he had Parkinson’s disease, which led to several related brain surgeries. His wife, SG, 58 years old and a creative therapist, had taken a leave of absence to care for him. The Gs were relying on their investments to subsidize their income to pay living expenses. They said Fetherston introduced them to a mortgage broker and a tax attorney to handle their personal needs. He also assisted the Gs with their wills and suggested that he be the successor executor. They said they met Fetherston through a close friend many years earlier and since then he had been in frequent contact with them by telephone and in person.<sup>124</sup>

According to the memorandum, Fetherston, who had requested that the Gs make the checks payable to him, picked the checks up from their home and did not give them a receipt. The Gs told Investigator 1 that they could not remember any specific details about the purpose of the checks. They said they learned that Fetherston did not invest their money when Principal contacted them about the mutual fund switching in their account.<sup>125</sup>

The Gs did not take Fetherston’s telephone calls after they learned about what the memorandum termed “the misappropriation.” When Fetherston later showed up at their house twice, they did not answer the door. The Gs, who felt threatened by Fetherston, emailed him around February 27, 2020, advising him not to contact them by telephone or in person at their home.<sup>126</sup>

### **b. The September 30, 2021 Interview**

In July 2021, FINRA assigned Investigator 2 to the investigation, replacing Investigator 1.<sup>127</sup> Over the next year, Investigator 2 spoke with the Gs four or five times by telephone; both WG and SG were present each time.<sup>128</sup> Investigator 2 testified that when he conducted

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<sup>122</sup> Tr. 208–09.

<sup>123</sup> Tr. 210–12; CX-10.

<sup>124</sup> CX-10.

<sup>125</sup> CX-10.

<sup>126</sup> CX-10.

<sup>127</sup> Tr. 204, 208, 625.

<sup>128</sup> Tr. 372–73.

telephonic interviews with the Gs, along with an Enforcement attorney, he took contemporaneous notes and then created a memorandum of the interview that day.<sup>129</sup>

The September 30, 2021 interview memorandum states that the Gs confirmed that they wrote the three checks in the amounts and on the dates reflected on them.<sup>130</sup> As for the reason they wrote the checks, they said they believed the checks were to pay commissions Fetherston said they owed and for future investments.<sup>131</sup> They added that at Fetherston's suggestion, he came to their home and picked up each check so that they would not have to travel into New York City to drop them off. Further, they said that at the time they wrote the checks, WG was ill and ready to have brain surgery.<sup>132</sup> As Investigator 2 specifically recalled during his testimony, the Gs told him that Fetherston picked up the checks at their home because WG was ill, and they made out the checks personally to Fetherston at his request.<sup>133</sup> According to the memorandum, the Gs denied writing the Note or signing it and also said they did not know about Fetherston's purported medical condition. They said he never mentioned any health concerns to them.<sup>134</sup>

Finally, the memorandum states that the Gs discussed their purported fears about Fetherston. They said he came unannounced to their house in February or March 2020. They saw him through their intercom system and were afraid of what he might do to them, so they called the police.<sup>135</sup> Since then, they have had no contact with Fetherston or his lawyer. The Gs added that going forward, they would rather not get involved with Fetherston because they believed he has anger issues and were scared of him but said that they would be willing to speak with FINRA investigators.<sup>136</sup>

### **c. The May 3, 2022 Interview**

The May 3, 2022 interview memorandum states that, during this interview, FINRA staff told the Gs that a formal complaint was going to be filed against Fetherston and also told them "about the possibility of a hearing proceeding against Fetherston and what that may entail."<sup>137</sup> The Gs reiterated what they had told the staff in earlier interviews about their dealings with Fetherston, including that when they gave the three checks to Fetherston, he did not tell them exactly what investments he was going to purchase for them. They also emphasized that they

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<sup>129</sup> Tr. 234–37. Investigator 2 memorialized three interviews in three memoranda dated September 30, 2021, May 3, 2022, and September 14, 2022. CX-11; CX-12; CX-13.

<sup>130</sup> CX-11, at 1.

<sup>131</sup> CX-11, at 1.

<sup>132</sup> CX-11, at 1–2.

<sup>133</sup> Tr. 276–77, 386–87.

<sup>134</sup> CX-11, at 1–2.

<sup>135</sup> CX-11, at 2.

<sup>136</sup> CX-11, at 2.

<sup>137</sup> CX-12, at 1–2.

remained afraid of what he may do concerning this matter, although they again agreed to talk with FINRA staff if it had more questions.<sup>138</sup>

The Gs conveyed new information as well. They said they did not have any contact with Fetherston after he left his prior firm until they contacted him in 2019 when he joined Principal. They said they contacted him because they were unhappy with the advisor who took over their account after Fetherston left the firm.<sup>139</sup> The Gs recalled that the only money they gave Fetherston was for investment purposes. They stated that they never gave him a loan or a gift.<sup>140</sup> At the time they gave the \$89,000 to Fetherston, the Gs were unaware of Fetherston's purported financial or medical problems. Fetherston would sometimes drop by their personal residence to pick up a check or have them sign documents. But his reason for stopping at their home was always for business purposes.<sup>141</sup>

The Gs said, “[a]t the time they wrote and provided the three checks to Fetherston they considered their relationship with Fetherston to be solely a friendly business relationship and [they] were never close personal friends.”<sup>142</sup> For example, the Gs maintained that they never went to Fetherston's house. The Gs again denied writing the Note or knowing anything about it.<sup>143</sup> They also added a detail about the Note: they said they first learned of its existence when FINRA staff brought it to their attention during a prior call.<sup>144</sup>

#### **d. The September 14, 2022 Interview**

The September 14, 2022 interview memorandum states that the Gs told FINRA staff that they would not testify at the hearing.<sup>145</sup> They explained their reasons as follows: the Gs said they had searched on the internet for Fetherston's name and learned that he had been previously arrested for assault and intimidating a witness. “It was for these reasons that they are afraid of Fetherston.”<sup>146</sup> They went on to say that they did not trust him and while they did not necessarily “fear being in the same room as Fetherston,” they feared “he might try and take revenge and seek

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<sup>138</sup> CX-12, at 2–3.

<sup>139</sup> CX-12, at 1.

<sup>140</sup> CX-12, at 2.

<sup>141</sup> CX-12, at 2.

<sup>142</sup> CX-12, at 2.

<sup>143</sup> CX-12, at 2.

<sup>144</sup> CX-12, at 2.

<sup>145</sup> CX-13, at 1.

<sup>146</sup> CX-13, at 1.

payback for their testimony.”<sup>147</sup> They also said that Fetherston had “come to their home uninvited once while [WG] was in the hospital” and this heightened their fear.<sup>148</sup>

They discussed other topics too. The Gs said they could not recall who filled out the account opening forms for their Principal accounts.<sup>149</sup> Regarding the purchase of an annuity on November 4, 2019, they denied that the annuity application and corresponding support paperwork were in their handwriting and, other than WG’s signature, they denied that their handwriting was on the check.<sup>150</sup>

FINRA did not have jurisdiction over the Gs and therefore could not compel their testimony at a hearing.<sup>151</sup> So after the Gs declined to testify, FINRA staff contacted them to see if they would at least sign an affidavit and sent them a draft.<sup>152</sup> The Gs did not immediately reject the request; they said they wanted to take some time to review the affidavit.<sup>153</sup> But on November 11, 2022, WG wrote to Enforcement saying that he had decided not to sign it. “The person in question is, to my mind at least, someone who is prone to rage, and quite capable of physical violence. He knows where I live and,” WG continued, “indeed has come to my home, uninvited, on two occasions. I simply cannot subject myself or my family to any further risk in this regard.”<sup>154</sup>

## **5. FINRA Obtains Testimony, Information, and Documents from Fetherston**

FINRA staff took Fetherston’s OTR and sent him requests for documents and information. The requests, issued over the course of a year, consisted of at least three FINRA Rule 8210 request letters<sup>155</sup> and four follow-up requests.<sup>156</sup> FINRA staff sent the follow-up requests because Fetherston failed to respond, or respond completely, by the stated response deadlines. Each request, including the follow-up requests, notified Fetherston that failing to comply could result in sanctions including a bar from the securities industry. Several times he

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<sup>147</sup> CX-13, at 1.

<sup>148</sup> CX-13, at 1.

<sup>149</sup> CX-13, at 1. Fetherston admitted that he wrote the information on two of the new account forms using information he received from his meeting with the Gs. Tr. 470–72; CX-32; CX-33. He did not remember if he completed a third account form. Tr. 462; CX-30. And the record is silent about whether he filled out the new account form for the fourth account. CX-31.

<sup>150</sup> CX-13, at 1–2.

<sup>151</sup> Tr. 235, 242–43.

<sup>152</sup> Tr. 241–44.

<sup>153</sup> Tr. 243–44, 373, 395–96.

<sup>154</sup> CX-77.

<sup>155</sup> CX-40; CX-48, at 4–7; CX-56.

<sup>156</sup> CX-43; CX-47; CX-49; CX-57.

missed the deadlines without seeking an extension, prompting FINRA staff to notify him that as a result, he had violated FINRA Rule 8210.<sup>157</sup>

For months, Fetherston delayed responding to those requests focusing on his receipt and use of the funds from the three checks. When he finally responded to why the Gs gave him the funds—over five months after FINRA requested his explanation and related documents—he told FINRA staff a different story than the one he had told the Compliance Advisor. For the first time, he said that the Gs voluntarily gave him the money to help him with overwhelming medical and other expenses.<sup>158</sup> Even then, he made no mention that they had loaned him the funds. Three months later, his story changed yet again; he then submitted the Note purportedly evidencing that the Gs had loaned him the funds.<sup>159</sup>

#### **a. The March 31, 2020 Request and Two Follow-up Requests**

On March 31, 2020, Investigator 1 sent Fetherston a FINRA Rule 8210 request for information and documents about the Gs and related subjects: (1) information about the three checks Fetherston received from the Gs, including a description of the purpose of each check; (2) a “copy of any written document (i.e. receipt, statement, or confirmation) evidencing the purpose of each check”;<sup>160</sup> (3) information and documents regarding his personal bank accounts, including bank statements;<sup>161</sup> (4) information about Fetherston’s termination from Principal; and (5) information regarding mutual fund transactions involving several of his customers, including the Gs. The requested information and documents were due by April 14, 2020.<sup>162</sup>

After receiving extensions until May 29, 2020,<sup>163</sup> Fetherston did not respond to the March 31 request until June 1, 2020.<sup>164</sup> His response addressed the requests seeking information about his termination and the mutual fund transactions. And he provided some information about, among other things, his relationship with the Gs.

Fetherston’s response had two glaring deficiencies: he did not respond to the request asking him to explain why the Gs provided him with the three checks,<sup>165</sup> and he did not provide his bank statements and related information. Fetherston explained, without providing any support, that he lacked access to the client files because Principal had retained his files, and he

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<sup>157</sup> CX-43, at 1; CX-47, at 3; CX-49, at 2; CX-57.

<sup>158</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>159</sup> CX-8.

<sup>160</sup> CX-40, at 3.

<sup>161</sup> CX-40, at 3–4.

<sup>162</sup> CX-40, at 1.

<sup>163</sup> CX-43, at 1; CX-47, at 4.

<sup>164</sup> CX-42.

<sup>165</sup> CX-40, at 3–4.

was unable to retrieve them due to the ongoing COVID-19 lockdown in New York City. He said, again without any support, that he also could not access the “personal notes and bank account [in] question[.]”<sup>166</sup> As a result, Fetherston continued, he was “unable to proceed with this question with any degree of certainty” but would respond after he “had a chance to review the files, notes and bank account in question.”<sup>167</sup> Notably, he did not tell FINRA staff that the checks were a gift or a loan or were to help him pay his medical and other expenses. And he neither produced the Note nor mentioned its existence.<sup>168</sup>

On June 10, 2020, Investigator 1 sent Fetherston a letter informing him that he had violated FINRA Rule 8210 by failing to respond fully to the March 31, 2020 request despite receiving extensions to May 29, 2020. The letter contained a second request under FINRA Rule 8210 for the remaining information previously requested and set a response deadline of June 24, 2020.<sup>169</sup> Still, Fetherston did not respond fully to the March 31 request by the June 24 deadline.

On September 1, 2020, Enforcement counsel sent Fetherston a third request under FINRA Rule 8210 for the outstanding documents and information sought by the March 31, 2020 request.<sup>170</sup> This request reminded Fetherston that the requested information and documents were originally due on April 14, 2020; that FINRA staff had granted him extensions to May 29; that he had failed to respond to certain items; that FINRA staff had sent him a second request for the outstanding items; that the response to the second request was due by June 24; and that he had not responded or requested an extension of that date. As a result, FINRA staff once again told Fetherston that he had violated FINRA Rule 8210 and set a response date of September 10, 2020.<sup>171</sup> The email transmitting the third request informed Fetherston that “[b]ecause these requests have been outstanding since March 31,” Enforcement would not grant him any further extensions.<sup>172</sup>

#### **b. Fetherston’s Response to the March 31, 2020 Request**

On September 10, 2020, Fetherston responded to the outstanding information and document requests made on March 31, 2020.<sup>173</sup> Fetherston stated in his response that he was providing “supporting documentation to the best of [his] ability given [his] current health situation.” Without explaining the specifics of his health situation or providing supporting

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<sup>166</sup> CX-42, at 3.

<sup>167</sup> CX-42, at 3.

<sup>168</sup> Tr. 517–19.

<sup>169</sup> CX-43, at 1.

<sup>170</sup> CX-47, at 3.

<sup>171</sup> CX-47, at 3.

<sup>172</sup> CX-48, at 2.

<sup>173</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

documentation, Fetherston added that it was “very hard” for him “to concentrate so” FINRA should “let him know if [he] omitted anything.”<sup>174</sup>

Fetherston provided an entirely different version of events regarding the Gs’ three checks than what he told the Compliance Advisor in February 2020. He did not say that he placed the funds in a fixed investment. Instead, Fetherston denied requesting the checks from the Gs.<sup>175</sup> He explained that he and the Gs “were very close” and he had many conversations with them.<sup>176</sup> During those conversations, he had “shared with them [his] health issues and financial concerns and they were kind enough to offer help in a serious time of need.”<sup>177</sup> Further, Fetherston wrote that the Gs “were sympathetic to [his] situation and offered to assist. They believed it was suitable and meant to help [him] in a sincere way.”<sup>178</sup> In Fetherston’s view, he was “getting help from friends that [he] had helped many times over in the past.”<sup>179</sup> He stated that “[t]he purpose of each check was the same: help me to pay off my medical bills and expenses that were overwhelming.”<sup>180</sup>

This was the first time Fetherston had told FINRA staff that the Gs voluntarily gave him \$89,000 to help him pay medical expenses.<sup>181</sup> As discussed above, the March 31, 2020 request required him to both “[d]escribe the purpose of each check” and “provide a copy of any written document (i.e. receipt, statement, or confirmation) evidencing the purpose of each check.”<sup>182</sup> Fetherston’s response, however, did not disclose the existence of the Note, and he did not produce it to FINRA staff.<sup>183</sup> Nor did he mention that he received the funds as a loan.

Fetherston’s response went on to say—without support—that the Gs “had multiple sources of income and assets” and that when they gave him the checks, “their liquidity was excellent and their needs were much lower than previously expected.”<sup>184</sup> In conclusion, Fetherston denied “intentionally trying to violate firm and regulatory policies” and maintained

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<sup>174</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>175</sup> CX-7, at 1.

<sup>176</sup> CX-7, at 1.

<sup>177</sup> CX-7, at 1.

<sup>178</sup> CX-7, at 1.

<sup>179</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1. Fetherston did not elaborate on how the Gs had helped him many times in the past.

<sup>180</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>181</sup> Tr. 298–99, 531, 544–45. Under the applicable provisions in Principal’s manual in effect at the relevant time, registered representatives were prohibited from accepting a check made payable to them from customers unless it was a gift from an immediate family member. CX-14; Tr. 136–37.

<sup>182</sup> CX-40, at 3.

<sup>183</sup> Tr. 531–32.

<sup>184</sup> CX-7, at 1.

that his “intentions were not nefarious.”<sup>185</sup> But he did concede that his conduct showed “a complete lack of judgement on [his] part,” which he blamed on his “difficult circumstances,” again without elaborating on the details of those circumstances or providing any supporting documentation of them.<sup>186</sup>

Fetherston also provided the requested financial information and documents. He identified a Chase Bank account in his name where he claimed he deposited the three checks;<sup>187</sup> identified the existence of another account at HSBC Bank held jointly with his wife;<sup>188</sup> and provided copies of requested bank account statements. Responding to the request that he “[p]rovide documentation regarding the eventual disposition of the funds,” he wrote: “Bank records are attached and proceeds used to pay medical bills, etc. during a hardship.”<sup>189</sup>

### **c. The October 15, 2020 Request and Follow-up Request**

The next month, on October 15, 2020, Enforcement issued another FINRA Rule 8210 letter to Fetherston requesting: (1) all documents supporting Fetherston’s response that the Gs voluntarily gave him funds to help him with his financial difficulties and (2) all communications between him and the Gs during a specified period. The request set a response deadline of October 30, 2020.<sup>190</sup>

Fetherston did not respond by the deadline. As a result, on November 4, 2020, Enforcement issued a second request under FINRA Rule 8210 for the requested documents and information. The second request notified Fetherston that he had violated FINRA Rule 8210 because he had neither responded to the October 15, 2020 request nor sought an extension.<sup>191</sup> The request set a response deadline of November 19, 2020.<sup>192</sup> Fetherston did not respond by that deadline.

On December 8, 2020, Fetherston emailed his response to the October 15, 2020 request.<sup>193</sup> His email attached what he represented were all the documents and communications between him and the Gs. He also wrote that between August and December 2019, he had six conversations with the Gs about his “personal needs and situation. Some of those were via

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<sup>185</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>186</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>187</sup> Tr. 332–33, 496–98, 537; CX-61, at 1, 10, 18, 22.

<sup>188</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>189</sup> CX-7, at 1; CX-48, at 1; CX-61, at 1.

<sup>190</sup> CX-48, at 4.

<sup>191</sup> CX-49, at 2.

<sup>192</sup> CX-49, at 2.

<sup>193</sup> CX-8.

phone, some were in my office and some were at their home.”<sup>194</sup> In each conversation, according to Fetherston, he discussed his “situation” with the Gs “in detail and they were sympathetic and willing to help. They wanted to assist me, and I am grateful for their help as a friend.”<sup>195</sup>

Fetherston attached the Note to his December 8, 2020 response. The Note was handwritten on Principal Financial Group stationery and dated December 3, 2019. The Note stated in its entirety:

For Recordkeeping — We have given Peter Fetherston a total of 3 checks equaling \$89,000.00 to help pay his medical expenses and associated costs. He has been a tremendous help to us and we want to help him. This can be repaid in some fashion at a later date to be determined but we are flexible and will contact him when ready. Thank you.<sup>196</sup>

Appearing at the bottom of the Note are the Gs’ handwritten names, above which are their purported signatures.<sup>197</sup> This production was the first time Fetherston notified FINRA of the Note’s existence,<sup>198</sup> even though it was responsive to all prior FINRA Rule 8210 requests, including the March 31, 2020 request.<sup>199</sup>

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<sup>194</sup> CX-8, at 1.

<sup>195</sup> CX-8, at 1.

<sup>196</sup> CX-8, at 3.

<sup>197</sup> CX-8, at 3. In a September 30, 2021 interview with FINRA Investigator 2, the Gs stated that was not their handwriting on the Note or their signatures. CX-11, at 1. SG added that “the loop in her hyphenated last name . . . was not her handwriting.” CX-11, at 1.

<sup>198</sup> Tr. 303–04, 579–80, 716; CX-8, at 3.

<sup>199</sup> Tr. 304; CX-40, at 3. Additionally, “[b]orrowing from customers is regulated by FINRA Rule 3240.” *Dep’t of Enforcement v. N. Woodward Fin. Corp.*, No. 2011028502101, 2016 FINRA Discip. LEXIS 35, at \*16 n.17 (NAC July 19, 2016). “Absent specified conditions,” that rule “generally prohibits a person associated with a FINRA member from borrowing money from a customer.” *Dep’t of Enforcement v. Morton*, No. 2016052347901, 2019 FINRA Discip. LEXIS 19, at \*45 n.54 (NAC May 15, 2019). Enforcement did not charge Fetherston with violating FINRA Rule 3240. Principal’s policy at the time prohibited borrowing from customers (unless from an immediate family member) or converting customer funds. CX-14; Tr. 137–38.

**d. Fetherston's OTR, the March 29, 2021 Request, and Follow-Up Request**

On March 9, 2021, Fetherston emailed to FINRA staff certain of his credit card statements.<sup>200</sup> Two days later, on March 11, 2021, FINRA staff conducted an OTR of Fetherston.<sup>201</sup> At the OTR, FINRA staff questioned him about, among other things, the circumstances surrounding his receipt of the three checks and the preparation of the Note.<sup>202</sup> On March 29, 2021, Enforcement sent Fetherston, in care of his attorney, a FINRA Rule 8210 request directing him to produce copies of certain other credit card statements and to “[i]dentify the medical expenses [he] paid with the proceeds of the three checks from the [Gs] by dollar amount, date, and method of payment.”<sup>203</sup> The response was due by April 16, 2021.

When Fetherston neither responded by the deadline nor requested an extension, Enforcement sent him a second request under FINRA Rule 8210 on April 19, 2021.<sup>204</sup> The second request notified Fetherston that he violated FINRA Rule 8210 by failing to respond and set a deadline of May 3, 2021 for his response.

On May 3, Fetherston's attorney emailed Enforcement and explained Fetherston's efforts to respond to the request for the credit card statements.<sup>205</sup> The next day, May 4, Enforcement's counsel replied, reminding the attorney that Fetherston had still not identified the medical expenses he paid with the proceeds of checks.<sup>206</sup> Fetherston's attorney responded, “we consider such information to be privileged under both New York State and Federal law” and “we have never waived such privilege.”<sup>207</sup>

The next month, on June 23, 2021, Fetherston produced some of his credit card statements.<sup>208</sup> But he never identified “the medical expenses [he] paid with the proceeds of the three checks from the [Gs] by dollar amount, date, and method of payment,”<sup>209</sup> and he never produced any documents identifying his purported medical expenses.

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<sup>200</sup> CX-63; CX-64.

<sup>201</sup> Tr. 439–40.

<sup>202</sup> Enforcement read portions of the OTR into the record at the hearing. *See, e.g.*, Tr. 447–50, 573–74, 576–78, 581–82, 584–86, 592–98, 600–01.

<sup>203</sup> CX-56.

<sup>204</sup> CX-57.

<sup>205</sup> CX-58, at 1–2.

<sup>206</sup> CX-58, at 1.

<sup>207</sup> CX-58, at 3.

<sup>208</sup> CX-65; Tr. 607–08.

<sup>209</sup> Tr. 608–09; CX-56, at 2.

## 6. Fetherston Testifies at the Hearing

Fetherston testified at the hearing and gave yet another version of events, which differed from his statements to Principal and his original statements to FINRA’s investigators. It largely mirrored his responses to FINRA’s Rule 8210 requests and his OTR testimony and contradicted the Gs’ story.

First, while the Gs described their relationship with Fetherston as strictly business, he painted a different picture. According to Fetherston, he had socialized with the Gs before they became his customers. Afterward, Fetherston had seen them many times outside of business, and they became his friends.<sup>210</sup> He testified that from 2011 to 2017, he had been to their home six or ten times, socialized with WG outside the office, and, along with his wife, often had dinner with the Gs.<sup>211</sup> Fetherston also said he frequently met their daughter when she was younger.<sup>212</sup> The Gs disputed all of these claims.

Second, Fetherston’s explanation of how the Gs came to give him the funds conflicted with what the Gs told the Compliance Advisor and FINRA staff and what Fetherston told Principal. Fetherston denied telling the Gs that he would use their funds to pay commissions they owed him and to make investments on their behalf.<sup>213</sup> He said that when he received the checks, he was experiencing financial difficulties, part of which was credit card debt he was carrying.<sup>214</sup> But, Fetherston said, he did not directly or indirectly ask the Gs for money.<sup>215</sup> Rather, he had many conversations with them about his medical and financial hardships, and they volunteered to help him financially.<sup>216</sup> The Gs told FINRA staff they were unaware of Fetherston’s medical issues and did not voluntarily give him money for his use.

Fetherston said the Gs did not request a promissory note from him and declined his offer to sign one.<sup>217</sup> While he viewed the funds as a gift from friends, it was understood based on his conversation with the Gs that he would repay them when his financial situation improved.<sup>218</sup> As far as how the amount of each check was determined, according to Fetherston, he and the Gs talked about the checks at length, and the amounts were determined by “what was going on and what they were sort of thinking would be appropriate . . . they did what they were comfortable

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<sup>210</sup> Tr. 640.

<sup>211</sup> Tr. 648–50.

<sup>212</sup> Tr. 649.

<sup>213</sup> Tr. 528.

<sup>214</sup> Tr. 535–36.

<sup>215</sup> Tr. 703.

<sup>216</sup> Tr. 703, 671–72.

<sup>217</sup> Tr. 590–91, 703–04.

<sup>218</sup> Tr. 589–91, 677–78.

doing.”<sup>219</sup> Fetherston maintained that he never received personal checks from the Gs other than the three checks at issue.<sup>220</sup>

Third, Fetherston disputed the Gs’ claim that they first learned of his arrest by googling his name. According to Fetherston, before the Gs started investing with him at Principal, he met with them, told them about the criminal matter, informed them that it was all over the internet, and explained that it caused his firm to fire him.<sup>221</sup>

Fourth, Fetherston denied visiting the Gs’ home unannounced in February or March 2020.<sup>222</sup> He recalled speaking with the Gs by phone on February 26, less than an hour after his call with the Compliance Advisor.<sup>223</sup> Fetherston testified that SG did most of the talking and told him that she and her husband had received a \$26,000 check from Principal, which prompted their call to Principal.<sup>224</sup> She then said, according to Fetherston, they thought he had always tried to do his best for them over the years and they appreciated it. But, she added, they did not “know what is going on here;” they were “just very confused;” and while they said they did not know if Fetherston was in trouble, they felt bad about the situation; they did not want to get involved in things down the road; did not “want to be in any trouble;” and had been told not to speak with him further.<sup>225</sup>

Fifth, Fetherston maintained that the Note was genuine, although he conceded that it is the only document memorializing his alleged understanding with the Gs regarding the checks or referencing any discussion he had with them about his medical issues.<sup>226</sup> As for why the Note was written on the firm’s letterhead, he said he had firm letterhead at home and in his office and always carried it with him when he visited clients.<sup>227</sup> Fetherston further testified he and the Gs drafted the language together,<sup>228</sup> SG wrote the Note,<sup>229</sup> and he was with the Gs at their home when they signed it.<sup>230</sup> Fetherston did not recall if he wrote “for recordkeeping” on the Note. And he denied writing the Gs’ names or social security numbers at the bottom of it.<sup>231</sup> At his

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<sup>219</sup> Tr. 783–84.

<sup>220</sup> Tr. 788.

<sup>221</sup> Tr. 665–67. The report of Fetherston’s criminal charges was posted on the internet. Tr. 429.

<sup>222</sup> Tr. 619–20.

<sup>223</sup> Tr. 685–86.

<sup>224</sup> Tr. 791–92.

<sup>225</sup> Tr. 685–86, 790–92.

<sup>226</sup> Tr. 559–60, 705.

<sup>227</sup> Tr. 775.

<sup>228</sup> Tr. 579.

<sup>229</sup> Tr. 679.

<sup>230</sup> Tr. 679.

<sup>231</sup> Tr. 573.

OTR, however, Fetherston testified that he was the one who “wrote their names at the bottom” and thought “he wrote the numbers” as well.<sup>232</sup> The Gs denied knowing anything about the Note.

Fetherston gave several confusing, contradictory explanations as to why he did not disclose the Note’s existence to FINRA staff or Principal or produce it before December 8, 2020. “It is not my proudest moment,” he said, referring to his receipt of the checks from the Gs.<sup>233</sup> “So when you’re humbled like this and you have to do these types of things, it is not something that I want to play out on speakers and let a lot of people know about it, and I was very upset about it.”<sup>234</sup>

Fetherston then gave a different reason later in his testimony for not producing or disclosing the Note earlier. He said that besides his customer files at Principal, he also kept his own files in a storage unit that he could not access in March 2020, when he received the FINRA Rule 8210 request, because the unit was closed due to the COVID-19 pandemic.<sup>235</sup> On top of that, he testified, he and his family had COVID-19, and it was a difficult time for him “both medically and with what was going on in the world.”<sup>236</sup> The reason he did not tell FINRA staff about the Note earlier, he claimed, was because he “didn’t know what to do” during this difficult time and was unsure if he made a conscious choice not to disclose it.<sup>237</sup>

Later in his testimony, Fetherston changed his story yet again—this time recalling that during the early stages of the investigation, he was uncertain if the Note was in the storage facility. Fetherston stated that he did not keep track of what documents from his client files were in his house versus that facility, or whether the Note might have been in his office at Principal—left there after Principal terminated him.<sup>238</sup> He added that when the investigation started, he could not locate the Note in his house but did not know with certainty if it was in the storage unit.<sup>239</sup> Fetherston added that he produced the Note once he found it.<sup>240</sup>

Fetherston never offered an explanation of why he failed to mention the Note to Principal during its investigation of his actions.

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<sup>232</sup> Tr. 574, 577–78.

<sup>233</sup> Tr. 673.

<sup>234</sup> Tr. 680–81.

<sup>235</sup> Tr. 540–41. Fetherston provided no support for his claim that the storage facility closed access to individual units during the COVID-19 pandemic.

<sup>236</sup> Tr. 710–11.

<sup>237</sup> Tr. 711–13.

<sup>238</sup> Tr. 774–75.

<sup>239</sup> Tr. 774–75.

<sup>240</sup> Tr. 775–76.

## **B. Conclusions of Law**

### **1. Jurisdiction**

After Principal terminated Fetherston, he became registered and associated with another firm—Aegis Capital Corp.<sup>241</sup> After two months, on May 19, 2020, that firm discharged him for “job abandonment.”<sup>242</sup> Since then, Fetherston has not been registered with a FINRA member firm.<sup>243</sup>

Although he is no longer registered or associated with a FINRA member, Fetherston remains subject to FINRA’s jurisdiction for the purposes of this disciplinary proceeding because (1) FINRA filed the Complaint within two years after May 19, 2020, which was the effective date of termination of his registration with Aegis Capital Corp., and (2) the Complaint charges him with (a) misconduct committed while he was registered or associated with a FINRA member and (b) failing to respond to a FINRA request for information during the two-year period after the date on which he ceased to be registered or associated with a FINRA member.<sup>244</sup>

### **2. Burden and Standard of Proof**

In a FINRA disciplinary proceeding, Enforcement has the burden of proof.<sup>245</sup> The standard of proof in a FINRA disciplinary proceeding is preponderance of the evidence. This is equivalent to a “more likely than not” standard.<sup>246</sup> Put another way, “[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.”<sup>247</sup> Thus, “[i]f the evidence is evenly balanced, Enforcement has not met its burden under the preponderance of the evidence standard.”<sup>248</sup>

The NAC found that the Panel misapplied the burden of proof. On remand, the NAC stated that “the preponderance standard does not require certainty or ‘the absence of any

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<sup>241</sup> Compl. ¶ 9; Ans. ¶ 9; CX-1, at 4.

<sup>242</sup> Compl. ¶ 9; Ans. ¶ 9; CX-1, at 4.

<sup>243</sup> Tr. 422; CX-1, at 4.

<sup>244</sup> Article V, Section 4 of FINRA’s By-Laws. Fetherston asserted as an affirmative defense that FINRA no longer had jurisdiction over him. Ans. ¶ 66. But at the final pre-hearing conference, Fetherston, through counsel, withdrew that defense and conceded that the Complaint was timely filed. *See* Transcript of April 3, 2023 Final Pre-Hearing Conference.

<sup>245</sup> *Morton*, 2019 FINRA Discip. LEXIS 19, at \*32.

<sup>246</sup> *Id.* at \*33 (citing *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011)).

<sup>247</sup> *Id.* (citing *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006)).

<sup>248</sup> *Id.* at n.44 (citing *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.”)).

reasonable doubt.”<sup>249</sup> Rather, the NAC indicated, the standard “requires the factfinder to ‘make a comparative judgment’ as to what more likely than not took place.”<sup>250</sup> The Panel Majority considered the NAC’s directives, but nonetheless readopts its earlier conclusions as to causes one and two, as discussed in more detail below. As also discussed below, the Hearing Officer dissents as to causes one and two.

### **3. The Panel Majority Finds Enforcement Failed to Prove that Fetherston Engaged in Conversion and Improper Use of Funds (Cause One)**

The first cause of action in the Complaint charges Fetherston with converting and improperly using the Gs’ funds in violation of FINRA Rules 2150(a) and 2010.<sup>251</sup> FINRA Rule 2150(a) provides that “[n]o member or person associated with a member shall make improper use of a customer’s securities or funds.” Misuse occurs when “[a] registered person . . . fails to apply the funds or securities, or uses them for some purpose other than as directed by the customer.”<sup>252</sup> Conversion consists of 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.”<sup>253</sup> “Improper use rises to the level of conversion when the associated person intends permanently to deprive the customer of the use of his funds or securities.”<sup>254</sup> “[A]n associated person’s intentional use of funds for unauthorized purposes constitutes conversion, even when the owner of the funds voluntarily granted the associated person some control over them.”<sup>255</sup>

FINRA Rule 2010 requires “[a] member, in the conduct of its business,” to “observe high standards of commercial honor and just and equitable principles of trade.” This rule, which also applies to associated persons,<sup>256</sup> “prohibits conduct that may operate as an injustice to investors

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<sup>249</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*54 (citing *Lindsay v. Nat’l Transp. Safety Bd.*, 47 F.3d 1209, 1213 (D.C. Cir. 1995)).

<sup>250</sup> *Id.*

<sup>251</sup> Compl. ¶¶ 11–29.

<sup>252</sup> *Dep’t of Enforcement v. Taboada*, No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at \*35–36 (NAC July 24, 2017), *appeal dismissed*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018).

<sup>253</sup> *Dep’t of Enforcement v. Mellon*, No. 2017052760001, 2022 FINRA Discip. LEXIS 11, at \*17 (NAC Oct. 18, 2022) (quoting FINRA Sanction Guidelines (2021), at 36 & n.2), *appeal dismissed*, Exchange Act Release No. 97623, 2023 SEC LEXIS 1440 (May 31, 2023)).

<sup>254</sup> *Dep’t of Enforcement v. Mission Sec.*, No. 2006003738501, 2010 FINRA Discip. LEXIS 44, at \*17 (NAC Feb. 24, 2010) (citation omitted).

<sup>255</sup> *Michael Joseph Clarke*, Exchange Act Release No. 97860, 2023 SEC LEXIS 1756, at \*22–23 (July 10, 2023); *see also Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at \*23–25 (Sept. 30, 2016) (holding that an associated person committed conversion by representing that he would invest funds, and funds were transferred for that purpose, but he instead used the funds to pay personal expenses).

<sup>256</sup> *Dep’t of Enforcement v. Saliba*, No. 2013037522501, 2019 FINRA Discip. LEXIS 1, at \*45 n.11 (NAC Jan. 8, 2019) (holding that FINRA Rule 2010 applies to associated persons through FINRA Rule 0140(a), which provides that the rules “shall apply to all members and persons associated with a member” and that “[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules.”), *remanded*, Exchange Act

or other participants in the securities markets.”<sup>257</sup> Both the Securities and Exchange Commission (“SEC”) and the NAC have held repeatedly that conversion violates FINRA Rule 2010.<sup>258</sup> Also, “[a] violation of another FINRA rule is a violation of FINRA Rule 2010.”<sup>259</sup>

The Gs declined to testify or provide an affidavit. As a result, the main evidence supporting their version of events were their consistent oral statements to the Compliance Advisor at Principal and FINRA staff, which these interviewers then memorialized in memoranda. These memoranda—and the testimony from the Compliance Advisor and Investigator 2 about their conversations with the Gs—constitute hearsay.<sup>260</sup>

Hearsay is permissible in FINRA disciplinary proceedings.<sup>261</sup> When considering whether to rely on hearsay evidence, the adjudicator must evaluate its:

probative value, reliability, and the fairness of its use. The factors to assess include any possible bias of the declarant; the type of hearsay at issue; whether the hearsay statements are signed and sworn to or anonymous, oral, or unsworn; whether direct testimony contradicts the hearsay statements; whether the declarant was available to testify; and whether the hearsay is corroborated.<sup>262</sup>

In its first decision, the Panel was unable to accept the Gs’ version of the events at issue because they did not testify and the Panel did not receive answers to its lingering questions about the Gs’ actions and statements.<sup>263</sup> The NAC found that the Panel’s initial conclusions lacked sufficient support and asked whether, in light of the Panel’s concerns with the Gs’ statements,

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Release No. 91527, 2021 SEC LEXIS 865 (SEC Apr. 9, 2021), *modified*, No. 2013037522501r, 2022 FINRA Discip. LEXIS 12 (NAC Oct. 6, 2022), *aff’d*, Exchange Act Release No. 99940, 2024 SEC LEXIS 852 (Apr. 11, 2024).

<sup>257</sup> *Mellon*, 2022 FINRA Discip. LEXIS 11, at \*17.

<sup>258</sup> *See, e.g., Clarke*, 2023 SEC LEXIS 1756, at \*22; *Mellon*, 2022 FINRA Discip. LEXIS 11, at \*17.

<sup>259</sup> *Taboada*, 2017 FINRA Discip. LEXIS 29, at \*35 n.17 (citing *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at \*26 (July 2, 2013), *aff’d sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014)).

<sup>260</sup> The formal rules of evidence do not apply in FINRA proceedings. *See* FINRA Rule 9145. But “FINRA adjudicators may look to the Federal Rules of Evidence for guidance.” *Dep’t of Enforcement v. North*, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at \*8 n.5 (NAC Aug. 3, 2017). Hearsay is generally defined as a statement made by a declarant, other than a statement made while the declarant is testifying at the current hearing, that is offered to prove the truth of the matter asserted in the statement. *See* Fed. R. Evid. 801(c). Here, the Gs were the declarants. Enforcement offered their statements into evidence through the Compliance Advisor and Investigator 2 to prove the truth of the matters asserted in them.

<sup>261</sup> *Morton*, 2019 FINRA Discip. LEXIS 19, at \*46.

<sup>262</sup> *Dep’t of Enforcement v. McGuire*, No. 20110273503, 2015 FINRA Discip. LEXIS 53, at \*23–24 (NAC Dec. 17, 2015) (citing *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*47 (Jan. 30, 2009)).

<sup>263</sup> *Fetherston*, 2023 FINRA Discip. LEXIS 14, at \*55–56.

the Panel accorded those statements no weight or reduced probative weight.<sup>264</sup> The Panel Majority finds that the Gs' statements are entitled to reduced probative weight.

Certain factors favor reliance on the Gs' statements or are neutral. Their statements were probative of whether Fetherston engaged in the misconduct alleged by Enforcement.<sup>265</sup> Also, the Gs were unavailable to testify, as it is undisputed that they declined to testify out of fear and FINRA had no jurisdiction to compel their testimony.<sup>266</sup> It concerns the Panel Majority somewhat when assessing the reliability of the statements that, while the Gs agreed to be interviewed by Principal and FINRA several times, they would not make their statements under oath when asked to do so by FINRA because, they claimed, they feared retaliation from Fetherston. On the other hand, the Panel Majority recognizes that the Gs cooperated throughout the investigation even though they had been reimbursed by Principal and notwithstanding their professed fears of retaliation by Fetherston and that their statements have been consistent throughout. And while Fetherston directly contradicted the Gs' statements, the Panel Majority did not find his testimony credible in many respects, as discussed below.

However, the Panel Majority finds that other factors weigh against reliance. The Gs' statements were oral, unsworn, disputed by Fetherston, and uncorroborated. Enforcement presented no testimony (other than the Gs' hearsay statements) or documents showing that Fetherston told the Gs he was going to invest their funds or that the Gs had given him the checks for that purpose. Further, Fetherston's statement to the Compliance Advisor that he invested the funds does not constitute corroboration of the Gs' story. Fetherston told the Compliance Advisor that he invested the funds but did not admit telling the Gs he would do so. Moreover, he eventually abandoned the story he told the Compliance Advisor and did not repeat it. And while it is true that he never told the Compliance Advisor that the funds were a gift or a loan, the Panel Majority does not find that such an omission by Fetherston corroborates the Gs' story given the short duration of Fetherston's call with the Compliance Advisor and Fetherston's testimony that he was not expecting the call and was not even clear who the Compliance Advisor was.<sup>267</sup> His

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<sup>264</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*24.

<sup>265</sup> See *McGuire*, 2015 FINRA Discip. LEXIS 53, at \*24 (finding "undoubtedly probative" the testimony of three witnesses, including a FINRA examiner, who testified about statements the victim of respondent's alleged conversion made to them).

<sup>266</sup> *Harry Glikzman*, Exchange Act Release No. 42255, 1999 SEC LEXIS 2685, at \*15 n.17 (Dec. 20, 1999), *aff'd*, 24 F. App'x 702 (9th Cir. Nov. 26, 2001) (stating that because "NASD lacks subpoena power, it [cannot] compel a customer's attendance," and finding that NASD had made a sufficient showing that hearsay declarant, over whom NASD lacked jurisdiction, was unavailable because FINRA staff contacted her counsel who said that she did not wish to testify in person or by telephone). See also *Dep't of Enforcement v. Brookstone Sec. Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at \*115-17 (NAC Apr. 16, 2015) (finding that customers were unavailable due to physical and cognitive infirmities and the hearsay testimony of customers' sons was probative because it related to the charges against respondents).

<sup>267</sup> Tr. 495, 500.

agreement to repay the funds also is not corroborative of the G's story. Indeed, his agreement to repay the funds is consistent with his position that the funds were a loan.

As directed by the NAC, on remand, the Panel Majority considered the timing of Fetherston's conversations with the Compliance Advisor, which occurred less than three months after Fetherston received the final check from the Gs and six months before he ultimately told FINRA the checks were a gift or loan. But given the few details Fetherston provided to the Compliance Advisor during their conversations, the Panel Majority does not believe those statements should be given greater weight than the later statements he made to FINRA.

Additionally, the hearsay statements were not written by the Gs in the form of, for example, a complaint letter or questionnaire responses. Rather, the statements consisted of oral communications they made to others, who then memorialized the statements and testified about them. The NAC discredited the Panel's decision to place less weight on the Gs' statements because they were verbal and unsworn.<sup>268</sup> The NAC held that, because Principal promptly reimbursed the Gs after they contacted the Compliance Advisor by telephone, there was no need for them to lodge a written complaint and even Fetherston acknowledged he typically communicated with the Gs by phone or in person rather than by text or email.<sup>269</sup> The NAC also found it noteworthy that the Gs consistently stated over the course of nearly three years that they felt threatened by Fetherston and feared retaliation if they testified.<sup>270</sup> The Panel Majority considered the NAC's directives and respectfully disagrees. While Principal did not require a written complaint from the Gs, it nevertheless is difficult for the Panel Majority to believe there would not be an email, text message, or some other written statement from the Gs corroborating their hearsay statements. The Panel Majority concludes that, without something in writing or sworn testimony, it cannot rely fully on the Gs version of events.

Further, the Gs had a motive to say that they gave Fetherston the funds to invest. When the Gs first told their story to the Compliance Advisor, they knew that Fetherston was not employed and thus may have concluded he could have difficulty repaying the money they had given to him if the payments were a loan, as he ultimately claimed. In other words, the Panel Majority finds the Gs had an incentive to tell Principal that they gave Fetherston the funds to invest, as that explanation could induce Principal to reimburse them—which is exactly what happened. After the Gs were reimbursed by Principal and they spoke to FINRA, they had a motive to maintain the same story they told Principal; telling a different story to FINRA (for example, that they had loaned the funds to Fetherston) would make it look like they had lied to Principal to obtain reimbursement.

Besides these reliability issues, the weight the Panel Majority gives to the Gs' statements is lessened for additional reasons. The Panel Majority finds the Gs' reasons for refusing to testify

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<sup>268</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*31.

<sup>269</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*31–32.

<sup>270</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*32.

or sign an affidavit regarding the checks they gave Fetherston suspect. The Gs maintained they feared Fetherston because he previously had been arrested for assault and intimidating a witness. But there is no evidence that Fetherston ever threatened the Gs or any other clients. Fetherston testified he told the Gs the circumstances surrounding the incident and the Gs knew the incident involved a personal relationship.<sup>271</sup> And Fetherston was aware the Gs were cooperating with FINRA—the Panel Majority believes that testifying or providing an affidavit would not provide Fetherston with any greater incentive to harm them.

The Panel Majority finds the Gs’ version of events, as communicated to the Compliance Advisor and FINRA, is also questionable. The Gs maintained they gave Fetherston \$89,000 without knowing how he would invest their funds and without receiving any documentation of the purported investment then, or later. As the NAC found, the Gs were not particularly sophisticated investors.<sup>272</sup> But the Panel Majority finds they also were not novice investors. The Gs had many years of investing experience that included multiple accounts at more than one firm. And there is no evidence they ever gave Fetherston—or any other broker—discretionary trading authority over an account. Also, there is no evidence the Gs ever bought any investment, at any time, at any firm, by writing a personal check payable to a broker. As directed by the NAC, the Panel Majority considered the evidence that the Gs trusted Fetherston in a professional capacity and therefore may not have doubted his direction to make the checks payable to him for investments.<sup>273</sup> While there is evidence in the record that the Gs named Fetherston as a successor executor to their wills and they generally trusted him, the Panel Majority does not believe that such trust means the Gs would write a check payable to Fetherston for an unknown investment, particularly on the same day they wrote a check made payable to Principal Life Insurance to purchase an annuity.<sup>274</sup> Moreover, trusting Fetherston is as consistent with lending him money as giving him money to invest without a receipt.

The NAC also held that the fact that the Gs had some investment experience “does not mean they would have been prepared to detect deceit by a securities professional they trusted.”<sup>275</sup> While the Panel Majority agrees with the NAC’s statement, it finds the Gs’ credibility damaged by their apparent failure to ask any questions or raise any concerns with Fetherston or Principal about the disposition of their funds until they received a reimbursement check from Principal stemming from unrelated misconduct by Fetherston. Finally, the Panel Majority finds the Gs’ credibility was undermined by the Gs’ unlikely claim to the Compliance Advisor that they did not know if they had ever given money directly to Fetherston before he joined Principal.

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<sup>271</sup> Tr. 665–66.

<sup>272</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*29 & n.24.

<sup>273</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*29.

<sup>274</sup> CX-35; Tr. 479.

<sup>275</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*29.

Another impediment to accepting the Gs' account as true is the lack of context necessary for the Panel Majority to evaluate fully their version of events.<sup>276</sup> Because the Gs' did not testify, the Panel Majority could not probe for the sorts of details, missing from their statements, that might have convinced it that Fetherston had converted their funds.<sup>277</sup> For example, why did the Gs tell Investigator 1 that they could not remember the specifics about the reason they gave Fetherston the checks (and learned that Fetherston did not invest their money when Principal contacted them about the mutual fund improprieties), but then later remembered that the reason they gave him the checks was for commissions and to purchase an investment? And did the Gs ever question Fetherston about why he wanted the checks made out to him personally, rather than to Principal, or did they ask Fetherston for evidence of the investment? Also, why did the Gs write a check payable to Fetherston purportedly for an investment yet, on the same day, purchase an annuity by writing a check in the amount of \$320,000 to Principal Life Insurance rather than to him? The FINRA investigators never asked these questions. For all of these reasons, the Panel Majority is unable to accept the Gs' version of the events at issue.

The Panel Majority also does not accept Fetherston's account of events.<sup>278</sup> As counsel for the parties correctly said at the hearing, an adjudicator is not required to credit one version over the other.<sup>279</sup> Instead, the Panel Majority can decide not to accept either version, which is what it does here.<sup>280</sup> The Panel Majority is not persuaded by Fetherston's story for several reasons.

First, Fetherston lied to the Compliance Advisor about having invested the Gs' funds, then told FINRA—after much delay—that the Gs gave him the funds to pay medical and other expenses but did not tell the FINRA staff it was a loan, and then changed his story, yet again, and claimed that they loaned him the funds. Also, his testimony was at times vague, inconsistent, and evasive—especially when he tried to explain why he did not produce the Note earlier. And his

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<sup>276</sup> *Cf. Dep't of Enforcement v. Niekraas*, No. 2013037401001, 2018 FINRA Discip. LEXIS 25, at \*2, \*27 (NAC Oct. 4, 2018) (finding that Enforcement failed to prove its case because without testimony from certain witnesses, notably the customers, the NAC lacked the context necessary to evaluate the materiality of the respondent's representations in documents and in his discussions with the customers)).

<sup>277</sup> *See Dep't of Enforcement v. Puma*, No. C10000122, 2003 NASD Discip. LEXIS 22, at \*17 (NAC Aug. 11, 2003) (declining to reverse the hearing panel's credibility determination where it found that because the customers did not appear at the hearing, "the parties and Panel were unable to probe for the sorts of details, missing from the customers' complaints and declarations, that might have convinced the Panel that the trades in question were, in fact, unauthorized.").

<sup>278</sup> The Panel unanimously finds Fetherston not credible and his story unsupported by any evidence. *See* Hearing Officer Dissent.

<sup>279</sup> Tr. 889–93.

<sup>280</sup> *Cf. United States v. Messina*, 806 F.3d 55, 64 (2d Cir. 2015) ("The law affords a factfinder considerable discretion in resolving evidentiary inconsistencies. Inconsistency may prompt a factfinder to reject both versions of an account.").

document production did not support his statement in response to a FINRA Rule 8210 request that he used some of the funds to pay medical expenses. All of this undermined his credibility.<sup>281</sup>

Second, the Panel Majority is not convinced that shortly after resuming their business relationship with Fetherston, the Gs would give him an unsecured loan amounting to three quarters of their yearly income, even taking into account that they had a net worth of several million dollars and assuming, according to Fetherston, that they were expecting an inheritance of about two hundred thousand dollars. It is doubtful that without a close personal relationship with Fetherston, the Gs would provide him such a large amount of funds without a promissory note from him, with no clear terms of repayment, and no corroboration of the arrangement other than the Note, which Fetherston did not sign. For example, there were no text messages, emails, or witness testimony evidencing the existence of the arrangement. Fetherston's story might have some plausibility if there was evidence that he and the Gs had a close personal relationship, as he claimed. But the Panel Majority was never able to fully reconcile the Gs' and Fetherston's differing characterizations of their relationship since the Gs did not testify and the only evidence of this purported friendship is Fetherston's self-serving, uncorroborated testimony.

Third, further undercutting Fetherston's account is that at the time the Gs gave him the three checks, WG was (1) worried about how his serious health problems could impact his finances; (2) on a leave of absence from his job; (3) worried about his daughter's health and was considering purchasing a new home for her; and (4) concerned about "future market uncertainty" and needed "future guaranteed income for increasing ongoing housing and living expenses for [WG's] new home that he recently purchased a few months earlier."<sup>282</sup> According to Fetherston's testimony, WG's "health would go up and down, and he was going to do some experimental brain surgeries, that type of stuff. But there were assets that were going to them down the road. They just didn't know when."<sup>283</sup> Fetherston's statement that WG anticipated a financial windfall is much like what he told Principal when it investigated his mutual fund activities. There is no evidence, however, that the Gs ever received this purported expectancy.

The NAC directed the Panel to consider whether Fetherston's questionable testimony regarding the circumstances surrounding the checks and the Note provides further evidence of his liability.<sup>284</sup> The NAC specifically directed that, on remand, the Panel "should consider the overall plausibility of Fetherston's account—that, shortly after resuming a business relationship with Fetherston, the Gs felt such sympathy for him that they gave him an open-ended loan of

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<sup>281</sup> The credibility of the Compliance Advisor and Investigator 2 was not at issue in this case. Even so, these witnesses were generally credible, and the evidence did not provide a basis to discount the accuracy of their testimony or their interview notes. They answered questions directly and candidly; their testimony was not contradicted in material respects by other credible evidence; and it was not discredited or called into question as a result of cross-examination.

<sup>282</sup> Tr. 493–94; CX-42, at 1.

<sup>283</sup> Tr. 674.

<sup>284</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*33–34.

\$89,000, only to place his career in jeopardy several months later by falsely claiming this money was for their investments.”<sup>285</sup> But, as the NAC also stated, while a “factfinder may infer culpability from incredible testimony,” such an inference is appropriate when there otherwise is evidence of misconduct.<sup>286</sup> The Panel Majority finds the Gs’ statements were not fully reliable and therefore concludes there was insufficient additional evidence to permit the Panel Majority to infer liability based on Fetherston’s testimony alone.

Finally, while the Note, if authentic, would have corroborated Fetherston’s story, the evidence made its legitimacy suspect. There are no written communications between Fetherston and the Gs referencing the Note. Moreover, Fetherston waited to tell FINRA staff about its existence until eight months after he was required to produce such a document. Given the Note’s importance to the issue of why the Gs gave Fetherston the three checks, it is likely he would have produced it—or at least notified FINRA staff about it—when he first told his version of events to them on September 10, 2020. Instead, he waited until December 8 to do so. Finally, the Note is dated December 3, 2019, and this is suspicious. It coincides with the date on which the Gs gave Fetherston the last check. Yet, Fetherston never testified that at the time they gave him that check, he and they intended it to be the last check he would receive. This indicates the Note may have been written afterward and backdated at a time when Fetherston knew he received no additional checks from the Gs.<sup>287</sup>

The Panel Majority nevertheless concludes that the evidence fell short of proving Fetherston fabricated the Note. Fetherston testified under oath that it was genuine, while the Gs contradicted that testimony in their oral, unsworn statements to FINRA. It is significant to the Panel Majority that neither Enforcement nor Fetherston presented expert testimony about its authenticity.<sup>288</sup> Investigator 2 explained why FINRA did not submit the Note to a handwriting expert for examination: “number one, we did not have the original note, and number two . . . we believed what [the Gs] were telling us.”<sup>289</sup> Investigator 2 then said that Enforcement only had a copy of the Note because that is what Fetherston produced. And, according to Investigator 2, while Fetherston would have had the original Note, Enforcement did not ask him to produce it.<sup>290</sup> Ultimately, the Panel Majority readopts its original finding that the evidence on the Note’s legitimacy is inconclusive.

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<sup>285</sup> *Id.* at \*35.

<sup>286</sup> *Id.* at \*33; *see also Joseph C. Ruggieri*, Exchange Act Release No. 81143, 2017 SEC LEXIS 2193, at \*14 (July 13, 2017) (explaining that “a respondent’s implausible explanations for his trades may, *together with other facts*, be sufficient to infer that the respondent was tipped with material non-public information” (emphasis added)).

<sup>287</sup> The NAC similarly found that “Fetherston’s credibility is further called into question by the lengthy delays before he provided FINRA with his account of the circumstances surrounding the Gs’ checks and disclosed the existence of the Note.” *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*35–36.

<sup>288</sup> Tr. 370.

<sup>289</sup> Tr. 370–71.

<sup>290</sup> Tr. 399.

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To prove that Fetherston converted or made an improper use of the Gs' funds, Enforcement had to show that Fetherston acted contrary to the Gs' instructions and permanently deprived them of their funds. The Panel Majority finds that Enforcement's case rested on the Gs' uncorroborated, unsworn, disputed, oral statements that, in its view, presented a doubtful story leaving many open questions. Although the NAC cautioned that we cannot hold Enforcement to a standard of "the absence of any reasonable doubt," the Panel Majority stands firm in its belief that the record here is insufficient to find liability. The NAC has recognized that, when there is "no circumstantial or direct evidence in the record to corroborate" the hearsay, the evidence may be insufficient to conclude that the respondent misled a customer.<sup>291</sup> Likewise here, the Panel Majority finds there was no circumstantial or direct evidence in the record corroborating the Gs' statements.

Accordingly, the Panel Majority concludes that Enforcement failed to prove, by a preponderance of the evidence, that Fetherston violated FINRA Rules 2150(a) and 2010 as alleged in the first cause of action.

#### **4. The Panel Majority Finds Enforcement Failed to Prove that Fetherston Provided False or Misleading Information, Documents, and Testimony to FINRA Staff (Cause Two)**

The second cause of action in the Complaint charges Fetherston with violating FINRA Rules 8210 and 2010 in several ways. First, the Complaint alleges that he responded falsely on September 10, 2020, to a FINRA Rule 8210 request by (1) denying that he requested checks from the Gs and (2) stating that he shared his medical problems with them, after which they gave him the checks to help him pay off his medical bills and other expenses.<sup>292</sup> Second, according to the Complaint, Fetherston submitted a fabricated document (the Note) to FINRA staff on December 8, 2020, in response to a FINRA Rule 8210 request.<sup>293</sup> And, finally, Fetherston is charged with providing false testimony to FINRA at his March 11, 2021 OTR. The Complaint alleges that during the OTR, he falsely denied requesting the checks from the Gs, asserting, instead, that they gave him the checks

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<sup>291</sup> *Dep't of Enforcement v. Galasso*, No. C10970145, 2001 NASD Discip. LEXIS 2, at \*61–62 (NAC Feb. 5, 2001), *rev'd in part on other grounds sub nom. John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153 (Jan. 22, 2003); *cf. Dep't of Enforcement v. Stein*, No. C07000003, 2001 NASD LEXIS 38, at \*2 n.3 (NAC Dec. 3, 2001) (concluding that hearsay statements were not reliable or probative because (1) the examiner's affidavit was second-hand hearsay, since it discussed details of the examiner's conversations with the customer; (2) the customer did not testify, so the respondent was unable to explore whether the customer might have been biased against the respondent; (3) the customer's statements (as communicated in the examiner's affidavit) were contradicted by respondent's sworn on-the-record testimony; (4) and there was little other reliable evidence to corroborate the customer's statements)).

<sup>292</sup> Compl. ¶¶ 41–42.

<sup>293</sup> Compl. ¶¶ 45–47.

voluntarily. Enforcement also claims that Fetherston falsely stated that SG prepared the Note and that both she and her husband signed it.<sup>294</sup>

FINRA Rule 8210(a)(1) authorizes FINRA staff to “require a . . . person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation . . .” FINRA Rule 8210(a)(2) gives FINRA staff “the right to . . . inspect and copy the books, records, and accounts” of any member or associated person “with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member’s or person’s possession, custody, or control.” Under FINRA Rule 8210(c), “no . . . person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.” A violation of any FINRA Rule, including FINRA Rule 8210, is also a violation of FINRA Rule 2010.<sup>295</sup> Providing false or misleading information in response to a FINRA Rule 8210 request violates both FINRA Rules 8210 and 2010.<sup>296</sup>

The Panel Majority’s legal conclusions relating to the FINRA Rule 8210 and 2010 charges in cause two stem from its factual findings and legal conclusions regarding cause one. As discussed above, the Panel Majority finds that Enforcement failed to prove by a preponderance of the evidence that Fetherston converted or improperly used the \$89,000 the Gs gave him, as alleged in the first cause of action. The Panel Majority also finds that Enforcement failed to prove that Fetherston lied about who drafted the Note, or that the Note was fabricated. For those reasons, the Panel Majority finds that FINRA did not establish by a preponderance of the evidence the violations charged in the second cause of action.

### **5. The Panel Unanimously Finds that Fetherston Failed to Respond to a Written Request for Information (Cause Three)**

The third cause of action charges Fetherston with not responding to a FINRA Rule 8210 request asking him to identify and provide certain information about the medical expenses he purportedly paid with the funds from the three checks. Enforcement alleges that on March 29, 2021, it issued the request “[t]o determine the veracity of Fetherston’s claim that he used the \$89,000 to pay for his medical expenses.”<sup>297</sup> The parties do not dispute that Fetherston received the request and failed to respond to it. Fetherston sought to justify his failure to comply on several grounds, which the Panel addressed and rejected in its initial decision.<sup>298</sup> Accordingly, the Panel found that Fetherston violated FINRA Rules 8210 and 2010 by failing to respond to a written request for information under FINRA Rule 8210 asking him to identify the medical

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<sup>294</sup> Compl. ¶¶ 48–50.

<sup>295</sup> *Mellon*, 2022 FINRA Discip. LEXIS 11, at \*23 (citing *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at \*23–24 (Aug. 22, 2008)).

<sup>296</sup> *Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at \*5 (July 17, 2019).

<sup>297</sup> Compl. ¶ 55.

<sup>298</sup> See *Fetherston*, 2023 FINRA Discip. LEXIS 14, at \*64–72.

expenses that he paid with the proceeds of the three checks from the Gs by dollar amount, date, and method of payment.<sup>299</sup>

On appeal to the NAC, Fetherston did not cross-appeal the Hearing Panel’s finding of liability as to cause three and, in his brief, he did not contest liability for his failure to provide information requested under Rule 8210, as alleged in cause three.<sup>300</sup> The NAC nevertheless briefly addressed Fetherston’s liability for this cause and affirmed the Panel’s findings.<sup>301</sup> Accordingly, we do not revisit those findings, which the NAC affirmed.

The Panel unanimously finds that Fetherston violated FINRA Rules 8210 and 2010 by failing to respond to a written request asking him to identify the medical expenses that he allegedly paid with the proceeds of the three checks from the Gs by dollar amount, date, and method of payment.

## **V. Sanctions**

For misconduct under cause three, the Panel unanimously bars Fetherston from associating with any member firm in any capacity.

### **A. FINRA’s Sanction Guidelines**

In considering the appropriate sanctions to impose on Fetherston, we begin our analysis with FINRA’s Sanction Guidelines (“Guidelines”) as a benchmark.<sup>302</sup> In the Overview, the Guidelines explain that they “do not prescribe fixed sanctions to particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly.”<sup>303</sup> The Guidelines include “recommend[ed] ranges for sanctions and suggest[ed] factors that Adjudicators may consider in determining for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended ranges.”<sup>304</sup> But, the Overview emphasizes, the “[G]uidelines are not intended to be absolute.”<sup>305</sup> Instead, “[b]ased on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall

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<sup>299</sup> *Id.*

<sup>300</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*39.

<sup>301</sup> *Id.* at \*39–40.

<sup>302</sup> Guidelines (2022), <https://www.finra.org/sanctionguidelines>. *See, e.g., Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at \*56 (Sept. 28, 2017) (finding that a sanctions analysis should begin with the Guidelines as a benchmark).

<sup>303</sup> Guidelines at 1 (Overview).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* (Overview); *see also Dep’t of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at \*33 n.24 (NAC Feb. 12, 2007) (“Like all of the sanction ranges set forth in the Guidelines, those applicable to Procedural Rule 8210 violations are neither absolute nor mandatory.”).

outside the ranges recommended.”<sup>306</sup> Adjudicators may also “consider aggravating and mitigating factors in addition to those” in the Guidelines.<sup>307</sup>

The Guidelines contain: (1) General Principles Applicable to All Sanction Determinations (“General Principles”) “that should be considered in connection with the imposition of sanctions in all cases”; (2) a list of Principal Considerations in Determining Sanctions (“Principal Considerations”) “which enumerates generic factors for consideration in all cases”; and (3) guidelines applicable to specific violations (“Specific Considerations”), which “identify potential principal considerations that are specific to the described violation.”<sup>308</sup>

The General Principles explain that “sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct.”<sup>309</sup> Adjudicators are therefore instructed to “design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.”<sup>310</sup> Further, sanctions should “reflect the seriousness of the misconduct at issue,”<sup>311</sup> and should be “tailored to address the misconduct involved in each particular case.”<sup>312</sup> It is paramount that “[a]djudicators . . . always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case” and “identify the basis for the sanctions imposed.”<sup>313</sup>

## **B. Fetherston’s Partial Failure to Respond to a FINRA Information Request**

A violation of FINRA Rule 8210 is serious and merits “stringent sanctions because it subverts [FINRA]’s ability to execute its regulatory functions.”<sup>314</sup> The Guidelines reflect the seriousness of this violation. They provide for different sanctions depending on the type of FINRA Rule 8210 violation: (1) failing to respond or respond truthfully; (2) providing a partial but incomplete response; and (3) failing to respond in a timely manner.

If a respondent completely fails “to respond to a particular request in a matter that involved multiple separate requests for information or testimony, and the individual complied

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<sup>306</sup> Guidelines at 1 (Overview).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 2 (General Principle No. 1).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 4 (General Principle No. 3).

<sup>314</sup> *Dep’t of Enforcement v. Jones*, No. 2015044782401, 2020 FINRA Discip. LEXIS 45, at \*35 (NAC Dec. 17, 2020) (quoting *Elliot M. Hershberg*, Exchange Act Release No. 53145, 2006 SEC LEXIS 99, at 10 (Jan. 19, 2006), *aff’d*, 210 F. App’x 125 (2d Cir. 2006)).

with at least some of the requests,” then the failure “is treated as a ‘partial but incomplete failure to respond.’”<sup>315</sup> In response to several FINRA Rule 8210 requests in connection with the investigation that led to this disciplinary action, Fetherston produced information and documents—although untimely and after receiving repeated requests—and provided investigative testimony. He then failed to provide the requested information about the medical expenses he purportedly paid with the funds the Gs gave him. So we treat his failure to respond to that one requested item as a partial failure to respond.

The Guidelines advise that for an individual who provides a partial but incomplete response to a FINRA Rule 8210 request, “a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.” Further, if mitigation exists, the Guidelines recommend a suspension in all capacities of up to two years. The Guidelines also suggest imposing a fine of \$5,000 to \$20,000.<sup>316</sup>

The Guidelines contain the following Specific Considerations for FINRA Rule 8210 violations:

- (1) The importance of the information requested that was not provided as viewed from FINRA’s perspective, and whether the information provided was relevant and responsive to the request;
- (2) The number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and
- (3) The reasons offered by the respondent to justify the partial but incomplete response.<sup>317</sup>

### **1. Aggravating Factors**

Aggravating factors are present here. The information requested, but not provided, was important. Investigator 2 testified that FINRA requested the information to see if it “could corroborate what we were told about that money going to medical expenses.”<sup>318</sup> Investigator 2 further explained, regarding FINRA’s attempt to corroborate Fetherston’s claimed use of the funds, that after receiving Fetherston’s bank records, the staff reviewed them “to see where

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<sup>315</sup> *Jones*, 2020 FINRA Discip. LEXIS 45, at \*33–34 (citing *John J. Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at \*55–56 (June 14, 2013) (holding that the determination of sanctions for a failure-to-respond violation must take into account the extent to which the respondent complied with other requests made in the same investigation)).

<sup>316</sup> Guidelines at 93.

<sup>317</sup> *Id.*

<sup>318</sup> Tr. 347.

the money came in and where it went out to. We also issued another Rule 8210 request.”<sup>319</sup> Given that the investigation involved Fetherston’s receipt and use of customer funds, it was pivotal to the investigation for FINRA to understand how Fetherston used the customers’ funds. It was also important in assessing Fetherston’s credibility to determine if he had used the funds in the way he claimed. Fetherston never produced this important information.

Further, FINRA had to exert significant regulatory pressure to obtain the information that Fetherston did provide. Fetherston failed to timely respond to requests for information and documents; provided incomplete responses; and gave shifting explanations for why the Gs gave him the checks. As a result, FINRA had to issue numerous follow-up requests and threaten filing an action against him seeking sanctions. FINRA should not have to go to these lengths to obtain compliance with its rules governing information requests.<sup>320</sup> Additional aggravating factors are present. Fetherston failed to accept responsibility for his misconduct<sup>321</sup> and deliberately chose not to respond to the request despite warnings from FINRA that failing to do so could result in the imposition of sanctions.<sup>322</sup>

Finally, while Enforcement did not charge Fetherston with the untimely production of requested information and documents, it alleged that by failing to respond to the one requested item, he “impeded and delayed FINRA’s investigation.”<sup>323</sup> The Guidelines permit us to consider whether a respondent attempted to delay FINRA’s investigation or conceal information from FINRA.<sup>324</sup> Investigator 2 did not testify about how, if at all, Fetherston’s refusal to respond to the request impeded or delayed the investigation. But given the importance of the requested information to the investigation, it is likely that Fetherston’s failure to respond negatively impacted the investigation’s progress. And the record on this point supports the Panel’s conclusion. The evidence shows that Fetherston used the vast majority of the Gs’ funds to make payments to an American Express credit card account for which he did not provide statements.<sup>325</sup> Without the relevant American Express statements reflecting the charges or the list of medical expenses that FINRA requested, FINRA was unable to determine whether Fetherston used the funds to pay medical expenses, as he claimed.

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<sup>319</sup> Tr. 330–31.

<sup>320</sup> *Dep’t of Enforcement v. Larson*, No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at \*114–15 (NAC Sept. 21, 2020).

<sup>321</sup> Guidelines at 7 (Principal Consideration No. 2).

<sup>322</sup> *Id.* at 8 (Principal Consideration Nos. 13 & 14).

<sup>323</sup> Compl. ¶ 61.

<sup>324</sup> See Guidelines at 8 (Principal Consideration No. 12).

<sup>325</sup> Bank account records show payments to American Express on September 19, November 4, and December 4, 2019. CX-61, at 14, 18, 22. But the American Express statements for those months that Fetherston produced in response to FINRA’s Rule 8210 request do not reflect payments to that account on those dates.

## 2. Mitigating Factors

Weighed against the conduct that aggravated Fetherston’s violation, we considered whether there was any mitigation, beginning with Fetherston’s assertion of reasonable reliance on advice of counsel. This mitigation claim, however, fails. As directed by the NAC,<sup>326</sup> we considered the standard articulated in the Guidelines: adjudicators should consider whether the respondent “demonstrated reasonable reliance on competent legal or accounting advice.”<sup>327</sup> A reliance on advice of counsel “claim must have sufficient content and sufficient supporting evidence.”<sup>328</sup> Here, we find no evidentiary basis for Fetherston’s advice of counsel claim.<sup>329</sup>

The evidence supporting Fetherston’s claim consisted of his testimony and the letter his attorney sent to Enforcement counsel stating that Fetherston would not respond to the request based on privilege. Fetherston testified as follows: he sought counsel’s advice on various matters, including whether he should respond to the FINRA Rule 8210 request that he identify the medical expenses,<sup>330</sup> and they discussed the subject of the medical records privilege specifically with respect to his response to that request.<sup>331</sup> Fetherston stated that his attorney “had every piece of documentation since we met . . . I turned everything over to him” and that he provided his attorney with documentation regarding the specific request.<sup>332</sup> Fetherston testified that after he gave his attorney the information, his attorney instructed him not to respond to the request.<sup>333</sup> Reiterating, Fetherston said that counsel decided, with his consent, that the particular request “wouldn’t be addressed.”<sup>334</sup> Fetherston recalled that his lawyer was “very matter of fact in what he told me. He just said the advice to me was not to respond” to the request for medical

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<sup>326</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*42–43.

<sup>327</sup> Guidelines at 7 (Principal Consideration No. 7); *see also Howard Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*38 (Nov. 14, 2008) (stating that a valid claim of reliance on counsel could mitigate sanctions), *petition for review denied*, 347 F. App’x 692 (2d Cir. 2009), *cert. denied*, No. 09-1054, 2010 U.S. LEXIS 3557 (Apr. 26, 2010); *Dep’t of Enforcement v. Tysk*, No. 2010022977801r, 2019 FINRA Discip. LEXIS 10, at \*39–40 (NAC Mar. 11, 2019) (“[R]easonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions.”), *aff’d*, Exchange Act Release No. 91268, 2021 SEC LEXIS 534 (Mar. 5, 2021).

<sup>328</sup> *Dep’t of Enforcement v. Reifler*, No. 2016050924601r, 2023 FINRA Discip. LEXIS 1, at \*25 (NAC Jan. 17, 2023) (quoting *Berger*, 2008 SEC LEXIS 3141, at \*38).

<sup>329</sup> *See Berger*, 2008 SEC LEXIS 3141, at \*40 (in determining sanctions, “[w]e believe that the respondent asserting such reliance must provide sufficient evidence to the body making the sanction determination that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice.”).

<sup>330</sup> Tr. 722–23.

<sup>331</sup> Tr. 771.

<sup>332</sup> Tr. 725–26.

<sup>333</sup> Tr. 755–56.

<sup>334</sup> Tr. 757–58.

information on privilege grounds.<sup>335</sup> Fetherston said that he followed counsel’s advice by not responding.<sup>336</sup>

Continuing, Fetherston testified that he did not recall if his lawyer gave him anything in writing specifically addressing his obligation to respond to the request.<sup>337</sup> According to Fetherston, the advice was verbal, not written.<sup>338</sup> That said, during his hearing testimony, when he was shown his lawyer’s letter to FINRA staff asserting privilege, Fetherston confirmed his understanding that the letter contained the advice that his lawyer had given him and that he followed that advice.<sup>339</sup>

When pressed on cross-examination for more details, however, Fetherston’s recollection became somewhat vague and inconsistent. He could not remember: (1) the specifics of his conversation with his lawyer about his obligation to respond to the request or counsel’s specific advice;<sup>340</sup> (2) the advice his lawyer gave him regarding his FINRA Rule 8210 obligations;<sup>341</sup> (3) what documents he had turned over to his lawyer in connection with the request;<sup>342</sup> (4) if he provided counsel with documents sufficient to identify the medical expenses by date, amount, and method of payment;<sup>343</sup> (5) if counsel specifically asked Fetherston to provide all documents to him sufficient to identify the medical expenses;<sup>344</sup> or (6) if he saw his lawyer’s letter to FINRA staff asserting privilege before it was sent.<sup>345</sup>

We find that Fetherston failed to produce the actual advice he received. He did not introduce an opinion letter from his attorney. And counsel’s letter to FINRA asserting privileges does not constitute legal advice to Fetherston.<sup>346</sup> Nor did Fetherston’s attorney testify. Instead, in Fetherston’s post-hearing brief, his counsel describes the advice he purportedly gave Fetherston about responding to the request.<sup>347</sup> We give his statements no weight; “unsworn representations

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<sup>335</sup> Tr. 807–08, 810.

<sup>336</sup> Tr. 696–97, 721–22, 760–61, 764.

<sup>337</sup> Tr. 759.

<sup>338</sup> Tr. 759–60.

<sup>339</sup> Tr. 763.

<sup>340</sup> Tr. 755, 759.

<sup>341</sup> Tr. 756–57.

<sup>342</sup> Tr. 725–26.

<sup>343</sup> Tr. 752–53.

<sup>344</sup> Tr. 752–53.

<sup>345</sup> Tr. 761–62.

<sup>346</sup> *Cf. Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at \*28 (July 31, 2019) (characterizing a letter from counsel to FINRA explaining why it should not bring a disciplinary action against his client as a response to FINRA and not legal advice to the client).

<sup>347</sup> Respondent’s Post-Hearing Brief 9–10 (May 24, 2023).

by counsel contained in briefs or memoranda are not evidence of the facts they purport to recount.”<sup>348</sup> Additionally, Fetherston failed to show he made full and complete disclosure to his lawyer of all relevant facts before counsel rendered his advice. Fetherston gave only a generalized description of his production of documents to his lawyer. And the record is silent about what he actually told his lawyer about the specific medical expenses, if any, he paid with the funds the Gs gave him. Thus, for these reasons, we do not credit Fetherston’s mitigation claim that he reasonably relied on competent legal advice in not responding to the request regarding the medical expenses.<sup>349</sup>

In the initial decision, the Panel found mitigating that Fetherston substantially complied with FINRA’s request to identify the medical expenses he paid using the Gs’ funds when he produced personal bank and credit card statements.<sup>350</sup> The NAC found that the Panel erred when it concluded that Fetherston substantially complied with the request and instructed the Panel to redetermine the sanction “without according mitigation based on substantial compliance.”<sup>351</sup> Indeed, the evidence shows that Fetherston used the vast majority of the Gs’ funds to make payments to an American Express credit card account for which he did not provide statements. Without the relevant American Express statements reflecting the charges or the list of medical expenses that FINRA requested, FINRA was unable to determine whether Fetherston used the funds to pay medical expenses, as he claimed. Accordingly, on remand, we find that Fetherston did not substantially comply with FINRA’s request. Under the Sanction Guidelines, a bar is standard when a respondent provides a partial but incomplete response unless the respondent can demonstrate that the information provided “substantially complied with *all aspects* of the request.”<sup>352</sup>

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After considering the relevant aggravating and mitigating factors discussed above, we conclude that the appropriately remedial sanction for Fetherston’s violation of FINRA Rules 8210 and 2010 by partially failing to respond to a FINRA request for information is a bar in all capacities from associating with any member firm.<sup>353</sup>

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<sup>348</sup> *Cleantech Innovations*, Exchange Act Release No. 69968, 2013 SEC LEXIS 1998, at \*6 n.7 (July 11, 2013); see also *Wood ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002) (explaining that unsupported factual assertions by counsel in a brief or other pleading “are not evidence.”).

<sup>349</sup> See *Reifler*, 2023 FINRA Discip. LEXIS 1, at \*25 (citing *Berger*, 2008 SEC 3141, at \*40 (respondent “must provide sufficient evidence to the body making the sanction determination” that he “made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice.”))

<sup>350</sup> *Fetherston*, 2023 FINRA Discip. LEXIS 14, at \*83.

<sup>351</sup> *Fetherston*, 2024 FINRA Discip. LEXIS 27, at \*41–43.

<sup>352</sup> Guidelines at 93 (emphasis supplied).

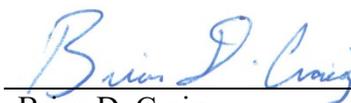
<sup>353</sup> In light of the bar, we exercise our discretion and do not also impose a fine as it would not serve a remedial purpose. See Guidelines at 9 (Technical Matters) (“Adjudicators may exercise their discretion in applying FINRA’s

## VI. Order

The Panel Majority finds that Enforcement failed to prove that Respondent Peter J. Fetherston converted or improperly used customer funds or that he provided false or misleading information, documents, or testimony to FINRA staff in violation of FINRA Rules 2150(a), 8210, and 2010, as alleged in causes one and two in the Complaint. Accordingly, the Panel Majority dismisses the first and second causes of action. The Hearing Officer dissents as to causes one and two, as indicated below.

The Extended Hearing Panel unanimously finds that Fetherston failed partially to respond to a FINRA request for information in violation of FINRA Rules 8210 and 2010, as alleged in cause three of the Complaint. For this misconduct, Fetherston is barred from associating with any FINRA member firm in any capacity.<sup>354</sup> This Decision will become FINRA's final disciplinary action unless it is appealed to the NAC by a party, or it is called for review. The bar shall become effective immediately if this Decision becomes the final disciplinary action of FINRA.

Fetherston is ordered to pay costs in the amount of \$7,599.12, which includes a \$750 administrative fee and \$6,849.12 for the cost of the transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.



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Brian D. Craig  
Hearing Officer  
for the Panel Majority

### Hearing Officer Dissent

#### Hearing Officer Craig, dissenting in part:

I respectfully dissent from the Panel Majority's decision to dismiss causes one and two of the Complaint. I would have found Fetherston liable for converting and misusing the Gs' funds (cause one) and providing FINRA with false information, documents, and testimony during its investigation (cause two).

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policy on the imposition and collection of monetary sanctions as necessary to achieve FINRA's regulatory purposes.").

<sup>354</sup> The Panel considered and rejects without discussion all other arguments of the parties.

The standard of proof in a FINRA disciplinary proceeding is preponderance of the evidence. This is equivalent to a “more likely than not” standard.<sup>355</sup> The preponderance standard does not require certainty or “the absence of any reasonable doubt.”<sup>356</sup> Instead, it requires the factfinder to “make a comparative judgment” about what more likely than not took place.<sup>357</sup> I believe the record shows that it is more likely than not that Fetherston converted and misused the Gs’ funds and provided false information and testimony and a fabricated document (the Note) during FINRA’s investigation.

**I. Cause One—Conversion and Misuse of Customer Funds (Rules 2150(a) and 2010)**

**A. The Gs’ Hearsay Statements to the Compliance Advisor and FINRA were Reliable**

The Panel Majority’s decision to dismiss causes one and two was based largely on its conclusion that the Gs’ hearsay statements to Principal and FINRA about the purpose of the checks were not reliable. I disagree. “[T]he hallmark of reliability is consistency of facts and details.”<sup>358</sup> Consistency in “core details” of an event is circumstantial evidence of reliability,<sup>359</sup> and the Gs told a consistent story to various Principal and FINRA investigators over the course of more than two years. Indeed, the Gs told the Compliance Advisor at Principal the same thing in February 2020 that they told FINRA investigators in March 2020, September 2021, and May 2022—specifically, that the checks they gave Fetherston in 2019 were for investments and related expenses, not Fetherston’s personal use.

I also disagree with the Panel Majority’s identification of a purported inconsistency in the customers’ statements—Investigator 1 wrote in her memo that the Gs could not remember specific details about the purpose of the checks and “were informed that Fetherston did not invest their money when they were contacted by [Principal] as a result of the mutual fund switching in their account.”<sup>360</sup> But this is not an inconsistency. Read in its entirety, Investigator 1’s memo reflects that the Gs told the investigator the checks were for investments, but they did not know the specific details of those investments. This is consistent with the Gs’ prior statements to the Compliance Advisor and their later statements to Investigator 2 that they gave Fetherston money for unidentified investments and to cover commissions they owed.

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<sup>355</sup> *Morton*, 2019 FINRA Discip. LEXIS 19, at \*33 (citing *Uthman*, 637 F.3d at 403).

<sup>356</sup> *Lindsay*, 47 F.3d at 1213.

<sup>357</sup> *Id.*; see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) (explaining that the preponderance standard “simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence”) (internal quotation omitted).

<sup>358</sup> *United States v. Delgado-Cortes*, 488 F. App’x 132, 134 (7th Cir. 2012).

<sup>359</sup> *Doe v. United States*, 976 F.2d 1071, 1079 (7th Cir. 1992).

<sup>360</sup> *Supra* at 33; CX-10.

And they had no motive to lie to FINRA about the checks, as the Panel Majority suggested, since Fetherston's firm already had reimbursed them when FINRA investigators interviewed them. They easily could have chosen not to cooperate with FINRA rather than maintain a lie for over two years. Moreover, why would they tell the Compliance Advisor the checks were for investment purposes if they had prepared and signed the Note, as Fetherston claimed, only a couple of months earlier?

Fetherston also effectively corroborated the Gs' statements when he spoke with the Compliance Advisor about the checks. When first confronted about the checks in February 2020—just a few months after receiving the last one—Fetherston told the Compliance Advisor that the proceeds from the checks were put in a “fixed investment.”<sup>361</sup> After the Compliance Advisor told Fetherston there would be some confirmation or other evidence of the investment if he had actually invested the funds, Fetherston acknowledged that he did not invest the funds and agreed to repay the firm.<sup>362</sup> In the two conversations Fetherston had with the Compliance Advisor in late February and early March 2020, he never said the funds were a gift or a loan, never mentioned any medical expenses, and never told the Compliance Advisor about the Note.<sup>363</sup> But he did express concerns to the Compliance Advisor about the impact the incident would have on his career,<sup>364</sup> which, to me, suggests a consciousness of guilt. In my view, Fetherston's statements to the Compliance Advisor, early on in the investigation before Fetherston fully developed his lies, strongly corroborates the Gs' version of events.<sup>365</sup>

Fetherston's actions in response to FINRA during the same period are also corroborative of the Gs' version of events. In March 2020, FINRA requested information from Fetherston about, among other things, the purpose of the three checks he received from the Gs, but he chose not to respond to the request at that time. It was not until months later, in June 2020, that Fetherston finally responded to FINRA's request for information about the checks, only to claim that he was unable to answer the question without looking at unspecified files.<sup>366</sup> Curiously, in the same response, he was able to provide specific details about mutual fund liquidations in the

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<sup>361</sup> Tr. 93.

<sup>362</sup> Tr. 94, 97.

<sup>363</sup> Tr. 96–97.

<sup>364</sup> Tr. 97.

<sup>365</sup> The Panel Majority discounted Fetherston's statements to the Compliance Advisor because Fetherston told the Compliance Advisor that he invested the funds but did not admit telling the Gs he would do so, eventually abandoned the story he told the Compliance Advisor and did not repeat it, talked on the phone with the Compliance Advisor for a short time, and did not expect the Compliance Advisor's call. I do not concur with the Panel Majority's reasoning. In fact, I find the fact that he was not expecting a call from the Compliance Advisor and his blurting out that he invested the money and was now concerned about his career strongly corroborative of the Gs story. It appears to me that Fetherston fabricated a better story once he had time to think about it and after FINRA got involved.

<sup>366</sup> CX-42.

Gs' and other clients' accounts without first reviewing files.<sup>367</sup> As the Panel Majority observed, Fetherston's failure to mention anything about the checks being used to pay medical expenses or the Note were "two glaring deficiencies" in the response, and it is not how someone with a documented right to \$89,000 would respond.

Fetherston never claimed any right to the funds until September 10, 2020, when, for the first time, he claimed the Gs gave him the checks specifically to help pay off medical expenses (of which the Gs consistently claimed to be unaware).<sup>368</sup> Tellingly, he never provided any evidence that he used the funds for medical expenses (or even that he had incurred medical expenses). He then changed his story again in December 2020 when he claimed the funds constituted a loan and produced the Note purportedly corroborating that claim.<sup>369</sup>

In my view, Fetherston's statements to the Compliance Advisor in February and March 2020 have greater probative value than the story he ultimately told FINRA because the statements to the Compliance Advisor were closer in time to when he received the checks.<sup>370</sup> Featherston explained at the hearing that he did not assert entitlement to the funds because he was shocked and confused during the initial call with the Compliance Advisor in late February 2020.<sup>371</sup> Yet during a subsequent call to the Compliance Advisor—a call he initiated a week later after time to reflect—he still did not claim that the funds were a gift or a loan and confirmed the previous agreement to pay back the firm.<sup>372</sup> These conversations occurred less than three months after Fetherston received the final check from the Gs.

I found the Gs' statements about the purpose of the checks to be reliable for other reasons. First, the record shows the Gs trusted Fetherston. They worked with Fetherston at a prior firm with no apparent problems.<sup>373</sup> They named him as a successor executor to their wills and they relied on him for professional services referrals.<sup>374</sup> Fetherston also assisted the Gs with

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<sup>367</sup> CX-42, at 1–2.

<sup>368</sup> CX-7, at 1.

<sup>369</sup> CX-8. Confoundingly, the Panel Majority discounts the fact that Fetherston could potentially have been exonerated by the existence of the Note, yet he never even mentioned it to the Compliance Advisor or the FINRA staff early in its investigation because he was not sure where he had stored it.

<sup>370</sup> See *United States v. Williams*, 800 F. App'x 734, 737 (11th Cir. 2020) (statements closer in time to the event "are more likely to be based on fresh recollection and carry a diminished likelihood of deliberate or conscious misrepresentation"); see also *Dep't of Enforcement v. White*, Discip. Proc. No. 2012033128703, 2015 FINRA Discip. LEXIS 48, at \*31 (OHO June 30, 2015) (explaining that the panel credited the respondent's "OTR testimony over his contrary hearing testimony . . . as it was given closer in time to the events at issue in this proceeding, before Enforcement notified [him] that it intended to recommend charges against him and, therefore, before he could better evaluate the impact on him of one answer or response versus another.").

<sup>371</sup> Tr. 682–83.

<sup>372</sup> Tr. 143–44.

<sup>373</sup> Tr. 639–40.

<sup>374</sup> CX-10.

a real estate transaction.<sup>375</sup> Given this level of trust, it is not unreasonable that they would have followed Fetherston's direction to make the checks for investment purposes payable to him.<sup>376</sup>

Second, WG was experiencing significant health issues throughout 2019. Fetherston told Principal during its investigation into potential misconduct involving mutual funds that the Gs were "very, very unorganized" at the time due to WG's serious ongoing health issues.<sup>377</sup> And "over the summer into the fall of 2019," WG's situation "drastically changed for the worse."<sup>378</sup> By fall 2019, WG was "facing multiple brain surgeries."<sup>379</sup> His condition deteriorated to the point that SG took a leave of absence from her job to care for him.<sup>380</sup> It is no surprise that they did not follow up with the firm about the checks in late 2019.

And the relatively short delay in informing Fetherston's firm about the three checks does not undermine the reliability of the Gs' statements. The timing makes sense—the Gs called the firm shortly after they received the reimbursement check in connection with the mutual fund issue and learned that Fetherston had been terminated by the firm in early 2020. They understandably would have asked the firm during that call about the checks they had written to Fetherston for investment purposes just a few months earlier.<sup>381</sup>

Finally, while the Gs declined to testify or provide an affidavit in this proceeding, they consistently told FINRA that they felt threatened by Fetherston and feared retaliation if they testified.<sup>382</sup> The Gs' fears were well-founded given the evidence that: (1) Fetherston's firm discharged him in 2017 after he was charged with assault and intimidating a witness;<sup>383</sup> (2) WG was suffering from Parkinson's Disease;<sup>384</sup> and (3) Fetherston went to the Gs home unannounced and tried to speak to them shortly after the firm learned of the checks Fetherston received from the Gs.<sup>385</sup> I do not agree with the Panel Majority that the lack of evidence that Fetherston

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<sup>375</sup> See Tr. 176–77; CX-36, at 34.

<sup>376</sup> The evidence also suggests the Gs were not sophisticated investors. While WG worked for a financial services firm, he worked in "IT," not investments or finance, and SG was a teacher's assistant. Tr. 642. The Compliance Advisor who dealt with the Gs also testified the Gs were unsophisticated. Tr. 181.

<sup>377</sup> CX-15, at 11.

<sup>378</sup> Tr. 491.

<sup>379</sup> CX-15, at 15; *see also* CX-11, at 1.

<sup>380</sup> CX-10; CX-31, at 1.

<sup>381</sup> The Panel Majority found the Gs' hearsay statements to be less reliable because they were not written by the Gs in the form of, for example, a complaint letter. But that is not surprising under the circumstances since Principal quickly addressed the Gs' concerns after they called the firm and told the Compliance Advisor about the checks they had given Fetherston, and the firm never required a written complaint.

<sup>382</sup> CX-12, at 2–3; CX-13, at 1; CX-77.

<sup>383</sup> CX-1, at 5, 14–17; Tr. 427–28.

<sup>384</sup> CX-10; Tr. 457.

<sup>385</sup> CX-10.

threatened the Gs or any other clients is sufficient to doubt the Gs' claim that they reasonably feared participating as a witness in this matter.

The Panel Majority found the Gs' hearsay statements to be unreliable in large part because they were verbal and unsworn. While those are factors a panel should consider when evaluating the reliability of hearsay statements, they are not dispositive. In *Department of Enforcement v. McGuire*, a case factually similar to this, the NAC affirmed a hearing panel's decision finding a respondent liable for conversion based mainly on verbal, unsworn hearsay statements from a customer.<sup>386</sup> In that case, a customer gave McGuire two checks totaling \$95,000 made payable to McGuire's outside business for an investment. After she was unable to reach McGuire about the investment, the customer called McGuire's firm, stating that she had made an investment through McGuire "similar to an annuity."<sup>387</sup> She explained that when she later tried to liquidate the investment, McGuire told her she should wait because there would be a significant surrender charge. When she insisted he liquidate the investment, he refused. The firm then asked McGuire about the purported investment. Like Fetherston, McGuire claimed the customer was a good friend who offered to give him the funds to assist with his financial difficulties (over McGuire's objection) and that he ultimately agreed to take the funds as a loan.<sup>388</sup>

The hearing panel in that case found McGuire liable for conversion. It reached this conclusion based on findings that McGuire's testimony that the customer loaned him the funds was not credible; the hearsay testimony to the contrary from Enforcement's witnesses—who conveyed the customer's version of events—was probative and reliable;<sup>389</sup> and additional evidence in the record further supported its credibility determinations and the trustworthiness of Enforcement's witnesses' testimony.<sup>390</sup> The NAC affirmed the decision, noting that the testimony of each witness conveying the customer's version of events was consistent in all material respects and corroborated the other witnesses' testimony.<sup>391</sup>

## **B. Fetherston Was Not Credible**

While the Gs' statements about the checks they gave Fetherston were consistent, credible, and reliable, Fetherston's explanations about the checks were anything but that. When confronted about the checks, he lied to the Compliance Advisor about investing the Gs' funds in

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<sup>386</sup> See *McGuire*, 2015 FINRA Discip. LEXIS 53.

<sup>387</sup> *Id.* at \*14.

<sup>388</sup> *Id.* at \*8–11.

<sup>389</sup> The customer passed away before the hearing and therefore was unavailable to testify. As in this case, the hearsay statements consisted of testimony from witnesses, who conveyed the customer's version of events, and their notes of conversations with the customer.

<sup>390</sup> *Id.* at \*19.

<sup>391</sup> *Id.* at 25; see also *John Montelbano*, 2003 SEC LEXIS 153, at \*17 (Jan. 22, 2003) (holding that hearsay testimony of witnesses was mutually corroborative and consistent and thus reliable).

a “fixed investment.”<sup>392</sup> He then acknowledged that he did not invest the funds and agreed to reimburse the firm.<sup>393</sup> Several months later, he told FINRA the Gs gave him the funds to pay medical and other expenses, then later changed that story and claimed the Gs loaned him the funds.<sup>394</sup>

Fetherston’s uncorroborated story that the Gs felt such sympathy for him after learning of his alleged medical condition that they gave him an open-ended loan of \$89,000 shortly after resuming their business relationship with him is completely implausible. There are no emails, text messages, or documents evidencing the purported loan, other than the Note that Fetherston inexplicably located months after first being asked about the checks by FINRA. He never mentioned the Note to the Compliance Advisor in February and March 2020 and only told FINRA of its existence six months after FINRA first asked about the checks.<sup>395</sup>

And Fetherston has offered no explanation for why the Gs would voluntarily loan or give \$89,000 to him at a time when both WG and SG were not working, WG was undergoing brain surgeries and suffering from chronic illness, and their daughter was also unwell, only to deny having given him the funds just months later. Additionally, he claims the Gs wanted to help him with his healthcare costs (although they had two unwell people in their own family), yet Fetherston has not shown one scintilla of evidence to support his claim that he had extensive medical bills. Add to this that, before the Gs talked with Fetherston in February 2019, they had not talked in two years, but just months later, in the fall of 2019, Fetherston claims they gave him \$89,000 because they were “friends.” Fetherston’s version of events is improbable at best.

As the Panel Majority noted, Fetherston’s testimony was particularly inconsistent and evasive “when he tried to explain why he did not produce the Note earlier.”<sup>396</sup> Indeed, he gave three different explanations why he did not disclose the existence of, or produce, the Note until December 2020. First, he testified that he “held on to it . . . and felt terribly about [the checks] and didn’t quite know what to do.”<sup>397</sup> He then claimed that the Note was “not in my possession. It was in a storage unit, which was closed for months” due to the COVID-19 pandemic and he therefore could not access it.<sup>398</sup> Finally, he testified that during the early stages of the investigation he “wasn’t certain” where the Note was, but disclosed it for the first time and produced it once he found it.<sup>399</sup> He also provided inconsistent testimony about who wrote the Note—in his OTR, he said both he and SG drafted it, while at the hearing, he said that SG alone

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<sup>392</sup> Tr. 93.

<sup>393</sup> Tr. 94, 97.

<sup>394</sup> CX-7, at 1; CX-8.

<sup>395</sup> Tr. 96-97; CX-8.

<sup>396</sup> *Supra* at 33.

<sup>397</sup> Tr. 680–81.

<sup>398</sup> Tr. 710–11.

<sup>399</sup> Tr. 774–76.

drafted it.<sup>400</sup> And he never explained why, even if he could not locate the Note, he never mentioned it to the Compliance Advisor or FINRA staff.

Fetherston provided inconsistent statements on other matters too. For example, he changed his story about the Gs' financial situation to fit two different and conflicting narratives. When asked about mutual fund liquidations in the Gs account, he told Principal in late 2019 that the Gs needed liquidity at that time for "rising income needs."<sup>401</sup> Then, when FINRA asked about the checks the Gs gave him during the same time period, he stated, "[a]t that point their liquidity was excellent."<sup>402</sup>

In sum, Fetherston was not believable, and his lack of credibility and the implausibility of his story strongly supports an inference that he converted and misused the Gs' funds. "[A] factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt," and federal courts have repeatedly ruled that inconsistent statements are "circumstantial evidence of consciousness of guilt."<sup>403</sup> Similarly, the NAC has ruled that a respondent's "shifting and contradictory explanations for the purposes of" his use of a customer's funds provided circumstantial evidence of conversion.<sup>404</sup>

In dismissing cause one, the Panel Majority's evaluation of the evidence shows a demand for certainty that simply is not required under the preponderance standard.<sup>405</sup> After evaluating the evidence under the applicable standard, I would have found that Enforcement proved by a preponderance of the evidence that Fetherston converted and misused the Gs' funds.

## **II. Cause Two—Providing False or Misleading Information, Documents, and Testimony to FINRA Staff (FINRA Rules 8210 and 2010)**

For the same reasons I would have found Fetherston liable under cause one, I also would have found that Fetherston's written responses and his testimony that the Gs gave him \$89,000 to help him pay medical bills and expenses were false.

In March 2020, FINRA issued a request to Fetherston under Rule 8210 for information about the checks the Gs gave him, including "the purpose of each check."<sup>406</sup> The request also sought documents "evidencing the purpose of each check" and "the eventual disposition of the

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<sup>400</sup> Compare Tr. 572–79, with Tr. 679.

<sup>401</sup> CX-15, at 15.

<sup>402</sup> CX-48, at 1.

<sup>403</sup> *Wright v. West*, 505 U.S. 277, 296 (1992); *United States v. Lara*, 23 F.4th 459, 471 (5th Cir. 2022).

<sup>404</sup> *Butler*, 2015 FINRA Discip. LEXIS 35, at \*25.

<sup>405</sup> See *Lindsay*, 47 F.3d at 1213 (explaining that preponderance standard does not require certainty).

<sup>406</sup> CX-40, at 3.

funds.”<sup>407</sup> After several follow-up requests seeking this information, on September 10, 2020, Fetherston finally responded, asserting for the first time that the Gs gave him the checks to “help me pay off my medical bills and expenses.”<sup>408</sup> He said nothing about the Note. In March 2021, FINRA took Fetherston’s testimony under Rule 8210. Fetherston testified that the Gs “gave me [the funds] to help me out” with “medical and associated expenses.”<sup>409</sup> A review of the record indicates that Fetherston’s statements to FINRA were false.

In three interviews over the course of over two years, the Gs told FINRA they gave Fetherston the \$89,000 for investments and related expenses,<sup>410</sup> not so Fetherston could pay medical bills and expenses that he claims he incurred. The Gs’ statements to FINRA were consistent and credible. Other than Fetherston’s self-serving testimony, there is no evidence that the Gs knew about Fetherston’s purported medical problems and the Gs consistently stated that they never spoke with Fetherston about any medical issues. Likewise, Fetherston failed to provide any testimony or documents that identified a single medical expense. In fact, the documentary evidence in the record shows that Fetherston did not pay any medical expenses with the Gs’ funds.<sup>411</sup>

I also would have found the Note he belatedly produced to FINRA was not genuine.<sup>412</sup> Nine months after FINRA first asked Fetherston about the purpose of the checks and any documentation he had concerning the purpose of the checks, Fetherston first disclosed the existence of the Note and produced a copy of it to FINRA. The record contains no written communications between Fetherston and the Gs referencing the Note. The Gs credibly denied that the Note was genuine.<sup>413</sup> When shown a copy of the Note after FINRA received it, the Gs

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<sup>407</sup> CX-40, at 3–4.

<sup>408</sup> CX-48, at 1.

<sup>409</sup> Tr. 584–86, 591–92, 596–98.

<sup>410</sup> CX-10; CX-11; CX-12.

<sup>411</sup> See CX-61. These bank account records do not show any payments for medical expenses. The records show payments to American Express on September 19, November 4, and December 4, 2019, shortly after Fetherston received the checks from the Gs. But Fetherston produced no evidence that the American Express charges were for medical expenses.

<sup>412</sup> The Panel Majority found it significant that Enforcement did not present expert testimony on the authenticity of the Note. But as the NAC pointed out in its decision remanding this case, Enforcement was not required to present such evidence to establish that the Note was fabricated. See *McGuire*, 2015 FINRA Discip. LEXIS 53, at \*31–32 (citing *Dep’t of Enforcement v. Kirlin Sec. Inc.*, No. EAF0400300001, 2009 FINRA Discip. LEXIS 2, at \*60–61 (NAC Feb. 25, 2009) (rejecting respondent’s argument that the hearing panel’s finding that he forged signatures must be overturned because it was not supported by expert or customer testimony and stating that “expert testimony is not required for a finding of forgery in FINRA cases”), *aff’d*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at \*32 (Dec. 10, 2009)).

<sup>413</sup> CX-11, at 1; CX-12, at 2; CX-13, at 2.

denied writing the handwritten note, denied signing it, and denied even being aware of its existence.<sup>414</sup> And they never wavered on this point.

On the other hand, Fetherston’s testimony about who wrote the Note changed and was not credible. He testified during his OTR that both he and SG wrote the Note but then testified at the hearing that only SG wrote the Note.<sup>415</sup> Fetherston also testified at his OTR and confirmed during the hearing that he “suggested” preparing the Note because “it was important for me, and they were helping me, that I acknowledge this, and I was very grateful to them.”<sup>416</sup> But Fetherston did not sign the note or express his gratefulness in the Note. Rather, the Note purports to have been written and signed by the Gs and they state in the Note what a tremendous help Fetherston has been *to them*.<sup>417</sup> Fetherston’s explanation about the Note makes no sense.

The circumstances and timing of the production of the Note also suggest that it was fabricated. Fetherston failed to produce or even mention the Note until a year after it was supposedly created, despite FINRA’s repeated requests for such documentation and the fact it would have corroborated his story. His explanations for the belated disclosure and production of the Note also changed multiple times.<sup>418</sup> It simply is not believable that a person confronted with accusations of converting customer money by both an employer and FINRA would repeatedly forget he has a document signed by the customers that exonerates him.

\* \* \*

For all of these reasons, I respectfully dissent from the Panel Majority’s decision with respect to the first two causes in the Complaint. I would have found Fetherston liable under cause one for conversion and misuse of customer funds. I also would have found Fetherston liable under cause two for providing false information and testimony and providing a fabricated document (the Note) to FINRA during its investigation. In accordance with the applicable Guidelines,<sup>419</sup> I would have imposed a bar as the sanction for each violation.

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<sup>414</sup> CX-11, at 1; CX-12, at 2.

<sup>415</sup> Compare Tr. 572–79, with Tr. 679.

<sup>416</sup> Tr. 595.

<sup>417</sup> CX-8, at 3.

<sup>418</sup> See Tr. 680–81; Tr. 710–11; Tr. 774–76.

<sup>419</sup> For conversion, a bar is standard regardless of the amount converted. See Guidelines at 96. For failing to respond truthfully to a request made pursuant to Rule 8210, the Guidelines do not specifically address a suspension range or bar, but a bar is generally considered standard. See *Mellon*, 2022 FINRA Discip. LEXIS 11, at \*31 (for providing false information to FINRA in response to a request made pursuant to Rule 8210, “a bar is the standard sanction” because the respondent “is presumptively unfit for employment in the securities industry.”)



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Brian D. Craig  
Hearing Officer

Copies to:

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