FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DAVID O. BRAEGER (CRD No. 2137240), Respondent.	Disciplinary Proceeding No. 2015045456401 Hearing Officer–LOM **EXTENDED HEARING PANEL DECISION** December 27, 2017

As alleged in the First Cause of Action, Respondent misused and converted his customers' investment funds, for which misconduct he is barred. As alleged in the Second Cause of Action, Respondent also made misrepresentations to his customers regarding the value and status of their purported investment, for which misconduct he is separately barred. He is ordered to pay costs.

Appearances

For the Complainant: Carlos A. Lopez, Esq., Frank Weber, Esq., Andrew Beirne, Esq., and Lara Thyagarajan, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Michael F. Torphy, Esq.

I. INTRODUCTION

The main issue in this case is factual. What did Respondent, David O. Braeger ("Braeger"), do with a $30,000 check that his customers, a married couple, gave him to invest in a private offering of a commodities trading investment fund called Rubicon Capital Appreciation Fund ("Rubicon")? There is no dispute that the money never reached the intended investment. The only question is whether Braeger took it.

Braeger created and controlled Rubicon, which was a limited partnership. As Rubicon's managing member, Braeger was responsible for all of its operational and investment decisions. As an associated person and registered principal of his FINRA member firm, he also marketed Rubicon in the private offering.

In July 2009, when Braeger solicited the couple, TH and SE, to invest in Rubicon, he directed SE to write the check to Rubicon, even though he knew that the check should be written to an escrow agent with which he had contracted to hold investor monies. SE gave Braeger the check written to Rubicon, along with a subscription agreement for the investment. After leaving the couple, Braeger endorsed the Rubicon check even though there was no need for him to do so for it to be deposited into the escrow account. He endorsed it with his initials and the instruction "for deposit only." That restrictive endorsement limited where the check could be deposited. It could be deposited only to an account belonging to Rubicon, the entity that Braeger controlled. The check was deposited the day after it was written in an account at the same bank where Braeger does all of his banking. Although he denies it, Braeger maintained an account for Rubicon at that bank. Once deposited, the money essentially disappeared.

Braeger claims that he sent the check and subscription agreement from his office in Wisconsin to his firm's headquarters in California by FedEx—either the day it was written or the day after—for deposit into the escrow account at the firm's bank. The firm has no record of receiving the check or subscription agreement, although it did receive another check and paperwork the customers gave to Braeger to open a separate investment account, which the couple gave to Braeger at the same time as the check written to Rubicon. The firm has no record that TH and SE invested in Rubicon. Braeger hypothesizes that the $30,000 check was stolen by some unknown person. As further discussed below, it is virtually impossible that Braeger sent the check to California.

For approximately a year after receiving the check, Braeger provided quarterly statements to TH and SE purporting to reflect the value of their Rubicon investment, even though they had no such investment. Then, in the summer of 2010, Braeger closed the investment fund. Braeger directed the commodities clearing firm for Rubicon to liquidate the trading accounts and send the proceeds to a Rubicon account at his bank. Braeger had checks printed and sent to other Rubicon investors. He did not inform TH and SE that the Rubicon fund had closed, and they received no money from the liquidation of the fund. He dissolved Rubicon completely in October 2010.

Even though the entity no longer existed, Braeger continued to mislead TH and SE, who continued to believe that they were invested in Rubicon. Among the many written and oral misrepresentations he made to the couple each year from 2010 through 2014, Braeger provided the couple with false Schedule K-1s for their income tax returns. The K-1s showed that the couple held an interest in Rubicon and gave a specific value to the investment. In the context of trying to obtain the Schedule K-1 for tax year 2014, the couple came to conclude that Braeger had deceived them. They submitted a complaint to FINRA in May 2015. In sum, Braeger made false and misleading statements over the course of more than five years to conceal his initial wrongdoing—the conversion of TH and SE's $30,000 investment.

With respect to each charge—the first for misuse and conversion, and the second for misrepresentations—the Extended Hearing Panel separately bars Braeger from association with any FINRA member in any capacity. His misconduct was egregious, and his testimony was almost wholly lacking in candor and honesty. We conclude that he would be a danger to

investors and the securities markets if he were permitted in the future to participate in the securities industry.

II. FINDINGS

A. Background

1. Proceeding

FINRA's Department of Enforcement ("Enforcement") filed the Complaint on July 20, 2016, charging Braeger with misuse and conversion of his customers' money in violation of NASD Rule 2330(a) and FINRA Rules 2150(a) and 2010 (First Cause of Action). The Complaint also charged him with making misrepresentations to his customers about the value and status of their investment in violation of FINRA Rule 2010 (Second Cause of Action). Respondent filed an Answer on August 17, 2016.

The hearing was held for seven days in May 2017. Nine witnesses testified.[1] The parties introduced exhibits into evidence,[2] and filed post-hearing briefs, with briefing completed on July 28, 2017.[3] After reviewing the briefs and evidentiary record, the Extended Hearing Panel deliberated. This decision reflects the Panel's findings, reasoning, and conclusions.

2. Respondent

a. Participation in Investment-Related Businesses

Braeger entered the securities industry in 1991. After working at eleven different FINRA member firms, he joined Newport Coast Securities ("Newport") in October 2008, around the time that the firm's ownership was changing and its name changed from Grant Bettingen, Inc. to

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[1] In addition to Braeger, the following persons testified: TH, the husband of the couple who made the $30,000 investment in Rubicon; SE, the wife, who wrote the $30,000 check to invest in Rubicon; MB, the FINRA investigator on the matter; DYW, a registered representative with Newport who invested in Rubicon and also sold it to his customers; SKS, a Newport administrative assistant who was responsible for processing private offering documents and submitting them to compliance for approval; LDM, another registered representative who invested in Rubicon and sold it to his customers; JPF, Braeger's business attorney; and TV, Braeger's litigation attorney for a defamation lawsuit against TH and SE.

References to hearing testimony are in the following format: "Hearing Tr. (last name or initials of witness), page of transcript." For example, Braeger's testimony is cited as "Hearing Tr. (Braeger) 1792-95."

[2] Complainant's exhibits are referred to with the prefix "CX," an identifying number, and sometimes a particular page. For example, "CX-8, at 1" is the portion of the Placement Agent Agreement, dated January 15, 2008, specifying that subscription monies would be placed in escrow at the CommerceWest Bank. Similarly, Respondent's exhibits are referred to with the prefix "RX." For example, "RX-34, at 3" is March 2009 email correspondence between Braeger and a person at CommerceWest Bank regarding the escrow account.

[3] References to the post-hearing briefs are as follows: Department of Enforcement's Post-Hearing Brief ("Enf. PH Br."); Respondent's Initial Post Hearing Brief ("Resp. PH Br."); Department of Enforcement's Post-Hearing Reply Brief ("Enf. Reply"); and Respondent's Post-Hearing Reply Brief ("Resp. Reply").

Newport (sometimes referred to, individually and jointly, as "the Firm"). Braeger remained associated with the Firm until January 2012. Braeger continued after that to work in investment-related businesses. He was last registered with a FINRA member firm in July 2014.[4]

Braeger's current business is Braeger Auto Finance. He raised money for it in a Regulation D private offering, and he says that as of January 2016 he had sold $8 million in notes.[5] As discussed in the context of sanctions, the sanctions we impose here may affect Braeger's future ability to raise money in Regulation D private offerings.

b. Asserted Wealth

One of Braeger's themes in his defense is that he had no incentive to take $30,000 from TH and SE.[6] Braeger and an attorney who testified on his behalf, TV, asserted that the Braeger family is prominent in southeastern Wisconsin through its ownership of several auto dealerships. Braeger's grandfather established the family's first auto dealership in 1923. Braeger asserts that he has a high income and is the beneficiary, along with his five sisters, of a multi-million dollar blind trust currently under the control of his stepmother.[7] He asked rhetorically at one point, "Why am I going to steal, generally, with my net worth[?]"[8]

Of course, wealth does not ensure against misconduct.[9] But, in any event, other evidence in the record undercuts Braeger's assertion that his financial position was such that he would never have converted his customers' money.

Braeger's record in the Central Registration Depository ("CRD") reveals that when he joined Newport in October 2008, he disclosed for the first time that he had previously filed for bankruptcy.[10] We also note that the business checking bank statements produced by Braeger for

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[4] CX-1, at 4-8, 18. During much of the relevant period, Braeger's office was located in Mequon, Wisconsin. He had two different addresses in Mequon, but, for the sake of simplicity, we simply refer to his office in Mequon as though it were all one. He moved to California in 2010 and headed the Firm's office there until he left the Firm in early 2012. CX-1, at 2-3; CX-107, at 1.

[5] Hearing Tr. (Braeger) 1690-91.

[6] Resp. PH Br. 1; Resp. Reply 4-5.

[7] Hearing Tr. (Braeger) 1365-66, 1371-74, 1620-22; Hearing Tr. (TV) 821-27. See also Resp. PH Br. 1.

[8] Hearing Tr. (Braeger) 1619.

[9] *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006), (affirming conviction on charges of obstructing justice in connection with alleged insider trading); *SEC v. Stanford Int'l Bank, Ltd*., 2013 U.S. Dist. LEXIS 189553 (N.D. Tex. Apr. 25, 2013) (describing a well-known Ponzi scheme); *In re Bernard L. Madoff Inv. Sec. LLC*, 424 B.R. 122 (Bankr. S.D.N.Y. 2010) (describing a second well-known Ponzi scheme).

[10] CX-1, at 20-22. Braeger identified the event date as April 19, 2002, more than six years before the disclosure, and the completion date as August 8, 2002. At the same time, Braeger inconsistently asserted on his Form U4 that the bankruptcy was not reportable because the initial bankruptcy filing had occurred more than ten years before. He also claimed on the Form U4 that there was no material difference in disclosure. CX-1, at 21. He explained that he was "forced to file bankruptcy when a family business" in which he had an ownership interest had "failed." CX-1, at 22.

one of his Wells Fargo accounts show a number of charges for overdrafts and items returned for insufficient funds.[11] Those statements cover the period from July 21, 2009, through August 19, 2010, and December 21, 2010, through January 21, 2011. We do not view these statements as an isolated business problem because Braeger treated his business accounts and personal account as one, making a number of online transfers from accounts labeled business accounts into his personal checking account.[12] At least once he made an online transfer from his personal account to a business account to cover an overdraft in that business account.[13] We do not have statements for all the accounts Braeger had at Wells Fargo, and so cannot fully analyze his financial situation. But the records that we do have undermine his assertion that he was or is too wealthy to be accused of converting $30,000 and diminish his credibility.

3. Jurisdiction

Although Braeger is no longer registered, he is still under FINRA jurisdiction because the Complaint charges him with misconduct committed while he was registered, and it was filed within two years of the termination of his registration.[14]

B. Braeger Creates Rubicon's Predecessor

Rubicon's predecessor was a small commodities futures trading investment fund called CMF, which Braeger created prior to joining Newport in October 2008.[15] The idea behind CMF was to aggregate a number of small investments to create the equivalent of a mutual fund for commodities futures trading. The pooling of small investments enabled CMF to access

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The document does not explain why the bankruptcy disclosure was not timely made within 30 days of the event as required by Article V, Section 2(c) of FINRA's By-Laws.

[11] CX-55. The statements show that overdraft fees were charged in August, September, November, and December 2009, and January 2010. Checks written in September and December 2009 were returned for insufficient funds and a fee was charged.

[12] CX-56, at 4 (7/14 and 7/22 online transfers from business account #5423), at 6 (7/31 online transfer from business account with illegible name), at 18 (9/1 online transfer from business account #5423), at 63 (2/17 online transfer from business checking legal), at 64 (2/18 online transfer from business checking office expense), at 72 (3/15 online transfer from business checking [KA, Braeger's accountant], at 73 (3/28 online transfer from business checking with illegible name), at 108 (7/13 online transfer from business checking trading, 7/22 online transfer from business checking), at 109 (7/26 online transfer from business checking California rent), at 133 (10/26 online transfer from business checking with illegible name), at 143 (11/22 online transfer from business checking), and at 150 (12/2 online transfer from expanded business services).

[13] CX-56, at 12 (8/18 online transfer to business account overdraft).

[14] FINRA By-Laws, Art. IV, Sec. 6; Art. V, Sec. 4.

[15] Hearing Tr. (Braeger) 894; CX-1, at 3.

commodities trading advisors who were trading on a larger scale.[16] CMF used MF Global as its commodities clearing agent.[17]

Braeger testified that CMF had some investors before it transformed into Rubicon and that some of those investors "folded"[18] into Rubicon. He identified four doctors in Racine, Wisconsin, who invested in CMF as a group, and a fifth person unconnected to them.[19] The CMF investors he identified appear in some notes made by Braeger's accountant,[20] but CMF investors were never on Newport's blotter as Rubicon investors[21] and none of them signed a Rubicon subscription agreement.[22] Braeger was vague about who "folded" into Rubicon. At one point, looking at a list of names the accountant had written down, Braeger said "I am highly assuming that was the amount of investors."[23] Braeger was also vague on how the "folding" was accomplished. He said that CMF was an "NFA" entity subject to oversight by the National Futures Association, but Rubicon was a "Regulation D" entity. He said that it was a big change, and CMF investors either could receive their money back and then separately invest in Rubicon or they could just "slide" into Rubicon.[24]

Braeger provided no CMF account statements or financial books and records. He said neither he nor his accountant, KA, had them any longer, because the time for mandatory retention had passed.[25]

Braeger portrayed Newport as highly desirous of "acquiring" him and CMF and turning the small fund into a much larger $50 million investment vehicle.[26] He spoke of CMF with pride as his "baby."[27]

C. Braeger Creates Rubicon

On December 1, 2008, Braeger registered Rubicon Capital Appreciation Fund as a Wisconsin limited liability company. In the Articles of Organization for the LLC, Rubicon's

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[16] Hearing Tr. (Braeger) 1075-81, 1375-84.

[17] Hearing Tr. (Braeger) 1403-05.

[18] Hearing Tr. (Braeger) 932.

[19] Hearing Tr. (Braeger) 922-26, 940-43, 1488-94, 1765-67.

[20] CX-120; Hearing Tr. (Braeger) 929-30.

[21] Hearing Tr. (Braeger) 922-26.

[22] Hearing Tr. (Braeger) 940-43.

[23] CX-120; Hearing Tr. (Braeger) 931.

[24] Hearing Tr. (Braeger) 925, 1384, 1413-25, 1492-95, 1676-81.

[25] Hearing Tr. (Braeger) 1676-80, 1695-96.

[26] Hearing Tr. (Braeger) 968-71, 1075-81, 1425-29, 1680-89.

[27] Hearing Tr. (Braeger) 1620, 1755.

business address was the same Mequon, Wisconsin address Braeger used as his business address. Braeger signed the document as its drafter and as the only organizer of Rubicon.[28] Braeger was the managing member of Rubicon through an entity called Ceres, which also used the same Mequon, Wisconsin business address. Braeger held a 51% interest in Ceres, and TA, another registered representative with the Firm during the relevant period, held the rest. As the managing member of Rubicon, Braeger had authority to make all investment and operational decisions for the investment fund, and he was responsible for conducting and managing its business.[29]

D. Rubicon Private Offering

1. Braeger Plans for Wells Fargo to Be Escrow Agent

In late December 2008, Braeger was working on the Rubicon private offering and hoping to begin soliciting investors the following month. Braeger planned for investor monies to be paid into an escrow account at Wells Fargo Bank.[30]

Braeger did all his banking at a Wells Fargo branch located in Mequon, Wisconsin, where he had multiple accounts.[31] He portrayed himself as an important customer of the branch. "I am not saying this pompously," he recounted, "but to this day when I walk in the branch I am known. I'm a highly valued customer of the branch."[32]

2. CommerceWest Bank Is Designated Escrow Agent for Rubicon

By mid-January, the plan for Rubicon monies to be deposited at Wells Fargo had changed. The Private Placement Agreement between the Firm and Rubicon, dated January 15, 2009, specified that until a threshold amount for investment was collected, all subscription funds would be deposited in a non-interest bearing escrow account at CommerceWest Bank.[33] Newport did all its business at CommerceWest Bank. It had no accounts at Wells Fargo.[34] Braeger knew

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[28] CX-4.

[29] Hearing Tr. (Braeger) 974, 976-78; CX-2, at 49; CX-7; CX-9.

[30] RX-12, at 1 (Braeger email 12/23/08).

[31] Hearing Tr. (JPF) 775-78; Hearing Tr. (Braeger) 1713-15; CX-55; CX-56; CX-67; CX-69. As further discussed below, Braeger initially responded to a FINRA staff Rule 8210 request, through counsel, that he had had one personal account at Wells Fargo for 12 years. CX-60. However, subsequent requests for bank statements for any accounts on which he was the signatory or beneficial owner revealed that Braeger had control of multiple Wells Fargo accounts. Account numbers ending in #3978, #3960, #5308, #5423, #5456, #6036, and #6044 were identified. CX-55; CX-56; CX-67; CX-69. Braeger produced bank statements for some of the accounts but declared that one belonged to his ex-wife and others had been "charged off" and records could not be located. CX-67, at 4.

[32] Hearing Tr. (Braeger) 1714.

[33] CX-9, at 6.

[34] Hearing Tr. (SKS) 565-66.

about the change of plan because he signed the Agreement as managing member of Ceres, the managing member of Rubicon.[35]

3. Braeger Represents that Rubicon Has Two Wells Fargo Accounts

On February 12, 2009, on behalf of Rubicon, Braeger signed a new account application with MF Global to be the clearing agent. In that document, Braeger described the applicant's banking relationships. He wrote on the application that Rubicon had both an escrow account and a checking account at the Wells Fargo Bank in Mequon, Wisconsin.[36] He also wrote on the application that the entity already had four investors who had been solicited by "invitation," and that the entity already had $125,000 under management—although the Rubicon private offering had not yet commenced.[37]

Braeger was testy when asked questions about his reference in the new account application to Rubicon's accounts at Wells Fargo. He said that it had been his intention for Rubicon to have its account at Wells Fargo because that was where he did all of his banking. He denied, however, that Rubicon actually had a bank account at Wells Fargo.[38]

Braeger's testimony is not credible. By mid-February, he knew Rubicon would not have a Wells Fargo escrow account. There was no reason for him to tell MF Global that Rubicon had an escrow account at Wells Fargo if it did not have one and did not need one. Furthermore, if, as Braeger represented on the application, the entity already held $125,000 from four investors, it had to have a bank account of some kind somewhere. We find that Braeger told MF Global that Rubicon had bank accounts at Wells Fargo because it did have at least one account there.

4. Braeger Is Told the February 2009 PPM Is Not Final

Mid-February email correspondence between Braeger and SKS, a Newport administrative assistant, shows that Braeger was anxious to begin selling Rubicon. He wrote SKS on the morning of Tuesday, February 17, 2009, hoping to set up a conference call with the Firm's brokers to introduce them to the fund. SKS wrote back later that day, "We are unable to do a conference call until the ppm is finalized. As soon as that is good we can set this up." Braeger responded later in the afternoon with irritation, saying "I feel like we are going backwards on this product roll out." He noted that the product had been approved, that the PowerPoint presentation for broker calls had been approved, and that "we are finalizing the [Private Placement Memorandum ("PPM")]." He complained about the difficulty of reaching key people at the Firm, and noted that "with the markets being this tough, this is an absolutely

[35] CX-8.

[36] CX-21; Hearing Tr. (MB) 376-82.

[37] CX-21, at 8; Hearing Tr. (MB) 376-82.

[38] Hearing Tr. (Braeger) 1002-05.

perfect time for this product." He concluded, "Please tell me what I can do to help this process move along."[39]

The email correspondence shows that as of February 17, 2009, Braeger was specifically told that the PPM had not been finalized. He also acknowledged in the correspondence that, as he tried to prod the Firm into moving more quickly, they were still finalizing the PPM.

On February 23, 2009, another of Braeger's attorneys, BB, sent an email to Braeger attaching a draft of the offering documents for Rubicon. Although the first page of the attached document said "final" at the top, it is clear that the document was a draft. Braeger's attorney said in his cover email that he had provided instructions on page B-1 of the document for investor checks to be made payable to Rubicon itself. He said that the Firm's counsel had approved the PPM with this provision. BB noted, however, that he and Braeger had discussed using an escrow account, and Braeger had suggested that the offering documents state that checks should be made payable to "Rubicon Capital Appreciation Fund, LLC escrow account." BB asked that Braeger review his escrow agreement with the bank and confirm to BB how investor checks should be made payable.[40]

Thus, Braeger's attorney expressed the sense that the document was close to final but should be changed to reflect the escrow arrangement. The record contains no evidence indicating whether Braeger ever provided BB with information about the escrow arrangement.

Braeger initially asserted at the hearing that the February 23, 2009 version of the PPM was the "final" version. He said he had "books" that had been printed for the Rubicon offering in his office bearing the date February 23, 2009. After he was shown email correspondence demonstrating that the final PPM was not approved until March, Braeger grudgingly admitted that there was another, later version of the PPM. The February 23, 2009 version of the PPM was BB's final draft,[41] but, as Braeger acknowledged, it was the Firm that had ultimate authority to approve the PPM.[42] BB did not work on the later version of the PPM that the Firm finally approved.[43]

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[39] RX-34, at 1.

[40] Hearing Tr. (Braeger) 1454-58; RX-12, at 3; RX-13. The February 23, 2009 draft PPM had a subscription agreement attached at A-12 (see the table of contents in RX-13, at 5). However, the copy admitted into evidence stopped with the first page of an operating agreement at A-1. Then it picked up with a client disclosure statement at B-19, an arbitration agreement at B-20, and a Firm privacy policy at B-21. Thus, the record copy of the document does not contain the page BB mentioned, page B-1, or the draft subscription agreement, which would have been at page A-12. Because the document is not complete, it is impossible to know exactly what BB's draft provided regarding how checks were to be written and where they were to be sent. There is no explanation in the record for why various pages and the subscription agreement are missing from the document.

[41] Hearing Tr. (Braeger) 1644, 1648-53, 1663-64; CX-173.

[42] Hearing Tr. (Braeger) 1472.

[43] Hearing Tr. (Braeger) 1448, 1454-58, 1465-66, 1470-72, 1642-44; RX-13.

Although Braeger tried to avoid admitting it, he improperly provided the February 23, 2009 draft PPM to one of the registered representatives of the Firm for use in selling Rubicon. When the Firm received a subscription agreement from a customer the representative had solicited, it questioned Braeger, who apologized by email, saying that he had sent PPMs to the representative but had not intended that the unfinished PPMs be used to solicit customers.[44] Thus, on February 27, 2009, Braeger again acknowledged that the February 23, 2009 draft was not the final PPM.

Braeger maintained at the hearing that he thought the February 23, 2009 version of the PPM was the "first finalization" but then he learned that the PPM had to be corrected and a new final version printed. He spoke of there being a "false green light" for the PPM and the need to correct a mistake. Even though he testified that it was "very expensive" to print the books—which meant that it would have been a notable event if the PPM needed to be reprinted—he could not remember what the error was that required reprinting. He also could not remember what he did with the copies he had of the incorrect print of the PPM after he received the later PPM.[45]

Braeger's testimony regarding the supposed false green light and why a supposed second final version of the PPM had to be printed was vague. He said, "Someone came to a conclusion that, whoops, this wasn't right. And I don't know if it was verbiage. I don't know, it could have been the bank. It … could have been the subscription agreement. I don't know what part of it."[46] It strains credulity that the managing member for the entity making the public offering would not know what caused the need to revise and reprint the PPM or who decided that it had to be done.

Because of the nature of his defense, Braeger continues to insist that he thought that the February 23, 2009 draft provided by his attorney was the final PPM for Rubicon—even though it obviously was not, and even though Braeger acknowledged on February 17 and again on February 27 that the PPM was not yet finalized. Braeger claims that he picked up an old version of the "book" of offering materials, the February 23, 2009 version that he had prematurely given to another registered representative, thinking that it was the final version.[47] If he admitted that he knew it was only a draft, his innocent mistake defense would evaporate.

5. Braeger Applies for Escrow Account at CommerceWest Bank

On March 5, 2009, Rubicon submitted an account opening document to establish the escrow account with CommerceWest Bank. Braeger signed in three places on behalf of Rubicon. He and TA, another registered representative at the Firm, provided personal and contact

[44] Hearing Tr. (Braeger) 1560-63, 1656-58; RX-34, at 7.

[45] Hearing Tr. (Braeger) 1448, 1556, 1560, 1699-1701.

[46] Hearing Tr. (Braeger) 1563.

[47] Hearing Tr. (Braeger) 1708-09.

information to confirm large transactions.[48] Braeger also submitted signature cards to CommerceWest for Rubicon's account there. Braeger was listed as the only manager of Rubicon. He and TA were listed as the only members.[49]

That same day, Braeger also engaged in email correspondence with an employee of CommerceWest Bank regarding how checks for investment in Rubicon should be written. Braeger asked whether checks should be payable to "CommerceWest Bank, Escrow Agent for the Rubicon Capital Appreciation Fund." The employee responded that a check written to Rubicon itself would be acceptable "as long as the investor funds are properly deposited into the escrow account."[50]

Braeger testified that he understood from this correspondence that it would be acceptable to write checks to Rubicon directly.[51] At this point, however, the PPM was not finalized, and Braeger had not yet executed the escrow agreement on behalf of Rubicon with CommerceWest Bank. The requirements set forth in those documents, discussed below, would supersede the informal advice of a bank employee.

6. Rubicon's March 2009 PPM Becomes Final

The final PPM was dated March 19, 2009. It specified that all checks should be made payable to the escrow agent for Rubicon and delivered to the Firm, along with the customer's completed and executed subscription agreement. The PPM gave Braeger authority to order the breaking of escrow. Accompanying the PPM as Exhibit B was a one-page set of instructions directing that any check or wire for investment in Rubicon be made payable to CommerceWest Bank as escrow agent for Rubicon and sent to the Firm at its Newport Beach, California address.[52]

On March 23, 2009, Braeger informed SKS, the Newport administrative assistant, that Rubicon had received final approval and requested her help in publicizing the offering to the Firm's registered representatives.[53] We note that although Braeger says that he thought the February version of the PPM was final, he admits he never sought to publicize it the way he sought to publicize the March 19, 2009 PPM.[54] This further supports the conclusion that he knew that the February 23, 2009 PPM was not final.

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[48] CX-12.

[49] CX-107.

[50] RX-34, at 3.

[51] Hearing Tr. (Braeger) 1485-86.

[52] CX-9, at 22, 46; Hearing Tr. (Braeger) 1668.

[53] CX-173.

[54] Hearing Tr. (Braeger) 1785.

7. Braeger Enters into Escrow Agreement with CommerceWest Bank

On March 31, 2009, through Braeger, Rubicon entered into a detailed Escrow Agreement with CommerceWest Bank. Rubicon appointed the escrow agent to receive and collect subscription funds. The bank was to provide Rubicon with a monthly accounting that would account for deposits on an investor basis. Checks were to be made payable to the order of CommerceWest Bank, N.A. as escrow agent for Rubicon. The Escrow Agreement specified that any payment that did not conform to the instruction for writing the checks would be returned to the investor. The Firm, as Placement Agent, was to forward a copy of each check and subscription agreement to the "Company," meaning Rubicon. Rubicon had 30 days to give the Escrow Agent notice of any discrepancies in an escrow account statement. Three people were authorized to confirm funds transfer instructions: Braeger, TA, and SKS.[55]

The Escrow Agreement clearly provided that checks should be written to CommerceWest Bank as the escrow agent. Thus, regardless of what the CommerceWest Bank employee told Braeger earlier about accepting checks written to Rubicon, Braeger knew that he had entered into detailed contractual arrangements on behalf of Rubicon directing that checks would be written only to the escrow agent. It would be unreasonable for him to rely on the prior informal advice of a bank employee rather than to comply with the contract.

The Escrow Agreement also provided that documentation of investor deposits would be sent to Rubicon—meaning Braeger as its manager—to enable discrepancies to be identified. That documentation was to be on an investor basis, not in the aggregate. This means that pursuant to the Escrow Agreement Braeger would receive information about every deposit the escrow agent received, and he would know if a deposit by one of his customers did not reach the escrow agent.

Rubicon had two accounts at CommerceWest Bank, a general account and an escrow account. All customer checks that the Firm received were deposited into the escrow account.[56]

8. Braeger Distributes the Final PPM

After establishing the escrow account with CommerceWest Bank, Braeger began circulating the final PPM that the Firm had approved, the one dated March 19, 2009. On March 31, 2009, SKS asked him to send some copies to the Firm's headquarters.[57]

On April 2, 2009, Braeger emailed a copy of the March 19, 2009 Rubicon PPM to another registered representative. That copy included a subscription agreement that instructed, in red typeface, "Make checks payable to: CommerceWest Bank, Escrow Agent for Rubicon

[55] CX-11, at 9.

[56] Hearing Tr. (SKS) 744-45.

[57] CX-174; Hearing Tr. (Braeger) 1653-55.

Capital Appreciation Fund."[58] Braeger conceded that this document was "seemingly" the final version.[59]

On April 3, 2009, Braeger emailed a copy of the subscription agreement for the Rubicon PPM to the broker who had originally used the February 23, 2009 draft. Braeger wrote in his cover email to the registered representative that there had been "minor changes to the sub doc." He said, "The one you are using is fine but please use this one in the future."[60] In red typeface, the attached subscription agreement directed that checks should be made payable to "CommerceWest Bank, Escrow Agent for Rubicon Capital Appreciation Fund."[61]

Thus, by early April 2009, Braeger knew what the correct subscription agreement for Rubicon provided—checks should be written to CommerceWest Bank as escrow agent. He himself had told another registered representative to use the subscription agreement containing that instruction. In light of these circumstances, when Braeger solicited TH and SE almost four months later to invest in Rubicon, his claim that he innocently used a different instruction is not credible.

9. Other Rubicon Investor Monies Are Deposited in the Escrow Account

Two of the Firm's other registered representatives, LDM and DYW, invested in Rubicon themselves and sold subscriptions to a few of their customers. They used subscription agreements that instructed customers to make their checks payable to CommerceWest Bank as escrow agent for Rubicon.[62] They and their customers appeared in the Firm's records.[63] Those registered representatives did not endorse the checks before sending them to the Firm's

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[58] CX-176, at 48.

[59] Hearing Tr. (Braeger) 1664-68.

[60] CX-175, at 1.

[61] Hearing Tr. (Braeger) 1657-58, 1662-63; CX-175, at 2.

[62] Hearing Tr. (MB) 524-25; Hearing Tr. (DYW) 465-69; Hearing Tr. (LDM) 686-89; Hearing Tr. (Braeger) 896-900; CX-20, at 4 (LDM), 21 (LSJ), 38 (JJH), 54 (GW Trust), 69 (GKA Trust), 87 (DYW), and 99 (CHY).

Nevertheless, some of the checks these investors wrote did not strictly follow the instructions. For example, LDM's check was made out as follows: "Rubicon Capital Appreciation Fund, FBO CommerceWest Bank, Escrow Agent for Rubicon Capital Appreciation Fund FBO [LDM]." CX-20, at 17. The check for LSJ's investment was simply written to "Rubicon Capital Appreciation Fd LLC." CX-20, at 34. CommerceWest Bank accepted these checks for deposit into the escrow account, as well as other checks varying from the instruction in the subscription agreement. Hearing Tr. (MB) 655-63. This means that if Braeger had sent the check written by SE to the Firm, and the Firm had processed it and sent it on to CommerceWest, the check would likely have been deposited in the escrow account.

The fact that CommerceWest accepted those checks does not, however, show that Braeger made an innocent mistake. The circumstances surrounding his instruction to SE to write the check to Rubicon, including his use of a subscription agreement that did not even mention the escrow agent, compel the conclusion he did not act innocently.

[63] CX-20, at 1-17 (LDM), 18-34 (LSJ), 35-50 (JJH), 51-64 (GW Trust), 65-82 (GKA Trust), 83-97 (DYW), 98-112 (CHY).

headquarters for processing.[64] There is no evidence in the record that they or the Firm sought Braeger's endorsement either. Accordingly, Braeger's endorsement was neither anticipated nor necessary to accomplish a deposit in the Rubicon escrow account.

E. Braeger Solicits TH and SE to Invest in Rubicon

1. TH and SE

TH is an airline pilot. His wife, SE, is an obstetrician who no longer practices. They had little investment experience prior to meeting Braeger. TH's investment experience was limited to the 401(k) accounts his employers provided. Prior to their investment in Rubicon, TH had never heard of a Schedule K-1 and had no understanding of why he was required to have one. SE had done some investing and had some CDs that were maturing. She had mostly invested in mutual funds. Because the traditional markets were not doing very well, they were anxious and looking for other types of investments when they met Braeger.[65]

The couple married in June 2008, approximately a year before they met Braeger and invested in Rubicon.[66] They both testified that their dealings with Braeger put an intense stress on their marriage.[67] TH bonded with Braeger over shared interests in music,[68] and TH for a long time thought that his friend "had [his] back."[69] TH continued to think of Braeger as his friend as late as February or March 2014, after he and his wife began to have concerns about what Braeger had been telling them.[70] Even though SE became uneasy about Braeger, she refrained for some time from pressing for answers. She said that when she raised questions Braeger made her feel as though she was being "disrespectful or rude."[71] She would "let it go" because she did not want to be "confrontational."[72] TH became the primary contact with Braeger.[73] By the time they insisted that Braeger either provide documentation to explain what had happened to their money or refund their Rubicon investment, SE was angry and felt embarrassed and vulnerable.[74] TH said

[64] Hearing Tr. (SKS) 576, 587-88.

[65] Hearing Tr. (TH) 44-49, 91-93; Hearing Tr. (SE) 1203-04.

[66] Hearing Tr. (SE) 1203.

[67] Hearing Tr. (SE) 1231; Hearing Tr. (TH) 128-32, 215-16.

[68] Hearing Tr. (SE) 1223-26.

[69] Hearing Tr. (TH) 89-90, 96-97, 123.

[70] Hearing Tr. (TH) 139.

[71] Hearing Tr. (SE) 1222-29.

[72] Hearing Tr. (SE) 1222-29.

[73] Hearing Tr. (SE) 1223-26.

[74] Hearing Tr. (SE) 1253-54, 1257-58, 1293-94, 1327-28.

that they were naive and felt terrible about the experience. "There was lots of discomfort … [and there is] still to this day."[75]

2. The Couple's Initial Contacts with Braeger

In early June 2009, SE attended a presentation Braeger made to 20-30 doctors at the Racine Medical Society. Braeger discussed Rubicon, and she was impressed. She talked about the investment with her husband. Afterward, she telephoned Braeger's office and made an appointment. Subsequently, SE and TH met with Braeger in his Mequon, Wisconsin office. The couple provided Braeger with information about their financial situation, indicating they had approximately $150,000 to invest, but they did not commit to anything at the first meeting. Braeger provided them with some recommendations, including a recommendation that they invest $30,000 in Rubicon.[76]

3. The Couple Gives Braeger a $30,000 Check to Invest in Rubicon

The couple decided to go forward, and contacted Braeger. He came to their home in Racine, Wisconsin, on July 20, 2009, sometime in the afternoon, before dinner. They spent at least two hours getting to know one another and dealing with the paperwork for Rubicon and other investments. They discussed an annuity for TH, a brokerage account at Penson, and the Rubicon commodities trading fund.[77]

The couple did not complete the purchase of the annuity until a later meeting with Braeger and TA, a Firm registered representative who specialized in annuities.[78] They did, however, fill out the paperwork to open an account at Penson, and SE wrote a $20,000 check to Penson.[79]

TH and SE also filled out a Rubicon subscription agreement, and SE wrote another check for $30,000 for investment in Rubicon. She followed Braeger's instruction to make the Rubicon check payable to Rubicon itself, writing "Rubicon Capital Appreciation Fund, LLC."[80] SE gave the two checks, the application to open an account at Penson, and the Rubicon subscription agreement to Braeger.[81]

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[75] Hearing Tr. (TH) 197-200.

[76] Hearing Tr. (SE) 1204-08; Hearing Tr. (TH) 46-49; CX-124.

[77] Hearing Tr. (TH) 49-51, 66-67; Hearing Tr. (SE) 1209-10; Hearing Tr. (Braeger) 890-92.

[78] On July 29, 2009, Braeger and TA met with TH and SE at their home to arrange the purchase of the annuity the couple wanted to purchase. TH wrote a $100,000 check for the annuity. CX-33; Hearing Tr. (SE) 1216-17.

[79] Hearing Tr. (Braeger) 892-93; Hearing Tr. (TH) 59-63, 278-79; CX-31; CX-32.

[80] Hearing Tr. (SE) 1209-13, 1268-69.

[81] Hearing Tr. (TH) 289-90; Hearing Tr. (SE) 1330-31; Hearing Tr. (Braeger) 894.

The Rubicon subscription agreement Braeger provided to TH and SE was unlike the subscription agreements provided to other Rubicon investors in two ways that were clearly distinguishable to Braeger. First, their subscription agreement instructed that checks should be made payable to Rubicon itself, without mention of an escrow agent or CommerceWest Bank. Second, their subscription agreement provided that checks could be sent to Braeger at his Mequon, Wisconsin office, as an alternative to sending them to the Firm's headquarters in California. Subscription agreements used by other Rubicon investors identified the Firm's headquarters in California as the only place where checks could be sent.[82]

In giving TH and SE a subscription agreement with incorrect instructions, Braeger characterized himself as having made an innocent mistake. He said that the mistake arose because he had a batch of "books" (PPMs) piled next to his desk from the February version of the PPM, and he failed to dispose of them properly when the later version was finalized. He made it appear that he simply picked up a "book" from the wrong pile without recognizing that it was not the correct version.[83]

We have found that Braeger knew that the February 23, 2009 draft of the PPM was not the final PPM. He could not have picked up and used the February 23, 2009 draft by mistake.

There are additional anomalies that cast doubt on Braeger's story of an "innocent mistake." The PPM that the couple received from Braeger and that they eventually submitted with their complaint to FINRA bore the date March 19, 2009,[84] and it contained the instruction to make checks payable to CommerceWest Bank as escrow agent for Rubicon.[85] Attached to it was a one-page Exhibit B that also directed delivery of a check payable to CommerceWest Bank as escrow agent for Rubicon.[86] They did not receive the incorrect February draft of the PPM, but, rather, the correct version bearing the March date. So Braeger did not mistakenly pick up a February "book" and provide it to TH and SE.

When the instructions in the PPM the couple received were pointed out to Braeger, he said that he followed the instructions on the subscription agreement that he gave the couple,

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[82] Hearing Tr. (SKS) 588-89; Hearing Tr. (SE) 1209-13, 1215-16; CX-20, at 4 (LDM), 21 (LSJ), 38 (JJH), 54 (GW Trust), 69 (GKA Trust), 87 (DYW), and 99 (CHY); CX-29; CX-30.

The couple later made two other investments on Braeger's recommendation, Aegis and Western Credit, putting $25,000 into each. TH testified that Aegis and Western Credit, like Rubicon, appeared to be in trouble. Having a total of $80,000 "frozen," he said, put a "real stress" on their marriage. Hearing Tr. (TH) 128-29.

[83] Hearing Tr. (Braeger) 1701-03, 1787-88.

[84] CX-2, at 12. Counsel explained at the hearing that CX-9, which was the subject of some testimony by SE, is another copy of the same March 19, 2009 PPM. The subscription agreement TH and SE received is a separate exhibit, CX-29. Hearing Tr. 1788-90.

[85] CX-2, at 33.

[86] CX-2, at 57.

which would have been stapled inside the PPM.[87] He seemed to suggest that there was nothing that would have alerted him that the instructions on the subscription agreement were incorrect. He said, "The whole book, the whole book says – doesn't say Commerce[W]est in it."[88] But, in fact, the "book" or PPM that TH and SE received *did* say to make checks payable to CommerceWest as escrow agent. And, more importantly, Braeger had entered into an escrow agreement on behalf of Rubicon with CommerceWest Bank. He knew that the check was supposed to be written to the escrow agent and that the subscription agreement that did not mention the escrow agent was incorrect.

When asked to explain the conflict between the instructions in the March 19, 2009 PPM and the instructions in the subscription agreement he gave TH and SE, Braeger did not have an answer other than to say, "It's the conflict of the whole situation."[89] He characterized the offering documents as constantly changing, leading him to mistakenly give TH and SE the wrong document.[90]

We note that the subscription agreement, unlike the PPM, is easily subject to modification and is a supplement that is stapled to the printed "book." Braeger explained that the Firm has a template for the subscription agreement, and that template does not change except for one space at the top of the first page. There is a blank space on the template for instructions on how to write checks and where to send them. Someone at the Firm opens the template, fills in the appropriate information for the particular deal, and puts it in PDF form, after which it is ready to be stapled into a PPM "book."[91] In contrast, the PPM has particularized information throughout and is only printed when those details have been finalized and approved.

Because the subscription agreement is not included in the February 23, 2009 draft of the PPM that was admitted in the record, we have no way of knowing whether the subscription agreement Braeger gave TH and SE was the same or different from the one BB was working on to accompany the February 23, 2009 draft. Either way, however, Braeger knowingly used an incorrect version of the subscription agreement. If the version was the same as that accompanying the February 23, 2009 PPM, then Braeger must have separated the subscription agreement from the draft PPM in order to use it to misdirect the money. If the version was different from the one accompanying the February draft, then Braeger must have created the version of the subscription agreement for the particular purpose of using it with TH and SE to misdirect the money.

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[87] Hearing Tr. (Braeger) 1788-93.

[88] Hearing Tr. (Braeger) 1788.

[89] Hearing Tr. (Braeger) 1792-93.

[90] Hearing Tr. (Braeger) 1793.

[91] Hearing Tr. (Braeger) 1793, 1795.

F. The Couple's Money for Investment in Rubicon Disappears

1. Braeger Did Not Send the Rubicon Check to the Firm in California

When he left TH and SE, Braeger took SE's $30,000 check and the Rubicon subscription agreement with him, along with the separate check and application to open an investment account at Penson.[92] He said that he did not leave TH and SE until 7 or 8 p.m., and that they live about an hour south of where he lives.[93]

Braeger endorsed the Rubicon check on the back, writing his initials as his signature and specifying that the check was "for deposit only." He did not indicate the bank where it was to be deposited, and he did not write a bank account number on the check. Stamped information on the back of the check is not legible and the bank account number of the account where the check was deposited cannot be determined from the back of the check.[94]

Asked when he endorsed the check, Braeger could not say whether he waited until "it was brought to the office." He was uncertain whether that would have been on July 20, the same day that he met with TH and SE, or the next day. He noted that by the time he could have reached the office with the checks that evening, his assistant would have been gone.[95]

Later in his testimony, Braeger firmly asserted that he gave the Penson and Rubicon checks and accompanying documents to his assistant for processing. He said, "They went right to [my assistant] on her desk."[96] He explained how she customarily processed such documents and said it was the same process for all the brokers in the office, including him. She first made copies and placed the copies in file folders. Then she would combine his documents with any other documents of other brokers in the office and send them all in one FedEx package to be sent for next day delivery. He said the process was like "clockwork."[97] A FedEx pickup box was outside their building door where she could deposit the package. He thought the last pick-up was at 6:30 p.m. or 8:00 p.m.[98]

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[92] Hearing Tr. (Braeger) 894.

[93] Hearing Tr. (Braeger) 1164.

[94] Hearing Tr. (Braeger) 893; CX-30. As discussed below, after it became clear to TH and SE that something had gone wrong with their investment, they obtained from their bank a copy of the front and back of the check. Hearing Tr. (TH) 71-76; Hearing Tr. (SE) 1211-15; CX-30; CX-37.

[95] Hearing Tr. (Braeger) 1162, 1164-65.

[96] Hearing Tr. (Braeger) 1526.

[97] Hearing Tr. (Braeger) 1525.

[98] Hearing Tr. (Braeger) 1428, 1524-28, 1715-18. Braeger testified that in any private offering the Firm required a broker to send the documents to the home office so that they could be reviewed by compliance and be available in the Firm's records for audit. Hearing Tr. (Braeger) 1057-58.

Braeger laid out two different scenarios in his testimony. Neither is plausible in light of the fact that the $30,000 check was deposited in a Wells Fargo bank account on July 21, 2009, the day after it was written.

In the first scenario, Braeger arrived at his office between 8 p.m. and 9 p.m. on July 20, 2009, and gave the Penson and Rubicon investment materials and checks to his assistant for processing. But Braeger himself said she would not have been at the office at that time. And, even if she had been, he said that the last FedEx pick-up was at 6:30 p.m. or possibly as late as 8 p.m. There would not have been enough time to process the materials and copy them before the last pick-up.

Moreover, even if the Rubicon check had been sent to California the night of July 20, 2009, the scenario continues to be implausible. Someone would have had to have removed both the check and the accompanying subscription agreement from the package when it arrived at the Firm the next day before the package reached SKS, the administrative assistant responsible for processing the documents, without arousing suspicion. This would not be general theft because the $20,000 Penson check, which would have been in the same package, was appropriately processed and appears in the Firm's records.[99] It is unclear why someone would particularly focus on stealing the Rubicon check, especially when that person would not have known in advance that the package contained a check made out to Rubicon, which was not the correct payee for the investment.

Braeger's second scenario is even more difficult to square with the facts. If, on the day after he met with TH and SE, he gave the Penson and Rubicon checks to his assistant to process and send to the Firm's headquarters, the check would have been shipped on July 21, 2009, for overnight delivery. We know, however, that the check was deposited in a Wells Fargo Bank account on that day. The check could not have been in the FedEx package sent by Braeger's assistant.

2. Braeger Personally Endorsed the Check

In light of the impossibility that Braeger sent the $30,000 check to California, we examine more closely his reasons for endorsing the check. The other registered representatives who sold Rubicon to customers did not endorse the checks they collected for investment in Rubicon,[100] and there was no evidence that they or the Firm sought Braeger's endorsement before deposit with the escrow agent. Accordingly, it was unnecessary for Braeger to endorse the check written by SE.

When Braeger was asked why he endorsed the Rubicon check and wrote "for deposit only," he responded, "I'm going to give my best assumption."[101] He continued, "I signed it

[99] Hearing Tr. (TH) 71-76; Hearing Tr. (Braeger) 892-93; CX-32; CX-37; CX-121.

[100] Hearing Tr. (SKS) 576.

[101] Hearing Tr. (Braeger) 1527.

because I was the manager …. [My role was] the management of the entire fund operation …. [It was] to be my business."[102] Asked if there was a reason he did not write the account number when he wrote "for deposit only" on the check, Braeger reasserted that it was appropriate for him to sign the check as manager of Rubicon, and reminded the Panel that an employee of CommerceWest Bank had told him it would be permissible for checks to be made payable to Rubicon. He never gave a direct, coherent response to the question.[103]

The only conceivable reason for Braeger to endorse the check in the way that he did is that he intended to deposit it in a Rubicon account that he controlled at Wells Fargo. He did not have to write the account number on the back of the check because the bank knew which account was the Rubicon account or Braeger could instruct the bank as to which account should receive the deposit.[104]

3. The Firm Has No Record of the Rubicon Check

The Firm has no record of an investment in Rubicon by TH and SE, and no record that it ever received the $30,000 check.[105] The Firm's sales blotter lists seven Rubicon investors, but not TH and SE.[106] SKS, who processed the Rubicon checks and subscription agreements, testified that the first time she ever heard of TH and SE was when the Firm received a letter from FINRA regarding the couple's complaint about Rubicon. Subsequently, when she searched for documents relevant to FINRA's inquiry, she identified no record of the check or subscription agreement submitted by TH and SE.[107]

The absence of any such record is difficult to explain in any way except that Braeger never sent the check or subscription agreement to the Firm. The Firm had processes for tracking and recording investors and their investments that should have had some trace of the couple's attempt to invest in Rubicon. As discussed below, the Firm's similar processes functioned

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[102] Hearing Tr. (Braeger) 1527.

[103] Hearing Tr. (Braeger) 1725-28.

[104] Writing "For Deposit Only" creates a "restrictive endorsement" under the Uniform Commercial Code, § 3-206. If a payee endorses a check and writes "for deposit only" on the back, with nothing more, the check can only be deposited in the payee's account, even if the specific account is not identified. A bank receiving such a check from someone not known to the bank has a duty to assure itself the stranger is authorized, and may require the stranger to identify himself as the payee. See https://www.consumerfinance.gov/ask-cfpb/what-does-it-mean-for-a-check-to-be-indorsed-for-deposit-only-en-947/. See also 6A Michie B&B COLLECTIONS. § 53 (2017). Unqualified language, "for deposit only" following the endorsement on back of a check, requires the depository bank to place the check's proceeds into named payee's account, and the bank violates that restrictive indorsement when it credits the check to any other account. *Qatar v. First Am. Bank*, 885 F. Supp. 849, 850 (E.D. Va. 1995). The presence of a restrictive endorsement imposes an obligation upon a depository bank not to accept that item other than in accord with the restriction. *Rutherford v. Darwin*, 95 N.M. 340, 345, 622 P.2d 245 (1980).

[105] Hearing Tr. (MB) 320; CX-72.

[106] Hearing Tr. (SKS) 578-79; Hearing Tr. (TH) 169; Hearing Tr. (MB) 330-31; CX-17.

[107] Hearing Tr. (SKS) 747-48.

properly in connection with the Penson check and documents that TH and SE gave Braeger at the same time they gave him the check to invest in Rubicon.

First, there was a control system for PPMs when the PPMs were given to customers. A person at the Firm handled the PPMs for all the private offerings and kept records of the control numbers. The Firm kept a record identifying each investor and the control number of the PPM that investor received. The control numbers were recorded when the "book" was given to an investor. When asked about the control number for the PPM that he gave TH and SE, Braeger said that he thought as a Series 24 he could put the number on the PPM. He believed that he did not have to ask the Firm for a control number. That does not explain, however, why the Firm has no record that a PPM was given to TH and SE. As Braeger acknowledged, he was supposed to give the information regarding the numbered document to the person at the home office who kept those records. He had an obligation to ensure that the Firm's records were accurate and complete.[108]

Second, there was a standard process for dealing with customers' checks, subscription agreements, and other materials submitted with an investment that would have created a record of the Rubicon investment by TH and SE if the check had reached SKS for processing. As Braeger testified, a registered representative, wherever located, was required to send subscription agreements and other documents to the Firm's home office for processing and review by the compliance department. Records had to be maintained for auditing purposes.[109] When the Firm received checks and accompanying documents, it recorded every investment on a sales blotter. The information included the date received, date sent out, client name, subscription amount, offering, and registered representative that sold it.[110] During the offering period for Rubicon, SKS was the person responsible for processing such materials.[111]

With respect to Rubicon, SKS processed the checks and subscription documents, making a copy of materials she received and recording investments in the Firm's blotter.[112] Using as an example LDM's investment in Rubicon, she explained that she would review documents and then provide them to the compliance officer for suitability review. SKS would either hand-deliver Rubicon checks for deposit at CommerceWest Bank or send them to the bank overnight.[113] As discussed above, it is highly unlikely that a thief would or could have stolen the check and the subscription agreement before they reached SKS for processing, and if they were stolen after she processed them the Firm would have had a record of receiving them.

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[108] Hearing Tr. (Braeger) 1666-68, 1729-34.

[109] Hearing Tr. (Braeger) 1057-58.

[110] Hearing Tr. (SKS) 578.

[111] Hearing Tr. (SKS) 557-58, 560-62, 572-73.

[112] Hearing Tr. (SKS) 560-62.

[113] Hearing Tr. (SKS) 574.

Third, the Firm had electronic copies of investment applications sent to the home office separate from the hard copy originals.[114] Accordingly, even if the hard copy originals were lost or stolen, there would be an electronic copy in the Firm's systems. In this case, if the Rubicon check and subscription agreement had been stolen after Braeger sent the originals to the Firm by FedEx, the electronic file would have alerted the Firm that it had not received the hard copies. Thus, even if SKS had not realized the Rubicon check was missing, the person collecting the electronic copies would have realized they were missing.

The absence of any electronic record of the investment in Rubicon by TH and SE is even more inexplicable in light of email correspondence a couple of days after SE wrote the Rubicon check. On July 22, 2009, CR, the person at the Firm's home office responsible for receiving and processing the electronic copies of investment documents, engaged in correspondence with Braeger regarding the TH and SE application to open a Penson account. CR wrote that she had accidentally deleted the electronic files for two of Braeger's accounts, and she asked him to provide the originals "completed and signed in their entirety" as soon as possible. She identified the first account with the initials H/E, referring to TH and SE, and by the account number assigned to TH and SE for their Penson account. The second deleted file CR identified was for a different customer and a different account number. Braeger responded that same day, attaching to an email a copy of the Penson application that TH and SE had signed. He also sent her a screen shot of a U.S. Treasury's Office of Foreign Asset Control's search on TH and SE.[115]

Braeger claimed that CR lost both the file with the Penson application and the file with the Rubicon subscription agreement and check. He claimed that he sent her copies for both investments. He said he "fully recall[ed]" sending the Penson check and Penson application and separately sending the Rubicon check and Rubicon application.[116]

Braeger's story is not consistent with the facts. Nothing in CR's email indicates that she knew anything about a Rubicon investment. She referred to the Penson account application by the specific account number, and she did the same for the other customer's investment. Also, there is no explanation why we would have the email correspondence by which Braeger sent to CR a copy of the Penson application by TH and SE and not have the email correspondence by which he supposedly sent the second electronic copy of the Rubicon subscription agreement. Certainly, if Braeger had sent the Rubicon file to CR, and the check and subscription agreement were missing from the FedEx package containing the Penson application, the Firm would at some point have realized the discrepancy and have investigated. Nothing of the sort occurred.

Furthermore, if Braeger's story were true, and he sent CR a second copy of the Rubicon file, then CR must have deleted or lost it again and then not sought another replacement. Only

[114] Hearing Tr. (Braeger) 1734-41. Braeger testified that the branch office was required to retain copies and send originals to the home office. Hearing Tr. (Braeger) 1740. The home office then also could check that the originals and the record copies maintained at the branch matched.

[115] RX-31.

[116] Hearing Tr. (Braeger) 1513-17, 1734-38.

that would explain why the Firm had no record of the couple's Rubicon investment. Such a scenario strains credulity.

Braeger's testimony regarding what happened to the check was vague and speculative.[117] He concluded, "What I guess …, it was stolen. Maybe. I don't know."[118] That is insufficient to rebut the overwhelming circumstantial evidence that leads to the conclusion that Braeger did not send the $30,000 check to the Firm.

4. The Rubicon Check Is Deposited at Wells Fargo Bank

The $30,000 Rubicon check was deposited in a Wells Fargo bank account on July 21, 2009, the day after it was written, and was presented for clearing on July 22, 2009. We know this, and we know how Braeger endorsed the back of the check, because TH and SE made several requests to their bank for help after they realized that their money had been mishandled. The couple's bank provided a copy of the front and back of the check along with a Wells Fargo routing number and a sequence number. Their bank could not, however, identify the account number of the account that received the deposit or the individual or entity to whom the account belonged.[119]

G. Braeger Directs CommerceWest Bank to Break Escrow and Trading Begins

A couple of weeks after directing SE to write the check to Rubicon directly, instead of the escrow agent, Braeger signed various documents necessary to break escrow. CommerceWest Bank issued a settlement closing statement dated August 4, 2009, for the Rubicon escrow account.[120] Braeger signed a wire transfer request for $248,674.78 to be sent to MF Global's bank for use in commodities trading, and another wire transfer request for $13,090 to be paid to the Firm for expenses.[121]

Braeger claims that he did not know that the $30,000 check written by SE was not included in the funds released from escrow. He said he did not verify the figures and did not identify "every name of every investor." He said he took the word of the back office at the Firm and that he had "full confidence" in the information they provided.[122] Similarly, he said he did not review the monthly statements from CommerceWest Bank for the escrow account, and so did not know that the deposit by TH and SE did not appear in the bank's records. Although he was Rubicon's managing member, responsible for all its operations, he said it was not his

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[117] Hearing Tr. (Braeger) 1719-22, 1739-41.

[118] Hearing Tr. (Braeger) 1722.

[119] Hearing Tr. (SE) 1213-15; CX-30; CX-37.

[120] CX-13; Hearing Tr. (Braeger) 983-85.

[121] Hearing Tr. (MB) 334-37; Hearing Tr. (SKS) 582-83; CX-16.

[122] Hearing Tr. (Braeger) 983-87.

responsibility to conduct such a review. He repeated that he had "confidence" in the Firm's back office.[123]

Verifying the names of investors and the amounts invested would not have been onerous, given the fund's small size. The Firm's records show that only seven investors subscribed to Rubicon in the private offering, and TH and SE were not among them.[124] We find it unlikely that Braeger did not know that his customers' check—which would have represented more than 10% of the subscription funds raised—was not included when escrow was broken.

Braeger selected four commodities trading advisors to conduct trading for Rubicon. MF Global provided Braeger with monthly reports on the trading in the accounts from May 2009 through July 2010.[125]

H. The Couple's Money Never Reaches Rubicon

The $30,000 that TH and SE believed they had invested in Rubicon was never deposited in the Rubicon escrow account at CommerceWest Bank. It was never transferred to MF Global when escrow was broken. Nor was it deposited later in the Rubicon trading accounts at MF Global.[126] The money essentially disappeared after SE handed the check to Braeger.

I. Braeger Closes Rubicon, Sending Proceeds to a Wells Fargo Account

After about a year, DYW and LDM, the two registered representatives who invested in Rubicon, decided that the investment was not performing as well as they had expected. They sought to liquidate their holdings in Rubicon.[127]

Because the fund was small, and the requested liquidations amounted to 20% of the fund, Braeger then determined to close the fund, i.e., to liquidate the positions in Rubicon's commodities trading accounts and distribute the proceeds to Rubicon investors.[128] He admits that it was his intent to close the fund,[129] although he claims he later discovered it was not properly and completely closed (a claim discussed later).[130] Braeger wrote to one of the Rubicon investors

[123] Hearing Tr. (Braeger) 995-98.

[124] CX-20, at 1-17 (LDM), 18-34 (LSJ), 35-50 (JJH), 51-64 (GW Trust), 65-82 (GKA Trust), 83-97 (DYW), 98-112 (CHY).

[125] CX-22; CX-23; CX-24; CX-25; and CX-26.

[126] Hearing Tr. (MB) 335-41, 345-52, 356-57; CX-15; CX-166; CX-167.

[127] Hearing Tr. (DYW) 469-70; Hearing Tr. (LDM) 689-93.

[128] Hearing Tr. (Braeger) 944-49; Hearing Tr. (LDM) 690-93, 695-97, 702; CX-102.

[129] Hearing Tr. (Braeger) 952-54; CX-85.

[130] Hearing Tr. (Braeger) 1013-19.

on July 28, 2010, that the closing was "the final fund liquidation."[131] By the end of July 2010, Rubicon's accounts at MF Global had a balance of zero and no positions were left.[132]

As FINRA staff learned later from MF Global, Braeger directed the commodities broker to liquidate Rubicon's accounts and wire the money to a Rubicon account at Wells Fargo with the account number ending in #8511. Consistent with the information from MF Global, when LDM and his assistant inquired when investors could expect their checks, Braeger told them in a July 14, 2010 email that "[t]he money just hit the [W]ells Fargo account yesterday. Final audit of fund is being done right now…."[133] Braeger thus was in control of the funds to be distributed and was responsible for accurately apportioning the proceeds from MF Global among the Rubicon investors. He also had checks printed to be sent to Rubicon investors.[134] He had to know that TH and SE were not among the seven investors who received money back when he closed Rubicon.

J. Braeger Does Not Notify TH and SE of the Closing of Rubicon

Braeger was asked at least four separate times if he told TH and SE that Rubicon was going to close. Each time, he evaded the question, and then finally answered that he did not know. First, he said "Probably not at this moment. But …. We talked often, often. So we talked about this investment."[135] Then he said, "At this point I don't – I don't know. I don't know. That's the answer."[136] When asked the question a second time, he said, "I don't know if anybody had been informed yet. I don't know. I know that we were in the midst of – First we had to – First we decided, Newport and myself, to freeze the fund …."[137] When asked a third time, he said, "I don't know."[138] Then he was asked again, to which he responded "I don't know. I don't know."[139]

The Firm sent letters to Braeger for him to sign to inform investors about the closure of Rubicon. The Firm sent the letters electronically in PDF form. He printed them out, signed them,

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[131] CX-84, at 2.

[132] Hearing Tr. (MB) 364-65; CX-168, at 6.

[133] CX-104, at 1.

[134] Hearing Tr. (Braeger) 945-46, 955-56; Hearing Tr. (LDM) 703-04; CX-102.

Although the trading accounts showed a slight gain at the time they were liquidated, investors were not fully reimbursed. Instead, they suffered a small loss on their investments. Hearing Tr. (MB) 358-64; CX-168. DYW noted that when he spoke to Braeger about liquidating his Rubicon investment it was valued at slightly more than his original investment, but he received less than his original investment by the time Braeger distributed the proceeds. Hearing Tr. (DYW) 470, 478-79.

[135] Hearing Tr. (Braeger) 950.

[136] Hearing Tr. (Braeger) 951.

[137] Hearing Tr. (Braeger) 954.

[138] Hearing Tr. (Braeger) 955.

[139] Hearing Tr. (Braeger) 956.

and returned them to the Firm for it to send to the investors.[140] When asked if he informed TH and SE about the closure of the fund at the same time, he was once more evasive. He said he had no reason to believe the home office was "incompetent" and would not have sent him letters for all the investors.[141] He ended by admitting that he "did not get on the telephone with [TH and SE] and say it's closed."[142]

We find that Braeger never informed TH and SE that he had closed Rubicon, even though he was the person who determined to close the fund, directed that it be closed, received the proceeds from liquidating the trading accounts, purported to have the accounts audited, and had checks printed to return money to investors. The Firm had no record that TH and SE invested in Rubicon and, therefore, it would not have sent Braeger a letter to sign informing them of the closing of the fund. And Braeger admits he did not personally inform the couple by telephone. Moreover, if he had told TH and SE that the fund had closed, it would make no sense that he continued to provide them documents purporting to show a value to their investment.

K. Braeger Dissolves Rubicon

On October 21, 2010, Articles of Dissolution were filed for Rubicon. The document bears Braeger's standard signature, "DOB," and he is identified as the drafter of the document. According to the face of the document, an acknowledgment copy was to be stamped and returned to Braeger at his Mequon, Wisconsin address.[143]

Braeger denies having dissolved Rubicon. He says none of the writing on the document is his handwriting, and he knows nothing about it. He claims that he only learned of the Articles of Dissolution in the course of discovery in this proceeding. Then he was asked whether he investigated who might have filed the document if it was a false document. Braeger responded that he did not launch any investigation because he had an attorney who did not recommend it.[144]

We find that Braeger dissolved Rubicon in October 2010. The document appears authentic, and the "DOB" signature looks like Braeger's. If the document was false, then an acknowledgment copy sent to Braeger's office would have immediately alerted him that a false document had been filed. There is nothing in the record to suggest who might have submitted false dissolution papers or why. And the notion that Braeger would not investigate if someone unknown to him had falsely filed dissolution papers for an entity under his control—forging his signature in the process—is not credible.

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[140] Hearing Tr. (Braeger) 1001; CX-84, at 2.

[141] Hearing Tr. (Braeger) 1001.

[142] Hearing Tr. (Braeger) 1002.

[143] CX-6.

[144] Hearing Tr. (Braeger) 957-63.

Braeger needs to maintain that he knew nothing about the dissolution of Rubicon in order to claim—as discussed below—that the tax documents he provided TH and SE for 2011, 2012, and 2013 were legitimate. If he dissolved Rubicon in October 2010, as we find that he did, then he knew that all the Schedule K-1s he provided TH and SE after the dissolution of Rubicon were false.

L. Braeger Provides TH and SE False and Misleading Reports

1. Before Braeger Closes Rubicon

a. August 2009 Quarterly Statement

TH and SE received their first quarterly statement regarding Rubicon in the form of a letter to them from Braeger's accountant, KA, dated August 25, 2009. The accountant's letter told them that they had a net amount invested of $28,200, with $1,800 having been paid as a broker's commission. The letter gave a value to their investment as of July 31, 2009—$29,160.29. They were told to contact PK if there were mistakes as to their personal information. PK was Braeger's assistant, but KA did not identify her position or her connection to his letter. Finally, KA cautioned that he had "not audited or reviewed documents from MF Global, Commerce Bank or *Wells Fargo Bank*."[145]

The accountant's statement was false and misleading and Braeger was responsible for its false and misleading nature. Since the Firm had no Wells Fargo accounts and Wells Fargo had no ostensible connection to the Rubicon offering, there would be no reason for KA to mention Wells Fargo—unless Braeger told him to mention Wells Fargo. Furthermore, since KA did not review documents from MF Global, CommerceWest Bank, or Wells Fargo, he could only have gotten the false value assigned to the couple's investment from Braeger. In sum, Braeger provided his accountant with false information so that the accountant would provide the false information to TH and SE in a form that would seem valid and trustworthy.

b. January 2010 Quarterly Statement

At the end of the next quarter, KA provided another letter addressed to TH and SE. That letter, dated January 15, 2010, showed that the value of their investment had increased to $30,138.15. It showed that the value of the Rubicon fund as a whole was slightly more than $500,000. KA again disclaimed having audited or reviewed documents from MF Global, Commerce Bank, or Wells Fargo. KA again told the couple that if they had questions they should contact PK, but without identifying PK as Braeger's assistant.[146]

Braeger signed a cover letter addressed to all Rubicon investors, saying, "Although the fund did not perform to the level it did in 2008, we did have very nice consistency and very low

[145] CX-41 (emphasis supplied).

[146] CX-42, at 2-3.

volatility." The statement was accompanied by a print out from a website called Autumn Gold, which reported on the performance of the fund.[147]

The statement regarding the value of the couple's investment was false. TH and SE were not invested in Rubicon. The only possible source for the false information—since the Firm had no record of the couple's investment—was Braeger. The direction to raise any questions with PK, without identifying her as Braeger's assistant, was misleading because it made it appear that questions could be directed to an independent resource. The couple did not know who PK was.[148] That direction also made it less likely that the couple would contact the Firm if they had questions about their Rubicon investment.

c. April 2010 Quarterly Statement

At the end of the next quarter, KA provided a third letter addressed to TH and SE. That letter, dated April 21, 2010, told them that the value of their investment had slightly increased to $31,843.36. As he did in the other letters, KA disclaimed having audited or reviewed documents from MF Global, Commerce Bank, or Wells Fargo. Again, KA directed questions to PK, without identifying her as Braeger's assistant.[149]

KA's statement was accompanied by a cover letter from Braeger that was addressed to all Rubicon investors. Among other things, Braeger wrote "I look forward to the potential of further gains for the fund and your account." The statement also was accompanied with another Autumn Gold report.[150]

For all of the same reasons discussed in connection with the earlier quarterly statements, this statement was false and misleading. In addition, Braeger's cover letter indicating that the couple could hope for future gains on their Rubicon investment was false, and he knew it.

d. Schedule K-1 for 2009

Sometime in spring 2010, Braeger provided TH and SE with a Schedule K-1 for 2009 that showed that they owned 6.02% of Rubicon and had a capital account at year-end of $26,507.[151] At the time he provided the K-1, they were not invested in Rubicon, and he knew it.

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[147] CX-42, at 1, 4-5.

[148] Hearing Tr. (TH) 80.

[149] CX-43, at 3.

[150] CX-43, at 2, 5, 6.

[151] CX-50.

2. After Braeger Closes Rubicon

a. Braeger Stops the Quarterly Statements and Gives a False Explanation

The quarterly statements stopped when Braeger began making arrangements in July 2010 to close Rubicon. SE did not notice that the statements had stopped until six to eight months had passed. When she asked Braeger about the quarterly statement, he said he had moved and needed to find a new accounting firm to provide the information. He told her to look up the information online, referring to the Autumn Gold report. She was able to see a performance report once or twice, but not after that.[152]

When asked about Autumn Gold, Braeger called it the "Morning Star of C[ommodities] T[rading] A[dvisor]s." According to Braeger, a commodities trading fund enters an annual contract with Autumn Gold to provide performance reports. Then those reports are used to market the funds. Braeger said contracts with Autumn Gold are expensive. The reports are accessible to customers online until the annual contract runs out, unless the contract is renewed.[153]

Accepting Braeger's description of Autumn Gold, it appears that when SE asked about a quarterly statement, Braeger referred SE to a generalized performance report that, as he knew, would not exist once the annual contract ran out. Since Rubicon had by then been closed and dissolved, there would have been no reason for the contract to be renewed. When the couple was unable to access Autumn Gold any longer, he falsely told them that the report was not available online because Rubicon was a private investment.[154]

b. Schedule K-1s for 2011, 2012, and 2013

Braeger maintained the illusion that TH and SE were invested in Rubicon by providing the couple each year with a Schedule K-1 to include in their income tax return. Those Schedule K-1s purported to show the couple's ownership interest in Rubicon. The first Schedule K-1, the one for 2009 that was issued prior to the closing of Rubicon (discussed above), arrived timely. But after that, the couple had increasing difficulty obtaining the tax document from Braeger each year, and often had to file an extension on their income tax return. The struggle to get information from Braeger strained the marriage and caused them great anxiety.[155]

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[152] Hearing Tr. (SE) 1222-23; Hearing Tr. (TH) 81-86.

[153] Hearing Tr. (Braeger) 1777-81.

[154] Hearing Tr. (TH) 99-100; CX-134.

[155] Hearing Tr. (TH) 97-125; Hearing Tr. (SE) 1229-32; CX-125; CX-126; CX-127; CX-128; CX-129; CX-134.

The Schedule K-1s for 2011,[156] 2012,[157] and 2013[158] showed that TH and SE owned a larger portion of Rubicon than set forth in the 2009 Schedule K-1. In 2009, they purportedly owned 6%.[159] In 2011 and thereafter, they purportedly owned 33.33%. From 2011 through 2013, their investment was shown to have a constant value of $25,496. In the 2011 K-1, their investment status was listed as an "individual passive,"[160] but in the 2012 K-1 their status was changed to "individual active."[161]

The Schedule K-1s themselves do not indicate who prepared them. There is no signature to indicate who was responsible for their accuracy.[162] Braeger, however, as the managing member of Rubicon, bore responsibility for the accuracy of the K-1s and had to have been involved in their preparation.

M. Braeger Provides Shifting False and Misleading Explanations

1. Falsely Blaming MF Global Bankruptcy

In spring of 2012, TH had trouble obtaining the Schedule K-1 for the 2011 tax year from Braeger. MF Global had filed for bankruptcy in the fall of 2011. Braeger explained the problem with obtaining the K-1 and with recovering the couple's money as arising from MF Global's bankruptcy.[163] Braeger first told them that they did not need a K-1 because of the bankruptcy. Their tax accountant, however, told them that they did need the K-1 and told them to request it again. Braeger did eventually provide one. He reassured them, saying that they would eventually recover their money, or, if not, that it was insured. As a last resort, he told them he would be responsible as the manager of the fund, joking that he would have to get a part-time job at McDonalds to do it.[164]

Braeger's reassurances were false. The couple's money was never with MF Global, and, even if it had been among the monies initially invested with MF Global, Rubicon was closed and dissolved prior to the MF Global bankruptcy. The proceeds from the closing of Rubicon had already been distributed to Rubicon investors by the time of the MF Global bankruptcy.

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[156] CX-51.

[157] CX-52.

[158] CX-53.

[159] CX-50.

[160] CX-51, at 4.

[161] CX-52.

[162] CX-51; CX-52; CX-53.

[163] Hearing Tr. (TH) 100-10; CX- 123; CX-125.

[164] Hearing Tr. (TH) 100-06; CX-125.

In spring of 2013, TH again had trouble obtaining the Schedule K-1 for the prior tax year, the 2012 K-1. Braeger again falsely attributed the problem with getting their money back and with getting the K-1 to the MF Global bankruptcy. He complained that he had paid for the tax document himself, which seemed odd to TH and SE.[165]

In this proceeding, Braeger claimed that he believed that Rubicon had not been completely closed. His claim is based on a single monthly statement for one of the Rubicon trading accounts at MF Global that showed some transactions in the account on July 14, 2011. Those transactions were reversed on July 20, 2011. The amount of money involved bore no relation to the $30,000 that TH and SE invested in Rubicon; the mistake was in only one of the trading accounts and not spread across all four; and the mistake was corrected, zeroing out the account, only four days later.[166] Braeger's claim that he believed from this incident that TH and SE were still invested in Rubicon is not credible.

2. Falsely Explaining Changes in Tax Documents

TH and SE attempted to refinance the mortgage on a rental property. The mortgage broker reviewed the couple's tax returns for two tax years, and, when he saw the Rubicon Schedule K-1s, he said the schedules raised a red flag. He asked for the corporate tax returns for Rubicon, because the K-1s showed the couple as holding a significant ownership share. He told TH and SE that they were subject to potential liability because of the size of their ownership share of Rubicon. TH and SE were surprised and confused. They did not understand the K-1s or the issue they raised. When TH asked for corporate tax returns, Braeger told them they did not need them. Eventually, at the couple's request, Braeger and the mortgage broker spoke and, even though Rubicon closed in 2010, Braeger provided what appeared to be a corporate tax return for 2011. Braeger signed the false tax return.[167]

In response to the couple's questions regarding the increase in their percentage of Rubicon from 6% to 33.3%, Braeger said that other investors had written off the investment as a loss. He said that had caused TH and SE to "accelerate" to 1/3 ownership. He suggested that they do the same and write off the loss.[168] When the couple asked why they were listed as a general partner or member manager instead of a passive investor, he told them it was a clerical error.[169] As time went by, Braeger urged them repeatedly to write off the investment as a loss.[170]

When TH and SE discussed writing off the investment, their accountant told them they would need additional paperwork regarding Rubicon. To this day, they have not written off the

[165] Hearing Tr. (TH) 117-23, 126-28; CX-130.

[166] Hearing Tr. (MB) 369-71; CX-24.

[167] Hearing Tr. (TH) 110-17; CX-51.

[168] Hearing Tr. (TH) 114-15.

[169] Hearing Tr. (TH) 114-15.

[170] Hearing Tr. (TH) 115, 134, 1590-97.

investment because they do not have the paperwork to do so.[171] Their mortgage application was rejected and they were not able to refinance their mortgage.[172]

We find that Braeger's explanations for changes in the information on the Schedule K-1s were false. We also find that he urged the couple to write off the investment in the hope that it would put an end to their requests to him for tax documents and information about their purported Rubicon investment.

3. Falsely Blaming the Firm

By 2013, Braeger had become difficult to contact, and in early 2014 he told TH and SE that their money had been lost in the MF Global bankruptcy. He said that they were in a group of creditors that was not going to be paid back, but he never provided them any bankruptcy documents to verify his representation.[173]

In the spring of 2014, the couple once again struggled to obtain a Schedule K-1 from Braeger to include in their tax return for the tax year 2013. As they were riding home from meeting with their accountant, it occurred to them to call TA, the registered representative who, with Braeger, had sold them the annuity. They called him on the speakerphone in the car. When they reached TA, he told them that Rubicon had closed in the middle of 2010 and all the investors had been paid back their money. SE was shocked.[174]

A few minutes after they hung up from the conversation with TA, Braeger called them. He was angry, upset, and aggressive. He threatened to sue them for defamation of character for accusing him of taking their money.[175] SE said that the couple could not "get a word in edgewise."[176] She said his reaction was not what she would have expected from an innocent person. He did not say "let me walk you through this and let me show you the documentation."[177] In that call, Braeger told them that Rubicon was still in existence and had not been closed. However, he claimed that Rubicon had been taken over by the Firm. He also, somewhat inconsistently, claimed that he had placed a trade to liquidate Rubicon accounts and that the trade was tied up in the MF Global bankruptcy proceeding. He provided them no documentation.[178]

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[171] Hearing Tr. (TH) 132-37.

[172] Hearing Tr. (TH) 110-17; Hearing Tr. (SE) 1229-31.

[173] Hearing Tr. (SE) 1235.

[174] Hearing Tr. (TH) 140-41; Hearing Tr. (SE) 1233-36, 1241-42.

[175] Hearing Tr. (SE) 1233-36, 1242-45.

[176] Hearing Tr. (SE) 1235, 1236.

[177] Hearing Tr. (SE) 1236.

[178] Hearing Tr. (SE) 1242-45.

They agreed to end the conversation and resume the next day when tempers had calmed.[179] In the second conversation the following day and in subsequent conversations, Braeger said that it was the Firm's fault that problems had arisen. He said he would get his attorney involved, and he would collect information to figure out what happened to their money. He said that the Firm was running Rubicon, not him, and he continued to reassure them that they would get their money back.[180]

The couple corresponded with Braeger through 2014, as he purported to be assisting them to get information that he said they needed from the Firm. He repeatedly told them that he needed to obtain information from the Firm in order to figure out what had happened to their money.[181]

We find that Braeger deceived the couple throughout 2014 when he blamed the Firm and purported to be assisting them to obtain information from the Firm. By purporting to help them, he delayed and impeded their efforts to investigate by contacting the Firm themselves.

N. CM Tells Couple Rubicon Was Closed

The couple called TA again, but this time he told them something different about Rubicon than he told them in their earlier conversation. He gave them a story consistent with Braeger's assertion that the Firm was at fault. He said that the initial Rubicon fund had been "converted" to the Firm.[182]

The couple decided to contact the Firm. When they did, CM, a registered representative at the Firm with whom they had spoken once before, told them what they had first heard from TA—that Rubicon had been liquidated in mid-2010 and the investors had been repaid their money. After checking in the Firm's records, CM told them that they had never been listed on the Firm's blotter as Rubicon investors.[183]

O. TH and SE Demand Documentation or a Refund

TH and SE called Braeger in early January 2015. They were planning to build a new home and needed a construction loan, which they were going to seek from the same bank that had denied their refinancing loan. They wanted Braeger to provide them documentation or repay them. Otherwise, they told him, they were going to file a complaint with FINRA.[184]

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[179] Hearing Tr. (SE) 1235-36.

[180] Hearing Tr. (SE) 1235-36, 1245-48, 1251-52.

[181] Hearing Tr. (SE) 1251-52.

[182] Hearing Tr. (SE) 1248-51.

[183] Hearing Tr. (TH) 167-70; Hearing Tr. (SE) 1248-51.

[184] Hearing Tr. (SE) 1251-52.

P. Braeger Responds to TH and SE with Threat of a Defamation Lawsuit

Braeger told TH and SE he would pay them back but he would not admit guilt. He said that he needed to have his attorney do the paperwork. Time passed. In March 2015, the couple received the first of four letters from one of Braeger's attorneys threatening to sue them for defamation. They had to hire an attorney to advise and defend them. That attorney recommended that they file a complaint with FINRA. The attorney noted that there was a deadline for making a claim, which made SE think that Braeger had been stalling until the deadline was passed.[185]

We find that Braeger's promises to pay the couple and the extended time during which he did not, while purportedly trying to involve his attorney in working out a settlement agreement, were delaying tactics. It is apparent from Braeger's later correspondence with FINRA staff, that he was highly conscious of the deadlines for bringing various kinds of claims against him. He noted in an October 29, 2015 letter to FINRA staff that TH and SE were already beyond the statute of limitations for bringing a federal or state court claim and even beyond the time for bringing a claim in FINRA arbitration.[186] He never intended to pay them or to be helpful.

Q. Complaints Filed with FINRA

1. TH and SE File Complaint About Braeger

TH and SE filed a complaint with FINRA regarding the way Braeger had handled their Rubicon investment. FINRA received it on May 4, 2015. The couple attached the March 19, 2009 PPM that they had received, along with a copy of the subscription agreement they executed.[187]

2. Braeger Files Complaint About the Firm

FINRA received on the same day, May 4, 2015, a complaint from Braeger regarding the Firm and its alleged recalcitrance when asked for information regarding the couple's Rubicon investment.[188]

R. Braeger Files Defamation Lawsuit With False Description of Rubicon as Third-Party Escrow Agent

Braeger remained unaware for some period of time that TH and SE had filed their own complaint with FINRA. As noted above, his attorney sent the couple a letter dated May 5, 2015, threatening them with a defamation suit, and then Braeger filed a defamation lawsuit against the couple on May 29, 2015. In July 2015, Braeger's lawyer, TV, sent the couple a letter about

[185] Hearing Tr. (SE) 1252-53.

[186] CX-60, at 3.

[187] CX-2; CX-9; CX-29.

[188] CX-3.

resolving the lawsuit if they would agree not to complain to FINRA. Apparently, Braeger still did not know in July that they had already complained to FINRA.[189]

Braeger filed an amended defamation complaint against TH and SE on September 25, 2015. That complaint asserts something different about what happened to the couple's check than Braeger asserted in this proceeding.

The defamation complaint asserts that Braeger mailed the couple's PPM and subscription agreement to the Firm and that he "concurrently" sent their check to "a third party escrow/trust called Rubicon Capital Appreciation Fund."[190] The defamation complaint did not say that Braeger sent the check and subscription agreement together to the Firm, as he asserts here that he did. The defamation complaint did not mention CommerceWest Bank, the true escrow agent, for Rubicon. Rather, it falsely described Rubicon itself as a third-party escrow agent for the offering and asserted that the check was sent to Rubicon itself.

We find that Braeger falsely characterized Rubicon in his defamation complaint as a third-party escrow agent or a trust in yet another attempt to conceal what he had done. He had for years falsely told TH and SE that the money went into escrow where he could not touch it.[191] He did not want to reveal in his defamation complaint that he had instructed SE to write the $30,000 check to an entity that was neither a third party nor an escrow agent. That might cause them to realize that Braeger had lied to them and, as the fund's managing member, that he did have access to the couple's money.

S. Braeger Attempts to Prevent TH and SE from Giving Evidence

We further find that Braeger sought to evade any regulatory or disciplinary action that might arise from the couple's Rubicon investment. Not only did he initially seek the couple's agreement not to complain to FINRA, but, when the defamation lawsuit was finally settled in February of 2017, he continued to seek a stipulation from them that they would not testify at a FINRA proceeding.[192]

In the settlement of the defamation lawsuit, Braeger agreed to pay the couple $20,000 in two installments a month apart. He did not admit that he had done anything wrong, and they agreed not to countersue him. They refused to agree, however, not to testify against him in a FINRA proceeding. To defend themselves in the defamation suit, TH and SE incurred attorneys' fees over $12,000.[193]

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[189] Hearing Tr. (SE) 1254-55; Hearing Tr. (remarks of defense counsel) 217.

[190] CX-36, at 3. See also CX-35, at 4 (draft defamation complaint that TV sent to the couple with his letter dated May 5, 2015).

[191] Hearing Tr. (TH) 149-50; CX-134.

[192] Hearing Tr. (SE) 1256.

[193] Hearing Tr. (SE) 1256.

T. Evidence Regarding Bank Accounts

1. TH and SE Learn that the Check Was Deposited at Wells Fargo

TH and SE made several requests to their bank for information about what had happened to the $30,000 check. The bank provided a copy of the front and back of the check. It showed that Braeger endorsed the back with his initials. He also wrote "for deposit only," without indicating the bank or the account number where the check was to be deposited. Stamped information on the back is illegible.[194]

The couple's bank told them that the check had been deposited into a Wells Fargo bank account. It provided a routing number and a sequence number, but it did not provide a number for the account at Wells Fargo and it did not identify the individual or entity to whom the account belonged.[195]

2. MF Global Informs FINRA Staff that Braeger Directed Rubicon Proceeds to Wells Fargo Account #8511

MF Global provided FINRA staff with information regarding the instructions it received when Braeger liquidated the trading accounts and closed Rubicon. Braeger directed that all the trading accounts at MF Global be closed, and that the proceeds be sent to Wells Fargo Bank in Mequon, Wisconsin. He specified that the funds should be wired to a specific Rubicon account with an account number ending #8511.[196]

3. Wells Fargo Links Braeger to Rubicon Account #8511

In response to an inquiry from FINRA staff, Wells Fargo said that there was an older account in the name of Rubicon Capital Appreciation Fund that was linked to Braeger. FINRA staff asked Wells Fargo to identify the account number associated with Rubicon, and the bank responded with an account number that ended in #8511. The bank provided a one-page customer record for Rubicon. It described Braeger as the owner of 51% of Rubicon, and as the person with control of the entity.[197]

In addition, Wells Fargo identified other LLCs with Wells Fargo bank accounts linked to Braeger. Braeger had not previously identified these entities and their bank accounts to FINRA staff. Braeger was the sole owner of the following entities: Sonador Capital of Wisconsin, LLC, Signal Lake Top Prospects LLC, Forex Capital Management LLC, Private Equity Ventures LLC, and Badger Energy Ventures LLC.[198] The bank statements that Braeger produced in response to

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[194] Hearing Tr. (SE) 1213; CX-30.

[195] Hearing Tr. (SE) 1213-15; CX-37.

[196] Hearing Tr. (MB) 365-71; CX-85; CX-86.

[197] Hearing Tr. (MB) 400-07; CX-94; CX 95.

[198] Hearing Tr. (MB) 400-07, 440, 453-57.

Rule 8210 requests were for Private Equity Ventures LLC.[199] He subsequently admitted that Sonador and Signal Lake also both had accounts at Wells Fargo.[200] Braeger described Sonador as an investment fund that "may have" been active in Arizona. He said the account had been charged off and the bank could not locate any statements for it.[201]

4. Braeger Asserts Check Was Deposited in a Wells Fargo Account Opened in Arizona

At some point, TH and SE provided Braeger with information they had learned about the deposit of the $30,000 check in a Wells Fargo account. By letter dated June 30, 2016, FINRA staff sought information from Braeger about how he investigated the information he received from the couple. Braeger maintained that Wells Fargo had provided him "conclusive evidence" that the check was not deposited into a Wells Fargo account opened in Wisconsin.[202]

An employee of Wells Fargo told Braeger that the routing number for the Wells Fargo account in which the check was deposited indicates that the account was opened in Arizona. Braeger asserts that he never opened a Wells Fargo account in Arizona. Given that one of his companies, Sonador, had business activities in Arizona, and given that the record is replete with false and misleading statements by Braeger, we are unwilling to take Braeger's uncorroborated assertion that he never opened a bank account in Arizona as true.

Even if the account where the check was deposited was originally opened in Arizona, that fact does not bolster Braeger's defense. Bank accounts can be established anywhere, and transactions can occur at any bank location.[203] Regardless of where the account was established, Braeger could still have deposited the check at the Mequon, Wisconsin branch of the bank. Given that Braeger took the check on the evening of July 20, 2009, and the check was deposited the next day in a Wells Fargo account, it is far more reasonable to conclude that Braeger deposited the check at an account he controlled than to believe that the check was stolen by a thief from the FedEx package sent to California and somehow deposited immediately in a Wells Fargo Rubicon account unconnected to Braeger.

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[199] CX-55.

[200] Hearing Tr. (Braeger) 1689.

[201] CX-67, at 4; CX-94.

[202] FINRA staff followed up with a request pursuant to Rule 8210 for the basis for the assertion that he had "conclusive evidence" that the check was not deposited in an account opened in Wisconsin. CX-70, at 1-2.

[203] Hearing Tr. (MB) 396-97.

U. Credibility

1. Credibility: Braeger

a. Testimony Inconsistent With Other Evidence

Without repeating the particular findings above regarding credibility, we find that almost none of Braeger's testimony was credible. He was repeatedly evasive and inconsistent. He asserted as fact things that were virtually impossible to be true or that were contradicted by other evidence. His attorney often obtained his testimony by asking him leading questions, because otherwise Braeger would lose focus and wander away from the subject without answering the question. As SE observed, Braeger can be "incredibly evasive." We concur with her comment that "[h]e is very good a[t] misdirecting the conversation."[204]

b. Evasive Responses to Staff Requests for Information

We do not accept Braeger's testimony without corroboration. Not only was his testimony inconsistent with other evidence, but the manner in which he responded to investigatory requests heightens our distrust of Braeger. His responses to the staff's requests for information were, at best, dissembling. He did not admit that he had a Rubicon account at Wells Fargo and did not produce any bank statements for it, even after FINRA staff learned of the account ending in #8511 and asked him about it. When viewed in conjunction with his effort to persuade TH and SE not to complain to FINRA, his attempt to intimidate them by means of the frivolous defamation suit, and his subsequent attempts to convince TH and SE not to testify in this proceeding, Braeger's responses to the staff's Rule 8210 requests constitute a deliberate attempt to subvert the regulatory and disciplinary process.

i. Initial Failure to Disclose Rubicon Bank Account

FINRA staff sent Braeger a letter dated October 8, 2015, requesting information pursuant to Rule 8210. Among other things, the staff asked for a list of all his personal bank accounts during the period from July 2009 through December 2009, along with monthly bank statements for that period. The staff also asked for all Rubicon bank accounts and monthly statements for the same period, including—but not limited to—an account at Harris Trust.[205]

Braeger responded on October 29, 2015. He declared that he had had one personal bank account at Wells Fargo for approximately twelve years and provided monthly statements for that account for the latter half of 2009. He noted that the only deposits into that account were payments by the Firm for commissions and management fees, and a few monthly payments from

[204] Hearing Tr. (SE) 1228.

[205] CX-59.

a private placement investment. He failed to note the many online transfers from other accounts bearing business account labels.[206]

With respect to the request for Rubicon bank accounts, Braeger reinterpreted the staff's question to apply only to the one bank mentioned by name, Harris Trust. He declared that he had never personally held or opened an account at Harris Trust. He did not identify any Rubicon account. Braeger's response was deliberately incomplete.[207]

FINRA staff obtained information from MF Global regarding the instructions to close and liquidate Rubicon's account, which showed that Harris Trust was its custodial bank. Harris Trust received Rubicon monies after the breaking of escrow, and when Braeger issued the instruction to MF Global to liquidate and close Rubicon's trading accounts, the money flowed through Harris Trust to a Rubicon account at Wells Fargo. Braeger instructed that the proceeds from the Rubicon trading accounts be routed to a Wells Fargo account in Mequon, Wisconsin with an account number ending in #8511.[208]

ii. Failure to Provide Bank Statements for Rubicon Account

In February 2016, FINRA staff issued a second request pursuant to Rule 8210 to Braeger, asking for additional monthly statements for the personal account Braeger previously identified, and all monthly account statements from January 2009 to the present for the Wells Fargo account with the account number ending in #8511.[209]

Through counsel, Braeger responded by letter dated March 4, 2016, saying that he would produce bank statements for his personal account as soon as Wells Fargo made them available. With respect to the Rubicon account number ending in #8511, Braeger declared that he "has no such bank statements in his possession." He purported to have made inquiries of unidentified Wells Fargo employees for information about the account, and to have been told that they could not find any record of an account with that number "under Mr. Braeger's name or control."[210]

Braeger provided no documentation of precisely what he asked the bank about the Rubicon account or the bank's response. He did not indicate whether he had asked Wells Fargo to produce copies of the bank statements for the account ending #8511, even though he apparently asked the bank for copies of the bank statements for his personal account.

On March 10, 2016, Braeger's counsel produced monthly statements for Braeger's personal account for some—but not all—of the months covered by the request.[211] Braeger's

[206] CX-60, at 6.

[207] CX-60, at 7.

[208] Hearing Tr. (MB) 335-41, 371; CX-15; CX-27.

[209] CX-63.

[210] CX-64, at 1.

[211] CX-65.

counsel produced more records on March 15, 2016.[212] Braeger produced no statements for the Rubicon account number ending in #8511.

iii. Failure to Provide Bank Statements for Multiple Wells Fargo Accounts

By letter dated April 22, 2016, FINRA staff issued another, much broader, request for information pursuant to Rule 8210. The staff specifically requested that Braeger identify all bank accounts and securities and commodity accounts for any individual or entity maintained by Braeger or for which he was/is an authorized representative, has/had signatory authority, or has/had an interest in and/or is/was a beneficial owner. This broad request specified that the response should include, but not be limited to, any bank accounts for Rubicon. It also identified bank accounts by number that were referenced in the earlier production of Wells Fargo statements.[213]

By email dated April 29, 2016, Braeger's counsel provided a status report on the production of responsive information. Braeger asserted that two of the specifically identified bank accounts had been "charged off," meaning that they were closed. He asserted that the bank could not produce documents for at least one of those accounts. He asserted that another account was controlled by his former wife and the bank would not release records to him. As for the fourth, he promised to send monthly account statements when the bank provided them to him.[214] Braeger provided no documentation to support what he claims the bank told him.

iv. Failure to Provide any Financial Records for Rubicon

By letter dated May 18, 2016, through counsel, Braeger asserted that—as of January 21, 2016—he did not have financial books or records for Rubicon. He specifically denied having any income tax returns, Schedule K-1s, or financial records used to prepare income tax returns or Schedule K-1s.[215] In this response, Braeger repeated that he had no bank account statements for Rubicon, and that Wells Fargo had found no such accounts under his "name or authorization."[216]

Braeger's response strongly suggests that he once had financial records and bank statements relating to Rubicon, but that he no longer had them as of January 21, 2016. Notably, the date is more than three months after the staff's initial request in October 2015 for Rubicon bank statements. Braeger was aware of the investigation into the circumstances of the couple's Rubicon investment, but he did not preserve records relevant to that investigation. He acted to impede the ability of the staff to understand the truth.

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[212] CX-66.

[213] CX-67.

[214] CX-67, at 4.

[215] CX-68, at 1.

[216] CX-68, at 2.

v. Continuing Failure to Produce Bank Statements for Identified Accounts

By letter dated June 3, 2016, FINRA staff explained that Braeger's response to its April 22, 2016 information request was still deficient. In addition, the staff requested information regarding still other Wells Fargo bank accounts that were referenced in Braeger's prior production.[217]

vi. Introduction of Documents at the Hearing that Were Never Produced in Response to Rule 8210 Requests

Braeger's counsel at the hearing was not his counsel during the period that Braeger responded to FINRA staff requests for information pursuant to Rule 8210. Braeger's hearing counsel used and offered into evidence emails that he collected in preparation for the hearing from Braeger's home computer. He showed Enforcement those documents on the eve of the hearing. Enforcement counsel asserted that those emails had been subject to a FINRA staff request for emails, but that Braeger had never produced them. Enforcement counsel said it was a serious problem that Braeger withheld the emails until he had been out of the industry for more than two years and FINRA no longer had jurisdiction to bring a disciplinary proceeding against him for violating FINRA Rule 8210.[218]

Braeger's hearing counsel explained the circumstances in which he collected the emails. He said that he conducted a search of Gmail messages that contained the word "Rubicon" and printed a subset of them. He did not print emails he remembered seeing in Braeger's production by prior counsel, but he admitted that he may not have printed everything that Braeger's prior counsel did not produce. Thus, the newly produced emails were found on Braeger's computer but there is no way of knowing what else might be, or once have been, on the computer.[219]

The circumstances reveal that Braeger did not fully respond to the staff's Rule 8210 requests and that during the investigation he retained selected documentation he thought helpful to his case while, potentially, concealing or destroying documentation he did not think helpful to his defense. For example, he retained and produced the email in which a CommerceWest Bank employee told him that Rubicon investors could write checks to Rubicon, as long as the checks were deposited in the escrow account. But Braeger did not retain and did not produce Rubicon's books and records or the bank statements for the Rubicon Wells Fargo account with the account number ending in #8511.

In an effort to obtain the most complete record possible, we admitted the newly produced documents Braeger's counsel offered into evidence. However, they were admitted with the

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[217] CX-69.

[218] Hearing Tr. (remarks of counsel for Braeger and Enforcement) 302-05, 622-33; RX-34.

[219] Hearing Tr. (remarks of counsel for Braeger and Enforcement) 302-05, 622-33; RX-34.

caveat that the Extended Hearing Panel would evaluate the reliability and weight to give the materials in light of the circumstances of their production.[220]

We find that Braeger was not forthcoming in response to FINRA staff inquiries. His withholding of responsive emails is yet another manifestation of his intent to conceal information. The circumstances surrounding the production of documents further diminish Braeger's credibility.

2. Credibility: TH and SE

In contrast, we find TH and SE credible. Their testimony was consistent with the documentary evidence, and they have nothing to gain from this proceeding. They obtained a portion of their money from Braeger in settling the defamation case, and Enforcement has stated that it is not seeking restitution here.[221]

TH did not display rancor. He simply stated, "[T]he bottom line is, if [Braeger's] done nothing wrong, he has nothing to worry about."[222] TH explained why he and his wife participated in the hearing even though the process of doing so was evidently embarrassing and painful to them. They were concerned about the way Braeger might treat other people, given how he had treated them—his "friends." TH did not think "in good conscience" that it would be right to "just walk away from this story because we have been handed a few dollars." He said, "[I]t was the story that needed to be heard."[223]

SE was more certain that "Braeger lied to us . . . misled us . . . mishandled the investment."[224] "I don't take lightly ending somebody's career," she said, "but I truly believe that Mr. Braeger should not be in the position to where he can be entrusted with other people's money to invest."[225]

3. Credibility: Braeger's Attorneys, TV and JPF

The testimony of Braeger's two attorneys was largely irrelevant. Neither of them was involved with the Rubicon offering or knew anything about TH and SE until long after the couple's $30,000 check disappeared. To the extent, however, that either of them said anything relevant, we find that they were not credible.

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[220] Hearing Tr. (remarks of Hearing Officer) 633.

[221] Hearing Tr. (closing statement by Enforcement counsel) 1824-25. Enforcement stated that it does not generally seek restitution where a customer has already entered into a settlement with the respondent, even if the customer recovers only a portion of the loss. Tr. 1824-25.

[222] Hearing Tr. (TH) 216.

[223] Hearing Tr. (TH) 216.

[224] Hearing Tr. (SE) 1258.

[225] Hearing Tr. (SE) 1258.

Although TV asserted that he conducted an investigation to support the defamation complaint he filed on behalf of Braeger, it is apparent to us that he did not. When asked if Braeger gave him any documents to review, he said "maybe" and did not recall. He asserted that he filed the defamation complaint on information and belief and that he repeatedly asked for someone to show him evidence that Braeger converted the customers' money. He spoke as though it was the couple's burden in connection with the lawsuit to prove that Braeger converted their money, as opposed to Braeger's burden to prove the defamation claim he filed against them.[226]

JPF, who purportedly assisted Braeger to obtain information from the Firm about what happened to the couple's money, did not know the name of the investment fund, Rubicon. He mistook BB, Braeger's attorney on the Rubicon offering documents, for someone working on behalf of TH and SE. All he knew was that Braeger's customers had lost $30,000 and he was supposed to find information related to that. He claimed that he made a couple of telephone calls to the Firm. There was no corroboration in the form of documents reflecting the nature of his inquiries.[227]

Both of the attorneys were contentious and evasive. At one point JPF responded to a question by Enforcement counsel by snapping, "Don't get smart with me."[228] TV objected to questions as though he were counsel instead of a witness.[229] He responded to one question "asked and answered," and then asked for the court reporter to read back his answer.[230]

III. CONCLUSIONS

A. Misuse and Conversion—First Cause

1. Applicable Law

Braeger is charged with having "improperly used and converted" the $30,000 that TH and SE intended to be invested in Rubicon.[231] Misuse of customer funds is prohibited by NASD Conduct Rule 2330(a) and FINRA Rule 2150(a). Both Rules state that "No member or person associated with a member shall make improper use of a customer's securities or funds."[232] A particularly egregious form of misuse is conversion, which is defined in the Sanction Guidelines for misuse of customer funds. "Conversion generally is an intentional and unauthorized taking of

[226] Hearing Tr. (TV) 834-40.

[227] Hearing Tr. (JPF) 775-98.

[228] Hearing Tr. (JPF) 804.

[229] Hearing Tr. (TV) 828-30, 841-44.

[230] Hearing Tr. (TV) 844.

[231] Compl. ¶¶ 1-3, 54.

[232] The NASD Rule was in effect through December 13, 2009. FINRA Rule 2150(a), which is the same rule under a new number, went into effect on December 14, 2009.

and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[233]

Although both misuse and conversion constitute serious misconduct, they are distinguishable. Misuse occurs whenever customer funds are not applied in the manner they were intended to be applied. Misuse can be the product of misunderstanding or carelessness. Misuse can occur even when a customer's funds are returned, if the funds were used for an unintended purpose before their return or the return of the funds was delayed.[234]

Conversion, on the other hand, involves an intentional unauthorized taking of another's property. Conversion is akin to stealing. The wrongdoer acts with intention, and converts the property belonging to another to his benefit when he has no right to it.[235]

Braeger is also charged with violating FINRA Rule 2010 (formerly NASD Conduct Rule 2110). FINRA Rule 2010 requires that business conduct be consistent with "high standards of commercial honor and just and equitable principles of trade." This Rule is a broad and generalized ethical provision that applies to any unethical business-related conduct whenever the "misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business."[236] Whenever another violation of a FINRA rule is found, it is also a violation of the high standard of ethical conduct required by Rule 2010.[237]

Conversion in particular has long been recognized as a violation of Rule 2010, because it is fundamentally a dishonest act that reflects negatively on a person's ability to comply with regulatory requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets.[238]

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[233] FINRA Sanction Guidelines ("Guidelines"), at 36 n.2 (2017), http://www.finra.org/industry/sanction-guidelines.

[234] *See*, *e.g.*, *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001) (citing cases). *See also Bernard D. Gorniak*, 52 S.E.C. 371 (1995) (associated person improperly retained for an indeterminate period customer funds given to him for the purchase of mutual fund shares); *Daniel Joseph Alderman*, 52 S.E.C. 366 (1995), *aff'd*, 104 F.3d 285 (1997) (funds mistakenly transferred to wrong account and then deliberately withheld for two months); *Lawrence R. Klein*, 52 S.E.C. 535 (1995) (associated person transferred funds from one customer's account to another customer's account); *Robert L. Johnson*, 51 S.E.C. 828 (1993) (registered principal of broker-dealer failed promptly to register unit trust in customer's name and failed to return funds to customer for almost two years); *John C. Gebura*, 46 S.E.C. 1121 (1977) (registered principal delayed returning funds to customer after intended investment did not materialize).

[235] *Dep't of Enforcement v. Doni*, No. 2011027007901, 2016 FINRA Discip. LEXIS 10, at *42-46 (OHO Apr. 18, 2016), *aff'd*, 2017 FINRA Discip. LEXIS ___ (NAC Dec. 21, 2017).

[236] *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). *See also John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *28-29 (Feb. 10, 2012) (collecting cases).

[237] *E.g.*, *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007).

[238] *Dep't of Enforcement v. Grivas*, No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *14 (NAC July 16, 2015), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008).

2. Braeger Misused and Converted His Customers' Money

There is no genuine dispute that the $30,000 that TH and SE intended to invest in Rubicon was never applied in the manner they intended. This constituted misuse.

The real point of contention in this case is whether Braeger committed the egregious type of misuse known as conversion, which generally results in the "standard" sanction of a bar from the industry. We conclude that Braeger did commit conversion. He intentionally took his customers' money for his own benefit.

We summarize our findings and the evidence in support of our conclusion.

- As he admits, Braeger had intended for the Rubicon escrow account to be at his bank, the Wells Fargo Bank in Mequon, Wisconsin; and, as he represented to MF Global, he set up at least one Rubicon account at Wells Fargo in anticipation of that plan.

- Braeger purposely directed SE to write the check to Rubicon even though he knew that the check should have been written to the escrow agent, CommerceWest Bank. He himself executed the escrow agreement that set out detailed arrangements for the escrow account and specified that checks should be made payable to the escrow agent on behalf of Rubicon.

- Braeger gave TH and SE a subscription agreement that differed from the Rubicon subscription agreements that other registered representatives used. He knew that it was different because he provided the correct subscription agreement to at least two registered representatives. Instead of directing that checks should be written to the escrow agent and sent to the Firm, the subscription agreement that Braeger provided TH and SE did not even mention the escrow agent, CommerceWest Bank. We have rejected Braeger's claim that his use of a different subscription agreement was an innocent mistake. He did not mistake the February 23, 2009 draft PPM from his attorney for the final PPM dated March 19, 2009, that the Firm approved.

- Braeger endorsed the check even though that was unnecessary when sending it for deposit in the escrow account. Furthermore, he endorsed the check in such a manner that it required the bank receiving the deposit to know that Braeger was an authorized person for the payee on the check, Rubicon, and to know the account into which it should be placed.

- The check was deposited in a Wells Fargo Bank account the day after it was written. The check could not have been, as Braeger claims, in a FedEx package sent to California.

- The Firm has no record of the $30,000 check or the Rubicon subscription agreement signed by TH and SE. It has no record of a control number for the PPM Braeger gave TH and SE; it has no indication on its blotter of a Rubicon investment by TH and SE; and it has no electronic copy of the check and subscription agreement—even though Braeger purports to have sent the Firm the electronic file containing the Rubicon check and subscription agreement a second time after it was purportedly lost.

- MF Global informed FINRA staff that when Braeger closed Rubicon he directed that the proceeds be sent to a Rubicon account at Wells Fargo Bank in Mequon, Wisconsin, with the account number ending in #8511.

- Wells Fargo informed FINRA staff that it had once had a Rubicon account linked to Braeger with the account number ending in #8511.

- Braeger did not inform TH and SE when he closed Rubicon and did not include them in the distribution of the proceeds. Since he was responsible for the "audit" of the fund, the accurate apportionment of the proceeds, and the printing of checks to be sent to Rubicon investors, he had to know that TH and SE were not among the investors in Rubicon.

- Braeger pretended for years that TH and SE had an existing investment in Rubicon, even after he had closed and dissolved the investment fund. He repeatedly made misrepresentations to TH and SE over a prolonged period of time regarding the status and value of their purported investment in Rubicon. This was not the conduct of an innocent person.

- When TH and SE finally sought documentation or a refund, Braeger hired a lawyer to file a half-million dollar defamation suit in the hope of persuading them not to complain. In negotiating a settlement, he continued to seek their agreement not to testify in the FINRA proceeding. His evident goal was to conceal what he had done.

- In the defamation complaint, Braeger told a different story about where he sent the couple's check than the story he told in this proceeding. In the defamation complaint, Braeger said that when he sent the subscription application to the Firm he had "concurrently" sent the check to a third-party escrow or trust—Rubicon itself. Braeger described Rubicon as a third-party escrow account or trust because he had been falsely representing to TH and SE for years that their money had been placed in escrow where he could not touch it.

3. The Conclusion that Braeger Converted His Customers' Money Is Based on Evidence, Not Conjecture

The essence of Braeger's defense was revealed in his testimony when he commented, "I don't think any of us are ever going to know which account that [check] went into."[239] He seems to believe that—in the face of his testimony denying that he took the money—conversion cannot be proven without direct evidence that he deposited the money in an account he controlled and then used it for his benefit. He essentially argues that Enforcement has not proved its case because there is no bank statement or Rubicon financial record contradicting his testimony that he did not take his customers' money. In his post-hearing brief, he argues that it would be "pure conjecture" to conclude that he used his customers' money for his own benefit.[240]

Braeger misapprehends the burden of proof and the process by which a fact-finder evaluates evidence for reliability and persuasive force. A bank statement showing that Braeger deposited the $30,000 check in an account he controlled and then used the monies for his own benefit might be conclusive—but conclusive evidence is not required.

It is well established that the burden of proof is met in a disciplinary proceeding such as this if Enforcement establishes its claim by a preponderance of the evidence.[241] The preponderance standard requires only that the complainant "prove it is more likely than not" that the allegations are true.[242] Essentially, the balance of the evidence must tip at least slightly in favor of the complainant.

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[239] Hearing Tr. (Braeger) 1727.

[240] Resp. PH Br. 5.

[241] *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16 (June 2, 2016) (applying a preponderance of the evidence standard in FINRA disciplinary proceedings); *Luis Miguel Cespedes*, Exchange Act Release No. 59404, 2009 SEC LEXIS 368, at *18 & n.11 (Feb. 13, 2009) (citing *David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) (holding that preponderance of the evidence is the standard of proof in self-regulatory organization ("SRO") disciplinary proceedings)); *Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992) (stating the "the correct standard is preponderance of the evidence" in an SRO proceeding); *Dep't of Enforcement v. Claggett*, No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *25 (NAC Sept. 28, 2007) (Enforcement had burden of proof, which it had to satisfy by a preponderance of the evidence).

[242] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 328 (2007) (stating that, at trial, proof of scienter under the preponderance standard requires showing that allegation is "more likely than not"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (discussing preponderance standard and holding that it applies to civil damage actions for securities fraud); *United States v. Gumesindo Montano*, 250 F.3d 709, 713 (9th Cir. 2001) (under the preponderance of the evidence standard, the relevant facts must be shown to be more likely than not); *Days Inn Worldwide, Inc. v. Sonia Invs.*, 2007 U.S. Dist. LEXIS 29689, at *12 n.6 (N.D. Tex. Apr. 23, 2007) (preponderance of the evidence means to prove the claim or element is more likely than not).

And that balance of evidence can be tipped by circumstantial evidence. As the Supreme Court has stated, "circumstantial evidence can be more than sufficient" in civil actions.[243] Even in criminal actions, which require a higher standard of proof than preponderance of evidence, "circumstantial evidence is no less probative of guilt than direct evidence. Indeed, 'in some cases circumstantial evidence is even more reliable.'"[244] Circumstantial evidence can be the sole support for a claim, even the sole support for a criminal conviction.[245]

A fact-finder is expected to evaluate the evidence, not merely to accept it. We must consider Braeger's testimony, but we are not required to believe it.[246]

Similarly, we must consider the circumstantial evidence and draw on our common sense to make reasonable inferences from that evidence.[247] "While common sense is no substitute for evidence, common sense should be used to evaluate what reasonably may be inferred from circumstantial evidence."[248] Moreover, we should evaluate the evidence, particularly the circumstantial evidence, as a whole. As courts have recognized, circumstantial evidence "often has an exponential effect" and "the sum of an evidentiary presentation may well be greater than its constituent parts."[249]

The circumstantial evidence adduced here, particularly when viewed as a whole, compels the conclusion that Braeger intentionally, and without authorization, took his customers' money and deposited it in a bank account that he controlled to use for his own purposes. And then he concealed what he had done for years through various subterfuges, even after he had closed and dissolved Rubicon. It would defy common sense to reach any different conclusion.

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[243] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 391 n.30 (1983); *see also Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010), *aff'g Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142 (Nov. 14, 2008) (explaining that "[s]cienter can be established by direct or circumstantial evidence" and that "the objective unreasonableness of a defendant's conduct may give rise to an inference of scienter").

[244] *United States v. Starks*, 309 F.3d 1017, at 1021 (7th Cir. 2002) (quoting *United States v. Griffin*, 150 F.3d 778, 785 (7th Cir. 1998). *See also United States v. Adamo*, 882 F.2d 1218, 1223 (7th Cir. 1989) (collecting cases).

[245] *United States v. Grier*, 866 F.2d 908, 923 (7th Cir. 1989) (collecting cases); *United States v. Nesbitt*, 852 F.2d 1502, 1510 (7th Cir. 1988).

[246] *See SEC v. Reeves*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568 (Nov. 5, 2015), where the SEC found respondent's claim that he retained almost $60,000 belonging to his former employer because of an innocent mistake implausible. The SEC affirmed FINRA's decision sanctioning respondent for conversion.

[247] *Starks*, 309 F.3d at 1021-22; *United States v. Donovan*, 24 F.3d 908, 913 (7th Cir. 1994); *United States v. La-Van Hawkins*, 2005 U.S. Dist. LEXIS 21729, at *22-23 (E.D. Pa. Sept. 28, 2005).

[248] *Jackson v. Stovall*, 2010 U.S. Dist. LEXIS 41906, at *55 (E.D. Mich. Apr. 12, 2010) (quoting *United States v. Durham*, 211 F.3d 437, 441 (7th Cir. 2000)).

[249] *United States v. O'Brien*, 14 F.3d 703, 707 (1st Cir. 1994) (citing *United States v. Bourjaily*, 483 U.S. 171, 179-80 (1987) and quoting *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992)).

4. Case Law on Conversion Does Not Require a Different Conclusion

The case law on conversion does not require a different conclusion. Although frequently in conversion cases there is direct evidence of where a respondent deposited money or securities, or how a respondent used the property of another, Respondent here has cited no decision that *requires* direct evidence such as bank or credit card statements to prove conversion. As discussed above, such a holding would be counter to universal principals of evidence in other types of civil and criminal cases.

In fact, in a conversion case the Securities and Exchange Commission ("SEC") has rejected the argument that FINRA failed to prove conversion because there was no direct evidence of an element of the claim. The respondent in that case had argued that there was no evidence that his withdrawal of money from a customer's account was unauthorized. The SEC concluded, however, that his intent to convert an elderly customer's money was demonstrated, in part, by his failure during the investigation to provide FINRA staff with full information concerning the amounts he withdrew and his failure to maintain records as to how he used the money.[250] The SEC noted, "It is well established that 'circumstantial evidence can be more than sufficient to prove a violation of the securities laws.'"[251]

The circumstantial evidence here is sufficient to find that Braeger converted his customers' money, even if we do not know exactly how he used it. He had SE write the check in such a way that he, as the person in control of Rubicon, could deposit it in a Rubicon account instead of sending it for deposit in the escrow account. He then endorsed the check on behalf of Rubicon with a restrictive endorsement that limited where it could be deposited—it could only be deposited in a Rubicon account. Because of these acts by Braeger, he could control where the money flowed; and after Braeger took control, the money disappeared. Moreover, Braeger caused the lack of direct evidence. He failed to preserve and produce books and records for Rubicon or the bank statements for the account he used for Rubicon.

Braeger provides no credible explanation for what happened to the money to rebut the conclusion from this evidence that Braeger intentionally took his customers' money without authorization and used it for his own purposes.[252]

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[250] *Butler*, 2016 SEC LEXIS 1989, at *18 (quotations and citation omitted) (collecting cases).

[251] *Id.* at *19 n.18.

[252] Similarly, see *Dep't of Enforcement v. Barnes*, 2013 FINRA Discip. LEXIS 27, at *13-16 (OHO July 18, 2013), where the respondent took his customers' money, did not invest it as they had directed, and did not return the money. That respondent, like Braeger, failed to produce bank statements that could have enabled the money to be tracked. That respondent, like Braeger, contended that the money had been stolen by someone else. That respondent, however, offered an explanation that was not credible and did not rebut the circumstantial evidence supporting the conclusion that he had misused his customers' money. Braeger similarly has offered no credible explanation for what happened to his customers' money and has failed to rebut overwhelming circumstantial evidence that he converted it.

B. Misrepresentations—Second Cause

1. Applicable Law

Braeger is separately charged with a stand-alone violation of FINRA Rule 2010 based on his repeated false and misleading misrepresentations to TH and SE regarding the value and status of their intended Rubicon investment. As discussed above, Rule 2010 is a broad ethical prohibition. It applies to misconduct that casts doubt on a person's ability to act with honesty and integrity. Making materially false and misleading statements to customers about their investment casts such doubt. "It is axiomatic that a broker who makes material misrepresentations and omissions to customers is engaging in unethical conduct."[253]

2. Braeger Made Misrepresentations to His Customers

Without question, Braeger made materially false and misleading statements to TH and SE about their purported investment in Rubicon, both written and oral. He pretended that they had an investment in Rubicon when they did not.

- Braeger provided TH and SE quarterly statements that falsely showed they were invested in the fund (August 2009, January 2010, and April 2010).

- When Braeger closed Rubicon and stopped providing the quarterly statements, he gave TH and SE a false explanation. He said that he had moved and needed to find a new accounting firm. He also directed them to look at the Autumn Gold performance reports and, when they were no longer available, falsely told them the reports were no longer available because the investment was private.

- Braeger provided TH and SE Schedule K-1 tax documents for them to include in their tax returns, the first one in spring 2010 for tax year 2009, when Rubicon was still open, and the others (for tax years 2011, 2012, and 2013) after Braeger had closed Rubicon. But the couple was never invested in Rubicon.

- Braeger falsely blamed the MF Global bankruptcy for the couple's difficulty in recovering their money.

- Braeger falsely explained changes in tax documents as the couple's purported share of the Rubicon investment increased from 6% to 33.3%. He attributed the change to other investors "writing off" the investment, and urged TH and SE also to "write off" the investment.

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[253] *Dep't of Enforcement v. Timberlake*, No. C07010099, 2004 NASD Discip. LEXIS 11, at *16 (NAC Aug. 6, 2004). *See also Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *80 (NAC July 23, 2015); *Dep't of Enforcement v. Kapara*, No. C10030110, 2005 NASD Discip. LEXIS 41, at *20-21 (NAC May 25, 2005).

- Braeger falsely blamed the Firm for mishandling their money and failing to provide information regarding what happened to the check. He also falsely purported to assist TH and SE to obtain information from the Firm regarding their Rubicon investment.

- Braeger falsely promised to refund the couple's money while preparing a defamation lawsuit against them to intimidate and discourage them from complaining to FINRA.

- Braeger falsely represented in the defamation lawsuit he filed against them that he had sent their check to a third-party escrow agent or trust named Rubicon Capital Appreciation Fund. However, that was the name of the fund itself, not a third party.

Braeger's charade, pretending that TH and SE were invested in Rubicon when they were not, was astonishingly brazen. He made multiple misrepresentations in written form, some on official tax documents and at least one in a court filing. Many of these misrepresentations occurred after he knew that he had closed and dissolved Rubicon. He also made multiple oral misrepresentations, reassuring his "friends" that they would eventually recover their money and that he was working on their behalf to investigate what had happened.

Braeger conducted the charade for a long time, more than six years, apparently without compunction. Even at the end, when he settled the defamation lawsuit he had brought against TH and SE, he did not pay them all of their money or reimburse them for the legal fees they incurred in defending themselves against the charges.

IV. SANCTIONS

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines. The Guidelines contain recommendations for sanctions for many specific violations, depending on the circumstances. They also contain overarching Principal Considerations and General Principles, which are applicable in all cases. The Guidelines are intended to be applied with attention to the regulatory mission of FINRA—to protect investors and strengthen market integrity. Disciplinary sanctions should be designed to protect the investing public.[254]

A. Bar—First Cause

The specific Guidelines for misuse and conversion provide that improper use may result in a fine of $2,500 to $73,000, and, if the misuse is the result of a misunderstanding or other mitigation exists, a suspension of six months to two years. The suspension may be extended until restitution is paid. An adjudicator also may still consider a bar. Conversion, however, is subject

[254] Guidelines at 1, Overview; Guidelines at 2, General Principle 1.

to a "standard" sanction—a bar. The misconduct itself is considered so unacceptable that a bar is the sanction regardless of the amount converted.[255]

We have no difficulty in concluding that a bar is the appropriate sanction here. There are a number of aggravating factors that lead us to that conclusion, and no mitigating factors.[256]

Braeger has displayed no understanding that what he did was wrong, and he has accepted no responsibility for his misconduct.[257] His confession at the hearing that he failed to "protect" his customers' money was merely a denial that he misused and converted his customers' money.

Nor has Braeger reasonably attempted to pay restitution or remedy the harm to his customers.[258] To the contrary, he misled TH and SE to believe he would pay them their money and then sued them instead. In the context of the defamation lawsuit, he purported to repay them a portion of their investment, but even then he did not make them whole. This behavior exhibits a complete indifference to the harm he caused his customers to suffer.

Braeger engaged in the initial conversion and then deceived his customers over the course of years, concealing his initial misconduct. When his customers finally insisted on documentation or a refund, he tried to intimidate them with the defamation lawsuit in the hope that they would not complain to FINRA.[259] This behavior demonstrates Braeger's intent to circumvent regulatory discipline. He not only did not provide substantial assistance to FINRA in its investigation, but he attempted to conceal information and to withhold documents that were responsive to the staff's inquiries.[260]

Braeger's misconduct was the result of intentional acts.[261] He did not inadvertently make a mistake or misdirect his customers' money. He purposely told them to write the check in such a way that he could deposit it in a Rubicon account he controlled instead of the escrow account that he did not control.

Braeger's violation was egregious, and his increasingly desperate attempts to prevent inquiry into his misconduct show that he cannot be trusted in the future to comply with

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[255] Guidelines at 36.

[256] We have found that Braeger converted his customers' money. But even if the lesser label were applied to Braeger's misconduct, misuse, we would still impose a bar. Braeger did not misplace his customers' money because of some misunderstanding, and there are no mitigating factors. Many of the same aggravating factors apply regardless of whether his misconduct is labeled misuse or conversion. *See Barnes*, 2013 FINRA Discip. LEXIS 27, at *22 and *29 (misuse similar to conversion was egregious and warranted a bar).

[257] Guidelines at 7, Principal Consideration 2.

[258] Guidelines at 7, Principal Consideration 4.

[259] Guidelines at 7, Principal Consideration 10.

[260] Guidelines at 8, Principal Consideration 12.

[261] Guidelines at 8, Principal Consideration 13.

regulatory requirements. He would be a danger to public investors if permitted to remain in the securities industry. A bar is the appropriate remedy.

B. Bar—Second Cause

The Guidelines provide a range of specific sanctions for making misrepresentations in violation of FINRA Rule 2010. If the misconduct is negligent, a fine ranging from $2,500 to $73,000 may be imposed and an individual may be suspended from 31 calendar days to two years. If the misconduct is reckless or intentional, the range of fines runs from $10,000 to $146,000. The Guidelines recommend that an adjudicator "strongly consider" barring an individual whose misconduct is reckless or intentional. In that case, it is only where mitigating factors predominate that a suspension may be more appropriate.[262]

Many of the same aggravating factors discussed above in the context of Braeger's conversion of his customers' money apply to this violation as well. In addition, we note that Braeger made many false and misleading statements over an extended period of time.[263] He provided TH and SE multiple written reports on the status and value of their purported investment, and for over six years he gave shifting false and misleading explanations for why they could not recover their money. Since we find no mitigating factors, we do not believe a suspension would be appropriate for this violation. Based on this misconduct separately, Braeger is unsuited to be trusted with other people's money. He represents a danger to the investing public. A bar is the only appropriate remedy.

C. Disqualification from Regulation D Offerings Is Not a Mitigating Factor

Although Braeger is no longer registered, the bars that we impose may affect his ability in the future to raise money by a Regulation D private offering such as the one he used to raise $8 million for his auto loan business. SEC Rule 506(d) of Regulation D provides that a covered person who is barred from the securities industry by FINRA becomes disqualified to participate in Regulation D offerings. Covered persons include, among others, an issuer; an officer, director, or 20% owner of an issuer; or a promoter connected to the issuer.[264]

We do not view disqualification as a mitigating factor. If the bars we impose on Braeger result in his inability in the future to raise money in a Regulation D offering, that is a result that the SEC *intended*. The SEC purposely included a bar from the securities industry in its list of disqualifications from participation in Regulation D offerings.

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[262] Guidelines at 89.

[263] Guidelines at 7, Principal Considerations 8 and 9.

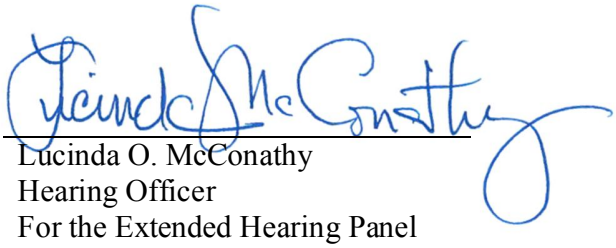
[264] Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings and Related Disclosure Requirements, https://www.sec.gov/info/smallbus/secg/bad-actor-small-entity-compliance-guide.htm#part2.

V. ORDER

As alleged in the First Cause, Respondent David O. Braeger misused and converted his customers' money in violation of NASD Conduct Rule 2330(a) and FINRA Rule 2150(a), as well as FINRA Rule 2010. For his misconduct he is barred from association with any FINRA member in any capacity.

As alleged in the Second Cause, Braeger made repeated misrepresentations over a number of years to his customers regarding the value and status of their investment and the reasons they could not recover their money, all in violation of FINRA Rule 2010. For this misconduct, he is separately barred from association with any FINRA member in any capacity.

Respondent is also ordered to pay costs in the amount of $14,816.95, which includes a $750 administrative fee and $14,066.95 for the cost of the transcript.[265] If this decision becomes FINRA's final disciplinary action, Braeger's bars will take immediate effect.



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[265] The Extended Hearing Panel has considered and rejected without discussion any other arguments made by the Parties that are inconsistent with this decision.