

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Peter J. Fetherston
(CRD No. 2108610),

Respondent.

Disciplinary Proceeding
No. 2020065396501

Hearing Officer–DRS
**EXTENDED HEARING
PANEL DECISION**

September 26, 2023

For partially failing to respond to a FINRA request for information, Peter J. Fetherston is suspended for four months in all capacities from associating with any FINRA member firm. The Department of Enforcement, however, failed to prove that Fetherston converted or improperly used customer funds or that he provided false or misleading information, documents, and testimony to FINRA staff. Those charges are therefore dismissed.

Appearances

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

For the Respondent: Clifford B. Olshaker, Esq.

DECISION

I. Introduction

While associated with a FINRA member firm, Peter J. Fetherston received three checks made payable to him personally totaling \$89,000 from two long-time, experienced customers, WG and SG (collectively “the Gs”), a married couple. Shortly afterward, Fetherston’s member firm employer conducted an internal investigation into his activities related to mutual fund purchases and sales by several of his customers. Upon concluding that Fetherston’s mutual fund-related activities violated firm policy, it discharged him. The Gs were among those customers impacted by Fetherston’s conduct, and the firm reimbursed them for the costs they had incurred related to the mutual fund purchases and sales.

During a call relating to that reimbursement, the Gs notified the firm that they had given Fetherston the three checks made payable to him. They told the firm that the purpose was to pay

for commissions Fetherston said they owed and so he could buy investments for them, although they claimed not to know what investments he planned to purchase. The firm memorialized the conversations in a memorandum and an internal email. After speaking with the Gs, the firm contacted Fetherston. He told the firm that he invested the funds but had no proof of it. In fact, Fetherston had deposited the checks into his checking account and used the funds to pay his personal expenses. The firm concluded that Fetherston had not invested the funds through the firm, but instead had converted the Gs' funds. It then reimbursed the Gs for the full amount of the checks they had given to Fetherston.

Next, the firm disclosed the situation to FINRA, and the Department of Enforcement launched an investigation into Fetherston's conduct. During the investigation, FINRA interviewed the Gs as well as Fetherston, and issued information and document requests to him. The Gs told Enforcement the same story they told the firm. And Enforcement's investigators, like the firm, memorialized their interviews with them. Fetherston, however, told FINRA a different story than the one he told the firm. In a written response to an information request and at his on-the-record interview ("OTR"), he said to FINRA that he and the Gs were friends, and that when he told them he was experiencing financial problems and medical issues, they felt sorry for him and wanted to help him out financially. He claimed that without being asked, they gave him the three checks and he used the funds to pay medical and other expenses. This, however, was not the only version he told FINRA staff.

Later, Fetherston asserted that he received the funds as a loan and produced to FINRA a handwritten note ("the Note"), on his former firm's stationary, purportedly signed by the Gs. The Note stated that they gave Fetherston the checks to pay his medical expenses and associated costs and that he could repay the funds "in some fashion at a later date to be determined but," it added, they "are flexible and will contact him when ready." The Gs disputed the Note's authenticity, telling FINRA staff they had not written or signed it or authorized anyone to do so on their behalf. They also said they had a strictly business relationship with Fetherston, and that he had never informed them of his medical and financial issues.

Enforcement credited the Gs' version of events and rejected Fetherston's. Thereafter, Enforcement filed a disciplinary action against him. The Complaint charged Fetherston with converting and making improper use of customer funds, giving a false explanation of the events during his OTR, and submitting a fabricated document—a scanned copy of the Note—to Enforcement. Finally, Enforcement charged Fetherston with failing to respond to a written request it issued to him during the investigation asking him to identify the medical expenses he purportedly paid with the funds from the three checks.

A FINRA Extended Hearing Panel held a three-day hearing. The parties did not dispute that the Gs gave Fetherston the checks and that he used the funds to pay personal expenses. The main issue was why the customers gave him the checks. The Gs declined either to testify at the hearing or provide an affidavit. During the course of FINRA staff's interviews with them, the Gs claimed that they feared Fetherston would retaliate against them and thought he was prone to rage and capable of physical violence. WG pointed out that Fetherston knew where he and his

wife lived and, after the incident involving the three checks came to light, Fetherston arrived at their home unannounced and tried to see them. But, WG said, they were scared, would not let him in, and wrote to him asking that he leave them alone. Also, the Gs said they had read that Fetherston had been previously arrested for assault and intimidating a witness. For these reasons, the Gs explained, they could not subject themselves to any further risk.

At the hearing, Fetherston testified, as did the firm's compliance advisor who had interviewed him and the Gs. One of the FINRA investigators who interviewed the Gs also testified. The interview memoranda and the firm's internal email memorializing conversations with Fetherston and the Gs were admitted into evidence as well.

The testimony from the compliance advisor and the FINRA investigator relating to their conversations with the Gs, coupled with the memoranda and internal email about those conversations, constituted the main evidence of the Gs' version of events. Thus, Enforcement's evidence supporting its allegations about why the Gs gave Fetherston the checks consisted almost entirely of unsworn, oral, uncorroborated, and disputed hearsay statements.

Moreover, the Gs' statements did not address numerous questions and issues relevant to assessing the credibility of their story. For example, why would the Gs, who were experienced investors with multiple brokerage accounts, give Fetherston a large sum of money in the form of checks made out to him personally to invest for them without any idea of what investments he would purchase? Why did they apparently never ask Fetherston or the firm for information about the purported investments until the firm told them that it concluded Fetherston had engaged in mutual fund-related misconduct in their account, and they learned he was no longer with the firm? Why did the Gs give Fetherston a check made payable to him purportedly to buy an investment when, on the same day, they bought an annuity by giving him a check payable to the issuer of the annuity? Further, there is no evidence that the Gs had previously ever written a check payable to a broker to buy an investment or that they had ever given discretionary trading authority to a broker. Also, although at the time the Gs gave Fetherston the checks, WG had serious, worsening chronic health problems, was home on a leave of absence from his job as an analyst at a financial institution, under his wife's care, and undergoing a series of brain surgeries, there is no evidence that he suffered from cognitive impairment or that SG suffered from any infirmity. Because the Gs did not testify, the parties and the Panel were unable to question them about these subjects.

In sum, the record was devoid of essential evidence the Panel needed to evaluate the Gs' hearsay statements in context. Without this evidence, we cannot credit the Gs' story. And because we are unable to credit their story, we find that Enforcement failed to prove, by a preponderance of the evidence, that Fetherston converted or improperly used the Gs' funds or that he testified falsely about the circumstances involving his receipt and use of the funds. As a result, the Panel dismisses the charges relating to those allegations. We also dismiss the charge that Fetherston submitted a fabricated note to FINRA. Although the evidence left us with doubts about the Note's authenticity, it was insufficient to establish that the Note was fake.

That said, we do not accept Fetherston's story either. It contained many inconsistencies and implausibilities. His version of events was uncorroborated except for the Note, which we discounted because of our concerns about its authenticity. Further, as noted above, at the time the Gs gave Fetherston the checks, WG was experiencing serious health problems. Additionally, the Gs were worried about their finances, as well as WG's and his daughter's health. There was also no proof, other than Fetherston's testimony, that he and the Gs were friends. This left the true nature of their relationship unclear. Thus, while the Gs had substantial assets and, according to Fetherston, may have been expecting an inheritance, we are skeptical that under these circumstances they would have loaned Fetherston an amount about three quarters of their yearly income, especially on an unsecured basis and without a promissory note. Nevertheless, Fetherston's lack of a fully credible version of the events does not substitute for evidence that he converted the Gs' funds.

We do find, however, that Fetherston violated FINRA rules by failing to respond to Enforcement's request during the investigation that he identify the medical expenses he purportedly paid with the funds the Gs gave him. Fetherston's attorney objected to the request on privilege grounds, and Fetherston did not provide the requested information. We find the objection meritless.

In determining the appropriately remedial sanction, we viewed Fetherston's response as a partial, rather than complete, failure, given that during the investigation he responded to other requests for information and documents, and testified during his OTR. We also considered that Fetherston's responses were often untimely, that he gave varying explanations about the circumstances surrounding his receipt and use of the Gs' funds, and that Enforcement had to exert substantial pressure to obtain his responses. Nevertheless, we found it especially pertinent that Fetherston substantially complied with the request. During the investigation, he produced documents enabling FINRA staff to see how he spent the funds he received from the Gs and to determine whether, in fact, he had spent any of it on medical expenses. Additionally, Fetherston's violation resulted from a failure to respond based on his lawyer's apparently good-faith objection. Accordingly, based on the relevant aggravating and mitigating evidence, we suspend Fetherston for four months in all capacities from associating with any FINRA member firm.

II. Findings of Fact

A. Background

Fetherston entered the securities industry in 1990 when he became employed by MetLife Securities, Inc. and Metropolitan Life Insurance Company (collectively, "MetLife").¹ The next year, while working at MetLife, he became registered with FINRA as an Investment Company and Variable Contracts Products Representative and then, in 1999, as a General Securities

¹ Complaint ("Compl.") ¶ 5; Answer ("Ans.") ¶ 5; Complainant's Exhibit ("CX-__") 1, at 7-8.

Representative.² In 2008, Fetherston met the Gs through a mutual friend.³ Around 2011 or 2012, they became his customers,⁴ and he served as their registered representative of record.⁵ About five years later, in March 2017, Fetherston became associated with MML Investors Services LLC (“MML”),⁶ when MetLife Securities sold its retail financial unit to that firm.⁷ He remained there only a few months. In October 2017, Fetherston was arrested and charged in Massachusetts with assault and battery and witness intimidation.⁸ As a result, MML discharged Fetherston,⁹ and his registrations through that firm were terminated, effective November 15, 2017.¹⁰ In January 2018, at Fetherston’s request, the charges against him were dismissed for failure to prosecute because the alleged victim refused to testify.¹¹ According to Fetherston, his termination had a “devastating” financial impact on him.¹²

After several months, in March 2018, he became associated with Principal Securities Inc. (“Principal”) as a General Securities Representative and Investment Company and Variable Contracts Products Representative.¹³ While associated with Principal, he was also employed as an agent by the Principal Life Insurance Company.¹⁴ Upon joining Principal, Fetherston sent out mailers to solicit clients.¹⁵ The Gs received one of those mailers. They had remained customers of MML after the firm terminated Fetherston.¹⁶ They also had an account at another FINRA member firm, according to Fetherston.¹⁷ Nevertheless, in February 2019, after receiving the mailer, the Gs contacted Fetherston and met with him to discuss their “current and future financial plans.”¹⁸ Fetherston testified that this overture by the Gs was the first communication

² Compl. ¶ 5; Ans. ¶ 5; CX-1, at 5–6.

³ Hearing Transcript (“Tr.”) 269, 639.

⁴ Tr. 639–40.

⁵ Tr. 435.

⁶ CX-1, at 5.

⁷ Tr. 424. The witnesses and the Gs at times referred to MML as MetLife when it was clear from the context that they meant MML. For clarity, in those instances, we refer to the firm as MML.

⁸ CX-1, at 15–17.

⁹ CX-1, at 5, 7, 14–15, 17; Tr. 427–28, 645.

¹⁰ CX-1, at 5.

¹¹ CX-1, at 15; Tr. 427–28, 658.

¹² Tr. 668; *see also* Tr. 669–71.

¹³ Compl. ¶¶ 1, 6; Ans. ¶¶ 1, 6; CX-1, at 4, 7.

¹⁴ CX-1, at 7.

¹⁵ Tr. 663–64.

¹⁶ Tr. 436.

¹⁷ Tr. 666–67.

¹⁸ Tr. 270, 454–55, 664; CX-36, at 2; *see also* CX-15, at 11.

between them since his termination from MML.¹⁹ According to Fetherston, when he first met WG years earlier, WG already had Parkinson's disease, but "you couldn't tell."²⁰ At the February meeting, Fetherston got an update on WG's health and learned that he was then on a leave of absence from work due to his worsened condition.²¹

A month later, in March 2019, the Gs transferred at least some of their accounts to Fetherston at Principal²² and opened four brokerage accounts:²³ three in WG's name²⁴ and a joint account for WG and his wife, SG.²⁵ Although Fetherston knew that WG suffered from a chronic health condition, and was on a leave of absence due to his condition, the new account forms simply noted that WG was employed as a financial analyst and identified his employer, a large financial institution.²⁶ One of the related forms, however, a Rollover Analysis Form, did acknowledge that WG was "no longer a full time employee at his employer" and stated that he "wants more control over his assets."²⁷

The new account forms also reflected that SG was a teacher's assistant;²⁸ the Gs' estimated combined net worth was \$2.7 million;²⁹ their estimated combined annual income was \$120,000;³⁰ they had at least 11 years of investment experience;³¹ and they owned mutual funds, stocks, a qualified/retirement plan, and a "money market."³² The new account forms for two of WG's accounts and the joint account reflected a high risk tolerance and a growth objective.³³ The new account form for WG's third account reflected a moderate risk tolerance and an

¹⁹ Tr. 439–41.

²⁰ Tr. 457, 647–48.

²¹ Tr. 456.

²² Tr. 171, 270.

²³ Tr. 457–58.

²⁴ CX-30, at 3; CX-32; CX-33.

²⁵ CX-31.

²⁶ CX-30, at 1; CX-32, at 1; CX-33, at 1; CX-31, at 1. *See also* Tr. 642 (Fetherston describing WG as "a very bright guy, [a] technical analyst," who worked in information technology on an operations team at a large financial institution).

²⁷ CX-30, at 21.

²⁸ CX-31, at 1. *See also* Tr. 642 (Fetherston testifying that SG was a therapist who ran her own business and was also an adjunct teacher).

²⁹ CX-31, at 2.

³⁰ CX-31, at 2.

³¹ CX-30, at 2; CX-32, at 2; CX-33, at 2; CX-31, at 2.

³² CX-30, at 3; CX-32, at 3; CX-33, at 3; CX-31, at 3.

³³ CX-30, at 2; CX-33, at 2; CX-31, at 2.

investment objective of income and growth.³⁴ The accounts were nondiscretionary, and Fetherston lacked the authority to make a trade on the Gs' behalf without discussing it with them first and getting their approval.³⁵

When the Gs first opened a brokerage account at Principal, they deposited funds into the account by sending a check made payable to Principal.³⁶ When they made additional investments at Principal, they deposited more checks at Principal rather than using cash in the account or proceeds from the sales of other securities.³⁷ According to Fetherston, the Gs' investments at Principal were much like their earlier investments: "brokerage, annuities, IRAs. Things like that."³⁸

B. Principal Investigates Fetherston's Activities

In November 2019, Principal began investigating Fetherston's activities after discovering that several of his customers, including the Gs, had bought mutual fund shares and sold them shortly afterward.³⁹ A compliance advisor ("Compliance Advisor") at the Principal Financial Group,⁴⁰ an affiliate of Principal,⁴¹ investigated complaints and reports of misconduct by financial professionals affiliated with Principal and allegations of representative misconduct.⁴² The Compliance Advisor helped on the investigation into Fetherston's conduct.⁴³

In connection with its investigation, Principal asked Fetherston to provide information about his dealings with the Gs. Fetherston responded on January 7, 2020. What he wrote provides background relevant to this disciplinary action. Fetherston told Principal, and later testified at the hearing, that WG's health situation had worsened dramatically by the fall of 2019,⁴⁴ the same was true for the Gs' daughter, their sole child.⁴⁵ Fetherston said "the client wanted to lower his overall risk in the market, acquire some tax deferral and efficiency and set up guaranteed income in the future for he and his family to face rising income needs and

³⁴ CX-32, at 2.

³⁵ Tr. 777-80.

³⁶ Tr. 168-69.

³⁷ Tr. 171.

³⁸ Tr. 667.

³⁹ Tr. 63.

⁴⁰ Tr. 60-61.

⁴¹ Tr. 72.

⁴² Tr. 62, 157-58.

⁴³ Tr. 62, 64.

⁴⁴ CX-15, at 15; Tr. 490-91.

⁴⁵ Tr. 641.

possibly a death benefit if he does not survive.”⁴⁶ Continuing, Fetherston explained that WG “is now facing multiple brain surgeries and his daughter is having major mental health issues.”⁴⁷ As a result, WG “wanted to keep his cash in banks that he already had as another precaution to lifestyle changes potentially.”⁴⁸ Fetherston also wrote that when he met with the Gs in February 2019, WG said he was expecting about \$200,000 from his brother resulting from his deceased mother’s estate, which had not yet fully settled.⁴⁹

Based on its investigation, Principal concluded that Fetherston had not followed Principal’s “policies and procedures regarding some replacement and switch transactions.”⁵⁰ Accordingly, Principal discharged him on January 23, 2020.⁵¹ Afterward, Principal decided “proactively” to send reimbursement checks to the affected customers.⁵² The reimbursed customers included the Gs, who received \$26,623.83 from Principal to compensate them for improper fees they incurred and for missed breakpoints.⁵³ The February 11, 2020 reimbursement letter sent to WG explained that the payment was “due to A-share mutual funds being liquidated shortly after purchase, missed breakpoints and annuity surrender charges assessed by [WG’s] previous carrier prior to [WG’s] annuity contract being established at Principal Life Insurance Company.”⁵⁴

Around February 24, 2020, after receiving the letter from Principal enclosing the reimbursement check, the Gs telephoned the Compliance Advisor.⁵⁵ He summarized their conversation in a memorandum that day.⁵⁶ According to the memorandum, the Gs knew that

⁴⁶ CX-15, at 15.

⁴⁷ CX-15, at 15. Fetherston testified that while he did not know all the details relating to the daughter’s mental health problems, “I knew her, and I knew her personality and things, and there were some change[s] going on there.” Tr. 787.

⁴⁸ CX-15, at 15.

⁴⁹ CX-15, at 11.

⁵⁰ CX-1, at 4, 17–18.

⁵¹ Tr. 66; CX-1, at 4.

⁵² Tr. 66–67.

⁵³ CX-16; Tr. 68–69. “Breakpoint discounts are volume discounts on the sales loads charged to investors who purchase mutual fund shares.” *Dep’t of Enforcement v. Mehringer*, No. 2014041868001, 2020 FINRA Discip. LEXIS 27, at *27 n.21 (NAC June 15, 2020) (citing Sales Charges and Breakpoints, <https://www.finra.org/rules-guidance/key-topics/mutual-funds>).

⁵⁴ CX-16, at 1. A “surrender charge” is “[a] type of sales charge that applies if you withdraw money from a variable annuity within a certain period of time, usually six to ten years.” <https://www.investor.gov/introduction-investing/investing-basics/glossary/surrender-charge>.

⁵⁵ Tr. 70.

⁵⁶ CX-18; Tr. 78, 81.

Fetherston was no longer with Principal.⁵⁷ They asked the Compliance Advisor why they received the reimbursement check. And he told them that Principal had reviewed their accounts and found transactions that did not meet its guidelines. Further, the Gs asked if they risked losing their money, and the Compliance Advisor told them that they had several investments with Principal, and while some were subject to market risk, they would not lose any of it to Fetherston. The Compliance Advisor added that the Gs would continue to receive statements and they could continue to access their accounts online. Then the conversation went in a new direction—one leading directly to the filing of this disciplinary proceeding.

The memorandum states that the Gs told the Compliance Advisor that they had written multiple checks payable to Fetherston. They could not remember the number of checks or the amounts. But they estimated they gave him five checks—one of which was for financial planning services, and the others were for investments. They said they would do some research and get back to the Compliance Advisor, but it might take a few weeks because WG was about to have brain surgery. Finally, the memorandum reflects that the Gs told the Compliance Advisor that Fetherston would likely call them in the next few days, and they did not know what to do. The Compliance Advisor replied that if he were the Gs, he would not answer the call. The Compliance Advisor also said they should contact him directly about issues relating to the checks.⁵⁸

As it turned out, the Gs did not take several weeks to do their research; they telephoned the Compliance Advisor later that same day, February 24. The Compliance Advisor testified that the Gs informed him that they found three checks made payable to Fetherston. The Compliance Advisor asked them to send him the checks, which they did the next day.⁵⁹ The checks were written over a three-month period in the fall of 2019 and total \$89,000. The first check, dated September 12, was in the amount of \$19,000.⁶⁰ The second check was dated November 4, in the amount of \$30,000.⁶¹ And the third check, dated December 3, was in the amount of \$40,000.⁶² According to the Compliance Advisor, the Gs told him on February 24, 2020, that they gave the

⁵⁷ While the evidence is conflicting about exactly when the Gs learned that Principal had terminated Fetherston, by the time they told the Compliance Advisor about the three checks they gave to Fetherston, they knew he had been fired by Principal and was unemployed. *See* Tr. 189, 280–81, 798–802. This impacts our assessment of their credibility, as discussed below. *See infra* page 30.

⁵⁸ CX-18, at 1; Tr. 78.

⁵⁹ Tr. 84–85, 159; CX-19.

⁶⁰ CX-19, at 5.

⁶¹ CX-19, at 3.

⁶² CX-19, at 7.

\$19,000 check to Fetherston for commissions relating to financial planning⁶³ and that the last two checks were for investment.⁶⁴

On November 4, 2019, the same day the Gs wrote the second check to Fetherston, another event occurred that is relevant here, as we discuss below. On that day, WG wrote a check for \$320,000 made payable, not to Fetherston, but to Principal Life Insurance Company.⁶⁵ This check represented the initial premium for a Principal Deferred Income Annuity.⁶⁶ The annuity application identifies Fetherston as the marketer and bears his purported signature.⁶⁷ It also reflects that WG's estimated annual income was \$90,000 and that he had 30 years of investment experience.⁶⁸ Later, at the hearing, Fetherston testified that when the Gs made out a check to him on the same day as the annuity check, they understood that it would not go to a Principal account for an investment.⁶⁹ But, at the same time, according to Fetherston, they knew that the annuity check would be used for an investment at Principal.⁷⁰

There are no notes in evidence detailing the Compliance Advisor's second call with the Gs on February 24. But three days later, he emailed Principal's Chief Compliance Officer ("CCO") summarizing the situation involving the Gs and Fetherston.⁷¹ The Compliance Advisor wrote that during the second call on February 24—after the Gs located the three checks—he “asked if they could tell [him] what kind of investment the money was for, but they did not know.”⁷² The Compliance Advisor then asked “if they had provided money to Fetherston directly before he was with our Firm and they did not know.”⁷³ His email to the CCO noted that WG's “speech was notably impacted” by his Parkinson's disease.⁷⁴ The Compliance Advisor later testified that the Gs had told him that WG suffered from Parkinson's disease.⁷⁵ “[Y]ou could tell

⁶³ Tr. 86–87.

⁶⁴ Tr. 88–89.

⁶⁵ CX-35, at 36.

⁶⁶ CX-35, at 1; Tr. 389–90, 479.

⁶⁷ CX-35, at 4.

⁶⁸ CX-35, at 6. The application also showed that his investment/financial objective was income; that his risk tolerance was moderate; that he had a two-million-dollar net worth; and that he had \$400,000 in illiquid assets (variable annuities) and liquid assets totaling \$1.6 million, which included, among other things, \$1 million in mutual funds and \$300,000 under the category “individual stocks, bonds, ETF's.”

⁶⁹ Tr. 781.

⁷⁰ Tr. 781.

⁷¹ CX-21, at 1–2; Tr. 106.

⁷² CX-21, at 2.

⁷³ CX-21, at 2.

⁷⁴ CX-21, at 2.

⁷⁵ Tr. 83–84.

by his speech that he had some sort of health condition that was impacting him,” the Compliance Advisor recalled. “He had trouble talking.”⁷⁶

C. Fetherston Lies to Principal About His Use of the Gs’ Funds

After finding no evidence that the Gs’ funds had been invested through Principal, the Compliance Advisor telephoned Fetherston on February 26, 2020. His purpose was “to confront [Fetherston] with our findings,”⁷⁷ get “his side of the story,” and determine “what had happened with these funds.”⁷⁸ The Compliance Advisor recounted their conversation at the hearing. He asked Fetherston where he had invested the Gs’ funds from the three checks. Fetherston could not provide any specifics but said he had placed them in a fixed investment.⁷⁹ The Compliance Advisor pressed Fetherston about whether he had any statements, confirmations, or receipts showing that he had invested the funds. Fetherston responded that he had no documentation. He was also unable to recall when he made the investment, or the amount invested.⁸⁰

At that point, the Compliance Advisor told Fetherston that if he had invested the funds, there would be documentation of it. “I understand,” Fetherston replied,⁸¹ and then expressed concern about how this matter could impact his career.⁸² The discussion moved on to the subject of repayment. The Compliance Advisor testified that Fetherston did not object to repaying the funds and stated he would try to do so as soon as possible,⁸³ effectively conceding that he had not invested the Gs’ funds. Two days later, on February 28, 2020, having concluded that Fetherston engaged in embezzlement and collusion,⁸⁴ Principal issued an \$89,000 reimbursement check to the Gs.⁸⁵ On February 28, the Compliance Advisor wrote to the Gs explaining that Principal was reimbursing them because: (1) “financial professionals should not be requesting or accepting commission checks directly from our clients”; (2) “[c]ommissions and other compensation should be issued to financial professionals directly from our Firm”; and (3) “any contribution to your investments would require a check made payable to the investment firm, not the financial professional.”⁸⁶

⁷⁶ Tr. 181–82.

⁷⁷ Tr. 90–91.

⁷⁸ Tr. 91–92.

⁷⁹ Tr. 92–93.

⁸⁰ Tr. 93.

⁸¹ Tr. 94, 186–87.

⁸² Tr. 97.

⁸³ Tr. 97.

⁸⁴ Tr. 125–27; CX-22, at 3, 5.

⁸⁵ Tr. 118–19, 128; CX-21, at 1; CX-24, at 2; CX-23.

⁸⁶ CX-24, at 1.

Then, on March 4, 2020, Fetherston called the Compliance Advisor to discuss the repayment of the funds.⁸⁷ During that call, Fetherston did not further explain why the Gs gave him the checks or his intended use of the funds,⁸⁸ nor did he describe the funds as a loan.⁸⁹ As discussed below, Fetherston never repaid the funds to Principal.

At the hearing, Fetherston confirmed the essential details of the Compliance Advisor's version.⁹⁰ He also explained that he characterized the investment as a fixed investment "because putting money in a checking account or a savings account is a fixed investment."⁹¹ Even so, Fetherston admitted not telling the Compliance Advisor that he had deposited the funds into his own checking account.⁹²

In sum, the Compliance Advisor testified that at no time did Fetherston tell him that: (1) the purpose of the funds was other than for a fixed investment; (2) the Gs gifted or loaned him the funds for personal use or to pay medical expenses; or (3) the Gs had signed a document relating to the \$89,000 they gave him.⁹³

D. FINRA Investigates the Gs' Accusations

On March 5, 2020, Principal filed a Form U5 (Uniform Termination Notice for Securities Industry Registration) with FINRA disclosing the reason it terminated Fetherston. According to the Form U5, the Gs complained orally that "they provided multiple checks made payable directly to the representative for what he said were for commissions and investments" and that Principal had settled the complaint for \$89,000.⁹⁴ This filing triggered an investigation by FINRA into whether Fetherston had misappropriated the Gs' funds.⁹⁵

1. FINRA Interviews the Gs

a. The March 19, 2020 Interview

Building on Principal's efforts, FINRA staff interviewed the Gs several times. Over the course of several interviews, the Gs told the staff largely the same story they had told the

⁸⁷ Tr. 142–43.

⁸⁸ Tr. 143–44.

⁸⁹ Tr. 144.

⁹⁰ Tr. 499–500, 503–05, 682–84.

⁹¹ Tr. 683.

⁹² Tr. 717–18.

⁹³ Tr. 95–97, 192–93.

⁹⁴ CX-1, at 21.

⁹⁵ Tr. 210, 409–10. The investigation led to the filing of this disciplinary proceeding. Tr. 409–10.

Compliance Advisor. On March 19, 2020, a FINRA investigator (“Investigator 1”)⁹⁶ interviewed the Gs by telephone. Afterward, she created an undated memorandum summarizing what the Gs told her and placed it in the investigative file.⁹⁷ The memorandum largely matches the story the Gs told the Compliance Advisor a few weeks earlier but includes more details. The memorandum reflects that the Gs told Investigator 1 the following: WG was 56 years old and a business analyst but was no longer working because he had Parkinson’s disease, which led to several related brain surgeries. His wife, SG, 58 years old and a creative therapist, had taken a leave of absence to care for him. The Gs were relying on their investments to subsidize their income to pay living expenses. They said they met Fetherston through a close friend many years earlier and since then he had been in frequent contact with them by telephone and in person.

According to the memorandum, Fetherston, who had requested that the Gs make the checks payable to him, picked the checks up from their home and did not give them a receipt. The Gs told Investigator 1 that they could not remember any specific details about the purpose of the checks. They said they learned that Fetherston did not invest their money when Principal contacted them about the mutual fund switching in their account. The Gs did not take Fetherston’s telephone calls after they learned about what the memorandum termed “the misappropriation.” When Fetherston later showed up at their house twice, they did not answer the door. The Gs, who claimed they felt threatened by Fetherston, emailed him around February 27, 2020, advising him not to contact them by telephone or in person at their home. Finally, the memorandum states, the Gs were pleased with how Principal handled Fetherston’s misconduct, that is, by fully reimbursing them for the fees incurred due to the exchanges and for the money they had given Fetherston.⁹⁸

b. FINRA Staff’s Later Interviews

In July 2021, FINRA assigned Investigator 2 to the investigation, replacing Investigator 1.⁹⁹ Over the next year, Investigator 2 spoke with the Gs four or five times by telephone; both WG and SG were present each time.¹⁰⁰ He testified that when he conducted telephonic interviews with the Gs, along with an Enforcement attorney, he took contemporaneous notes and then created a memorandum of the interview that day.¹⁰¹ Investigator 2 memorialized three interviews in three memoranda dated September 30, 2021;¹⁰² May 3, 2022;¹⁰³ and September 14,

⁹⁶ Tr. 208–09.

⁹⁷ Tr. 210–12, 229; CX-10.

⁹⁸ As of the hearing, the Gs were still customers of Principal. Tr. 173, 182.

⁹⁹ Tr. 204, 208, 625.

¹⁰⁰ Tr. 372–73.

¹⁰¹ Tr. 234–37.

¹⁰² CX-11.

¹⁰³ CX-12.

2022.¹⁰⁴ Investigator 2 said that when he first spoke to the Gs, he did not notice any mental deficiency issues or communication problems resulting from WG’s Parkinson’s disease.¹⁰⁵

The interview memoranda reflect the following:

i. The September 30, 2021 Interview

The Gs confirmed that they wrote the three checks in the amounts and on the dates reflected on them. As for the reason they wrote the checks, they said they believed the checks were to pay commissions Fetherston said they owed and for future investments. They added that at Fetherston’s suggestion, he came to their home and picked up each check so that they would not have to travel into New York City to drop them off. Further, they said that at the time they wrote the checks, WG was ill and ready to have brain surgery. As Investigator 2 specifically recalled during his testimony, the Gs told him that Fetherston picked up the checks at their home because WG was ill, and they made out the checks personally to Fetherston at his request.¹⁰⁶ They denied writing the Note or signing it. According to the memorandum, the Gs also said they did not know about Fetherston’s medical condition, and he never mentioned any health concerns to them.

Finally, the Gs discussed their purported fears about Fetherston. They said he came unannounced to their house in February or March 2020. They saw him through their intercom system and were afraid of what he might do to them, so they called the police. Since then, they have had no contact with Fetherston, his lawyer, or with any other regulators or criminal authorities. The Gs added that going forward, they would rather not get involved with Fetherston because they believed he has anger issues and were scared of him but said that they would be willing to speak with FINRA investigators “should further questions arise.”

ii. The May 3, 2022 Interview

During this interview, FINRA staff told the Gs that a formal complaint was going to be filed against Fetherston and also told them “about the possibility of a hearing proceeding against Fetherston and what that may entail.” The Gs reiterated, with only slight differences,¹⁰⁷ what they had told the staff in earlier interviews about their dealings with Fetherston, including that when they gave the three checks to Fetherston, he did not tell them exactly what investments he was going to purchase for them. They also emphasized that they remained afraid of what he may

¹⁰⁴ CX-13.

¹⁰⁵ Tr. 388.

¹⁰⁶ Tr. 276–77, 386–87.

¹⁰⁷ Two examples: according to the memorandum, they said that Fetherston told them that the money was for investment purposes, but they did not mention that he told them a part of the funds was to pay unpaid commissions they owed. They also referenced one but not two unannounced visits to their apartment, and fixed the month of the visit as February, rather than February or March.

do concerning this matter, although they again agreed to talk with FINRA staff if it had more questions.

The Gs conveyed new information as well. They said they did not have any contact with Fetherston after he left MML until they contacted him in 2019 when he joined Principal. They said they contacted him because they were unhappy with the MML advisor who took over their account after Fetherston left the firm. The Gs recalled that the only money they gave Fetherston was for investment purposes. Further, at the time they gave the \$89,000 to Fetherston, he would sometimes drop by their personal residence to pick up a check or have them sign documents. But his reason for stopping at their home was always for business purposes.

On a related point, according to the memorandum, the Gs said that before he joined Principal, they had a “strictly business” relationship with Fetherston, who provided “financial advice and services to them.” Continuing, the Gs said, “[a]t the time they wrote and provided the three checks to Fetherston they considered their relationship with Fetherston to be solely a friendly business relationship and [they] were never close personal friends.” For example, the Gs maintained that they never went to Fetherston’s house. They also added a detail about the Note: they said they first learned of its existence when the staff brought it to their attention during a prior call.

Finally, the memorandum reflects that the Gs said they learned that Fetherston was no longer associated with Principal when they received a communication in February 2020 regarding reimbursement of money from Principal, after which they contacted the firm and spoke with the Compliance Advisor.

iii. The September 14, 2022 Interview

At the September 14, 2022 interview, the Gs told FINRA staff that they would not testify at the hearing. They explained their reasons as follows: the Gs said they had googled his name and learned that he had been previously arrested for assault and intimidating a witness. According to the memorandum, “[i]t was for these reasons that they are afraid of Fetherston.” They went on to say that they did not trust him and while they did not necessarily “fear being in the same room as Fetherston,” they feared “he might try and take revenge and seek payback for their testimony.” They also cited his having “come to their home uninvited once while [WG] was in the hospital.” And they discussed other topics. The Gs said they could not recall who filled out the account opening forms for the Principal accounts.¹⁰⁸ Regarding the purchase of an annuity on November 4, 2019, they denied that the annuity application and corresponding support

¹⁰⁸ Fetherston admitted that he wrote the information on two of the new account forms using information he received from his meeting with the Gs. Tr. 470–72; CX-32; CX-33. He did not remember if he completed a third account form. Tr. 462; CX-30. And the record is silent about whether he filled out the new account form for the fourth account. CX-31.

paperwork were in their handwriting and, other than WG’s signature, they denied that their handwriting was on the check.

FINRA did not have jurisdiction over the Gs and therefore could not compel their testimony at a hearing.¹⁰⁹ So after the Gs declined to testify, FINRA staff contacted them to see if they would at least sign an affidavit and sent them a draft.¹¹⁰ The Gs did not immediately reject the request; they said they wanted to take some time to review the affidavit.¹¹¹ But on November 11, 2022, WG wrote to Enforcement saying that he had decided not to sign it. “The person in question is, to my mind at least, someone who is prone to rage, and quite capable of physical violence. He knows where I live and,” WG continued, “indeed has come to my home, uninvited, on two occasions. I simply cannot subject myself or my family to any further risk in this regard.”¹¹²

* * *

In addition to the above evidence FINRA staff gathered during its investigation, the staff also sought information and documents from Fetherston about his receipt and use of the funds from the three checks. Next, we turn to those attempts and what they yielded.

2. FINRA Obtains Testimony, Information, and Documents from Fetherston

FINRA staff took Fetherston’s OTR and sent him requests for documents and information. The requests, issued over the course of a year, consisted of at least three primary FINRA Rule 8210 request letters¹¹³ and four follow-up requests.¹¹⁴ FINRA staff sent the follow-up requests because Fetherston failed to respond, or respond completely, by the stated response deadlines. Each request, including the follow-up requests, notified Fetherston that failing to comply could result in sanctions including a bar from the securities industry. Several times he missed the deadlines without seeking an extension, prompting FINRA staff to notify him that as a result, he had violated FINRA Rule 8210.¹¹⁵

For months, Fetherston delayed responding to those requests focusing on his receipt and use of the funds from the three checks. When he finally responded to why the Gs gave him the funds—over five months after FINRA requested his explanation and related documents—he told

¹⁰⁹ Tr. 235, 242–43.

¹¹⁰ Tr. 241–44.

¹¹¹ Tr. 243–44, 373, 395–96.

¹¹² CX-77.

¹¹³ CX-40; CX-48, at 4–7; CX-56.

¹¹⁴ CX-43; CX-47; CX-49; CX-57.

¹¹⁵ CX-43, at 1; CX-47, at 3; CX-49, at 2; CX-57.

FINRA staff a different story than the one he had told the Compliance Advisor. For the first time, he said that the Gs voluntarily gave him the money to help him with overwhelming medical and other expenses.¹¹⁶ Even then, he made no mention that they had loaned him the funds. Three months later, his story changed yet again; he submitted the Note purportedly evidencing that the Gs had loaned him the funds.¹¹⁷ Ultimately, Fetherston provided all information and documents sought by the requests that are the subject of this proceeding with one exception: Based on his lawyer's objection that the information was privileged under federal and state law, Fetherston failed to provide information identifying the medical expenses he claimed to have paid with the funds.

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

On March 31, 2020, Investigator 1 sent a letter to Fetherston under FINRA Rule 8210 requesting information and documents about the Gs and related subjects. The letter contained 30 requests (including subparts) seeking: (1) information about the three checks Fetherston received from the Gs, including a description of the purpose of each check; (2) a "copy of any written document (i.e. receipt, statement, or confirmation) evidencing the purpose of each check";¹¹⁸ (3) information and documents regarding his personal bank accounts, including bank statements;¹¹⁹ (4) information about Fetherston's termination from Principal; and (5) information regarding mutual fund transactions involving several of his customers, including the Gs. The requested information and documents were due by April 14, 2020.¹²⁰

After receiving extensions until May 29, 2020,¹²¹ Fetherston did not respond to the March 31 request until June 1, 2020.¹²² His response addressed the requests seeking information about his termination and the mutual fund transactions. And he provided some information about, among other things, his relationship with the Gs. For example, he said he knew the Gs "on and off for about 8 years as a client and a friend";¹²³ he spoke with WG about once a month and met with him quarterly; he noted that WG's "health situation was constantly in flux"; and he stated that WG was considering either remodeling a home or buying an apartment for his daughter.¹²⁴ Fetherston also wrote that the Gs worried about "future market uncertainty (client had considerable gains in his portfolio up to that point) and the need for future guaranteed

¹¹⁶ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹¹⁷ CX-8.

¹¹⁸ CX-40, at 3.

¹¹⁹ CX-40, at 3-4.

¹²⁰ CX-40, at 1.

¹²¹ CX-47, at 4; CX-43, at 1.

¹²² CX-42.

¹²³ CX-42, at 1.

¹²⁴ CX-42, at 1.

income for increasing ongoing housing and living expenses for his new home that he recently purchased a few months earlier.”¹²⁵

Fetherston’s response, however, had two glaring deficiencies: he did not respond to the request asking him to explain why the Gs provided him with the three checks,¹²⁶ and he did not provide his bank statements and related information. Fetherston explained, without providing any support, that he lacked access to the client files because Principal had retained his files, and he was unable to retrieve them due to the ongoing COVID-19 lockdown in New York City. He said, again without any support, that he also could not access “personal notes and bank account questioned.”¹²⁷ As a result, Fetherston continued, he was “unable to proceed with this question with any degree of certainty” but would respond after he “had a chance to review the files, notes and bank account in question.”¹²⁸ Notably, he did not tell FINRA staff that the checks were a gift or a loan or were to help him pay his medical and other expenses. And he neither produced the Note nor mentioned its existence.¹²⁹

On June 10, 2020, Investigator 1 sent Fetherston a letter informing him that he had violated FINRA Rule 8210 by failing to respond fully to the March 31, 2020 request despite receiving extensions to May 29, 2020. The letter contained a second request under FINRA Rule 8210 for the remaining information previously requested and set a response deadline of June 24, 2020.¹³⁰ Still, Fetherston did not respond fully to the March 31 request by that date.

On September 1, 2020, Enforcement counsel sent Fetherston a third request under FINRA Rule 8210 for the outstanding documents and information sought by the March 31, 2020 request.¹³¹ This request reminded Fetherston that the requested information and documents were originally due on April 14, 2020; that FINRA staff had granted him extensions to May 29; that he had failed to respond to certain items; that FINRA staff had sent him a second request for the outstanding items; that the response to the second request was due by June 24; and that he had not responded or requested an extension of that date. As a result, FINRA staff once again told Fetherston that he had violated FINRA Rule 8210 and set a response date of September 10, 2020.¹³² The email transmitting the third request informed Fetherston that “[b]ecause these

¹²⁵ CX-42, at 1.

¹²⁶ CX-40, at 3–4.

¹²⁷ CX-42, at 1–3.

¹²⁸ CX-42, at 3.

¹²⁹ Tr. 517–19.

¹³⁰ CX-43, at 1.

¹³¹ CX-47, at 3.

¹³² CX-47, at 3.

requests have been outstanding since March 31,” Enforcement would not grant him any further extensions.¹³³

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

On September 10, 2020, Fetherston responded to the outstanding information and document requests made on March 31, 2020.¹³⁴ Fetherston stated in his response that he was providing “supporting documentation to the best of [his] ability given [his] current health situation.” Without explaining the specifics of his health situation or providing supporting documentation, Fetherston added that it was “very hard” for him “to concentrate so” FINRA should “let him know if [he] omitted anything.”¹³⁵

In his response, Fetherston provided a version of events about the three checks that was entirely different from the one he told the Compliance Advisor in February 2020. He did not say that he placed the funds in a fixed investment. Instead, Fetherston denied requesting the checks from the Gs. He explained that he and the Gs “were very close” and he had many conversations with them. During those conversations, he had “shared with them [his] health issues and financial concerns and they were kind enough to offer help in a serious time of need.” Further, Fetherston wrote that the Gs “were sympathetic to [his] situation and offered to assist. They believed it was suitable and meant to help [him] in a sincere way.” In Fetherston’s view, he was “getting help from friends that [he] had helped many times over in the past.”¹³⁶ He stated that the “[t]he purpose of each check was the same: help me to pay off my medical bills and expenses that were overwhelming.”¹³⁷

This was the first time Fetherston had told FINRA staff that the Gs voluntarily gave him the \$89,000 to help him pay overwhelming expenses.¹³⁸ Under the applicable provisions in Principal’s manual in effect at the relevant time, registered representatives were prohibited from accepting a check made payable to them from customers unless it was a gift from an immediate family member.¹³⁹ As discussed above, the March 31, 2020 request required him to both “[d]escribe the purpose of each check” and “provide a copy of any written document (i.e. receipt, statement, or confirmation) evidencing the purpose of each check.”¹⁴⁰ Fetherston’s response,

¹³³ CX-48, at 2.

¹³⁴ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹³⁵ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹³⁶ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹³⁷ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹³⁸ Tr. 298–99, 531, 544–45.

¹³⁹ CX-14; Tr. 136–37.

¹⁴⁰ CX-40, at 3.

however, did not disclose the existence of the Note, and he did not produce it to FINRA staff.¹⁴¹ Nor did he mention that he received the funds as a loan.

Fetherston's response went on to say—without support—that the Gs “had multiple sources of income and assets” and that when they gave him the checks, “their liquidity was excellent and their needs were much lower than previously expected.” In conclusion, Fetherston denied “intentionally trying to violate firm and regulatory policies” and maintained that his “intentions were not nefarious.” But he did concede that his conduct showed “a complete lack of judgement on [his] part,” which he blamed on his “difficult circumstances,” again without elaborating on the details of those circumstances or providing any supporting documentation of them.¹⁴²

Fetherston also provided the requested financial information and documents. He identified a Chase Bank account in his name where he claimed he deposited the three checks;¹⁴³ identified the existence of another account at HSBC Bank held jointly with his wife;¹⁴⁴ and provided copies of requested bank account statements. Responding to the request that he “[p]rovide documentation regarding the eventual disposition of the funds,” he wrote: “Bank records are attached and proceeds used to pay medical bills, etc during a hardship.”¹⁴⁵

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

The next month, on October 15, 2020, Enforcement issued another FINRA Rule 8210 letter to Fetherston. This one contained six itemized requests for documents and information, five of which related to his dealings with the Gs and sought (1) all documents supporting Fetherston's response that the Gs voluntarily gave him funds to help him with his financial difficulties and (2) all communications between him and the Gs during a specified period. The request set a response deadline of October 30, 2020.¹⁴⁶

Fetherston did not respond by the deadline. As a result, on November 4, 2020, Enforcement issued a second request under FINRA Rule 8210 for the requested documents and information. The second request notified Fetherston that he had violated FINRA Rule 8210 because he had neither responded to the October 15, 2020 request nor sought an extension.¹⁴⁷

¹⁴¹ Tr. 531–32.

¹⁴² CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹⁴³ Tr. 332–33, 496–98, 537; CX-61, at 1, 10, 18, 22.

¹⁴⁴ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹⁴⁵ CX-7, at 1; CX-48, at 1; CX-61, at 1.

¹⁴⁶ CX-48, at 4.

¹⁴⁷ CX-49, at 2.

The request set a response deadline of November 19, 2020.¹⁴⁸ Fetherston did not respond by that deadline.

d. Fetherston’s Response to the October 15, 2020 Request

On December 8, 2020, Fetherston emailed his response to the October 15, 2020 request.¹⁴⁹ His email attached what he represented were all the documents and communications between him and the Gs. He also wrote that between August and December 2019, he had six conversations with the Gs about his “personal needs and situation. Some of those were via phone, some were in my office and some were at their home.” In each conversation, according to Fetherston, he discussed his “situation” with the Gs “in detail and they were sympathetic and willing to help. They wanted to assist me, and I am grateful for their help as a friend.”¹⁵⁰

Fetherston also attached to his December 8, 2020 response a handwritten note dated December 3, 2019, on Principal Financial Group stationary. The Note, which purportedly memorialized the arrangements between the Gs and Fetherston regarding the three checks, stated in its entirety:

For Recordkeeping — We have given Peter Fetherston a total of 3 checks equaling \$89,000.00 to help pay his medical expenses and associated costs. He has been a tremendous help to us and we want to help him. This can be repaid in some fashion at a later date to be determined but we are flexible and will contact him when ready. Thank you.¹⁵¹

Appearing at the bottom of the Note are the Gs’ handwritten names, above which are their purported signatures.¹⁵² This production was the first time Fetherston notified FINRA of the Note’s existence,¹⁵³ even though it was responsive to all prior FINRA Rule 8210 requests,

¹⁴⁸ CX-49, at 2.

¹⁴⁹ CX-8.

¹⁵⁰ CX-8, at 1.

¹⁵¹ CX-8, at 3.

¹⁵² CX-8, at 3.

¹⁵³ Tr. 303–04, 579–80, 716; CX-8, at 3.

including the March 31, 2020 request.¹⁵⁴ Principal’s policy at the time prohibited borrowing from customers (unless from an immediate family member) or converting customer funds.¹⁵⁵

e. Fetherston’s OTR, the March 29, 2021 Request, and Follow-up Request

On March 9, 2021, Fetherston emailed to FINRA staff certain credit card statements for Fetherston.¹⁵⁶ Two days later, on March 11, 2021, FINRA staff conducted an OTR of Fetherston.¹⁵⁷ At the OTR, FINRA staff questioned him about, among other things, the circumstances surrounding his receipt of the three checks and the preparation of the Note.¹⁵⁸ On March 29, 2021, Enforcement sent Fetherston, in care of his attorney, a FINRA Rule 8210 request directing him to produce copies of certain other credit card statements and to “[i]dentify the medical expenses [he] paid with the proceeds of the three checks from the [Gs] by dollar amount, date, and method of payment.”¹⁵⁹ The response was due by April 16, 2021.

When Fetherston neither responded by the deadline nor requested an extension, Enforcement sent him a second request under FINRA Rule 8210 on April 19, 2021.¹⁶⁰ The second request notified Fetherston that he violated FINRA Rule 8210 by failing to respond and set a deadline of May 3, 2021 for his response.

f. Fetherston’s Response to the March 29, 2021 Request

On May 3, Fetherston’s attorney emailed Enforcement and explained Fetherston’s efforts to respond to the request for the credit card statements. The next day, May 4, Enforcement counsel replied, reminding the attorney that Fetherston had still not identified the medical expenses he paid with the proceeds of checks.¹⁶¹ Enforcement’s email triggered a quick reply: “I thought that we had made our position clear,” he wrote later that day, adding: “we consider such information to be privileged under both New York State and Federal law” and “we have never

¹⁵⁴ Tr. 304; CX-40, at 3. Additionally, “[b]orrowing from customers is regulated by FINRA Rule 3240.” *Dep’t of Enforcement v. North Woodward Fin. Corp.*, No. 2011028502101, 2016 FINRA Discip. LEXIS 35, at *16 n.17 (NAC July 19, 2016). “Absent specified conditions,” that rule “generally prohibits a person associated with a FINRA member from borrowing money from a customer.” *Dep’t of Enforcement v. Morton*, No. 2016052347901, 2019 FINRA Discip. LEXIS 19, at *45 n.54 (NAC May 15, 2019). Enforcement did not charge Fetherston with violating FINRA Rule 3240.

¹⁵⁵ CX-14; Tr. 137–38.

¹⁵⁶ CX-63; CX-64.

¹⁵⁷ Tr. 439–40.

¹⁵⁸ Enforcement read portions of the OTR into the record at the hearing. *See, e.g.*, Tr. 573–74, 576–78, 581–82, 584–86, 592–98, 600–01. We treat those excerpts as substantive evidence. Tr. 447–50.

¹⁵⁹ CX-56.

¹⁶⁰ CX-57.

¹⁶¹ CX-58, at 1.

waived such privilege.”¹⁶² To support this assertion, Fetherston’s attorney cited New York State’s physician/patient privilege provision—New York Civil Practice Law and Rules, Section 4504 (“CPLR 4504”)—and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Section 264.¹⁶³

The next month, on June 23, 2021, Fetherston produced his credit card statements, among other things.¹⁶⁴ But he never identified “the medical expenses [he] paid with the proceeds of the three checks from the [Gs] by dollar amount, date, and method of payment.”¹⁶⁵

E. Fetherston Testifies About His Version of Events

Fetherston testified at the hearing and gave his version of events. It largely mirrored his responses to FINRA’s Rule 8210 requests and his OTR testimony. His account contradicted the Gs’ story in material respects. First, while the Gs described their relationship with Fetherston as strictly business, he painted a different picture. According to Fetherston, he had socialized with the Gs before they became his customers. Afterward, when he was associated with MetLife, Fetherston had seen them many times outside of business, and they became his friends.¹⁶⁶ He testified that from 2011 to 2017, he had been to their home six or ten times, socialized with WG outside the office, and, along with his wife, often had dinner with the Gs.¹⁶⁷ Fetherston also said he frequently met their daughter when she was younger.¹⁶⁸

Second, Fetherston’s explanation of how the Gs came to give him the funds conflicted with what the Gs told the Compliance Advisor and FINRA staff. Fetherston denied telling the Gs that he would use their funds to pay commissions they owed him and to make investments on their behalf.¹⁶⁹ He said that when he received the checks, he was experiencing financial difficulties, part of which was credit card debt he was carrying.¹⁷⁰ But, Fetherston said, he did not directly or indirectly ask the Gs for money.¹⁷¹ Rather, he had many conversations with them about his medical and financial hardships, and they volunteered to help him financially.¹⁷²

¹⁶² CX-58, at 3.

¹⁶³ CX-58, at 3, citing Pub.L. No. 104-191, § 264, 110 Stat.1936.

¹⁶⁴ CX-65; Tr. 607–08.

¹⁶⁵ Tr. 608–09; CX-56, at 2.

¹⁶⁶ Tr. 640.

¹⁶⁷ Tr. 648–50.

¹⁶⁸ Tr. 649.

¹⁶⁹ Tr. 528.

¹⁷⁰ Tr. 535–36.

¹⁷¹ Tr. 703.

¹⁷² Tr. 703, 671–72.

He then explained the details of the arrangement regarding the funds. Fetherston characterized it as “very loose,” recalling that he and the Gs did not specifically discuss whether the checks were a loan or a gift;¹⁷³ rather, his friends, the Gs, simply helped him out during his time of financial difficulty by giving him the money without any plan of repayment or a promissory note.¹⁷⁴ Indeed, he said the Gs did not request a promissory note from him and declined his offer to sign one.¹⁷⁵ While he viewed the funds as a gift from friends, it was understood based on his conversation with the Gs that he would repay them when his financial situation improved.¹⁷⁶ As far as how the amount of each check was determined, according to Fetherston, he and the Gs talked about the checks at length, and the amounts were determined by “what was going on and what they were sort of thinking would be appropriate . . . they did what they were comfortable doing.”¹⁷⁷ Fetherston maintained that he never received personal checks from the Gs other than the three checks at issue.¹⁷⁸

Third, Fetherston disputed the Gs’ claim that they first learned of his arrest by googling his name. According to Fetherston, before the Gs started investing with him at Principal, he met with them, told them about the criminal matter, informed them that it was all over the internet, and explained that it caused MML to fire him.¹⁷⁹

Fourth, Fetherston’s version of his last contact with the Gs differs from what they told FINRA staff. He denied visiting the Gs’ home unannounced in February or March 2020.¹⁸⁰ He recalled speaking with the Gs by phone on February 26, less than an hour after his call with the Compliance Advisor.¹⁸¹ Fetherston testified that SG did most of the talking and told him that she and her husband had received a \$26,000 check from Principal, which prompted their call to Principal.¹⁸² She then said, according to Fetherston, they thought he had always tried to do his best for them over the years and they appreciated it. But, she added, they did not “know what is going on here”; they were “just very confused”; and while they said they did not know if Fetherston was in trouble, they felt bad about the situation; they did not want to get involved in

¹⁷³ Tr. 590.

¹⁷⁴ Tr. 703–04.

¹⁷⁵ Tr. 590–91, 703–04.

¹⁷⁶ Tr. 589–91, 677–78.

¹⁷⁷ Tr. 783–84.

¹⁷⁸ Tr. 788.

¹⁷⁹ Tr. 665–67. The report of Fetherston’s criminal charges was posted on the internet. Tr. 429.

¹⁸⁰ Tr. 619–20.

¹⁸¹ Tr. 685–86.

¹⁸² Tr. 791–92.

things down the road; did not “want to be in any trouble”; and had been told not to speak with him further.¹⁸³

Fifth, Fetherston maintained that the Note was genuine, although he conceded that it is the only document memorializing his alleged understanding with the Gs regarding the checks or referencing any discussion he had with them about his medical issues.¹⁸⁴ Fetherston testified about its preparation. As for why the Note was written on the firm’s letterhead, he said he had firm letterhead at home and in his office and always carried it with him when he visited clients.¹⁸⁵ Fetherston further testified he and the Gs drafted the language together;¹⁸⁶ SG wrote the Note;¹⁸⁷ and he was with the Gs at their home when they signed it.¹⁸⁸ Fetherston did not recall if he wrote “for recordkeeping” on the Note. And he denied writing the Gs’ names or social security numbers at the bottom of it.¹⁸⁹ At his OTR, however, Fetherston testified that he was the one who “wrote their names at the bottom” and thought “he wrote the numbers” as well.¹⁹⁰

Fetherston also addressed why he did not disclose the Note’s existence to FINRA staff or produce it before December 8, 2020. He gave several confusing, contradictory explanations. “It is not my proudest moment,” he said, referring to his receipt of the checks from the Gs. “So when you’re humbled like this and you have to do these types of things, it is not something that I want to play out on speakers and let a lot of people know about it, and I was very upset about it.”¹⁹¹ As a result, he added, “I kind of held . . . on to it because of that and I was, you know, not ashamed but felt terribly about this and didn’t quite know what to do.”¹⁹²

Fetherston then gave a different reason later in his testimony for not producing or disclosing the Note earlier. He said that besides his customer files at Principal, he also kept his own files in a storage unit. In March 2020, when he received the FINRA Rule 8210 request seeking documents relating to the reason the Gs gave him the checks, he knew that the Note was in that storage unit. Fetherston claimed, however, without any support, that he had no access to his files because the unit was closed due to the COVID-19 pandemic.¹⁹³ As a result, according to

¹⁸³ Tr. 685–86, 790–92.

¹⁸⁴ Tr. 559–60, 705.

¹⁸⁵ Tr. 775.

¹⁸⁶ Tr. 579.

¹⁸⁷ Tr. 679.

¹⁸⁸ Tr. 679.

¹⁸⁹ Tr. 573.

¹⁹⁰ Tr. 574, 577–78.

¹⁹¹ Tr. 680–81.

¹⁹² Tr. 680–81.

¹⁹³ Tr. 540–41.

Fetherston, he “had difficulty getting those things that [he] needed.”¹⁹⁴ On top of that, he testified, he and his family had COVID-19, and it was a difficult time for him “both medically and with what was going on in the world.”¹⁹⁵ The reason he did not tell FINRA staff about the Note earlier, he claimed, was because he “didn’t know what to do” during this difficult time and was unsure if he made a conscious choice not to disclose it.¹⁹⁶

But later in his testimony, Fetherston changed his story yet again—this time recalling that during the early stages of the investigation, he was uncertain if the Note was in the storage facility. Fetherston stated that he did not keep track of what documents from his client files were in his house versus that facility, or whether the Note might have been in his office at Principal—left there after Principal terminated him.¹⁹⁷ He added that when the investigation started, he could not locate the Note in his house but did not know with certainty if it was in the storage unit.¹⁹⁸ Fetherston added, however, that he produced the Note once he found it.¹⁹⁹

III. Conclusions of Law

A. Jurisdiction

After Principal terminated Fetherston, he became registered as an Investment Company and Variable Contracts Products Representative and General Securities Representative with Aegis Capital Corp. on March 11, 2020.²⁰⁰ Two months later, on May 19, 2020, that firm discharged him for “job abandonment.”²⁰¹ Since then, Fetherston has not been registered with a FINRA member firm.²⁰²

Although he is no longer registered or associated with a FINRA member, Fetherston remains subject to FINRA’s jurisdiction for the purposes of this disciplinary proceeding because (1) FINRA filed the Complaint within two years after May 19, 2020, which was the effective date of termination of his registration with Aegis Capital Corp., and (2) the Complaint charges him with (a) misconduct committed while he was registered or associated with a FINRA member

¹⁹⁴ Tr. 711.

¹⁹⁵ Tr. 710–11.

¹⁹⁶ Tr. 711–13.

¹⁹⁷ Tr. 774–75.

¹⁹⁸ Tr. 774–75.

¹⁹⁹ Tr. 775–76.

²⁰⁰ Compl. ¶ 9; Ans. ¶ 9; CX-1, at 4.

²⁰¹ Compl. ¶ 9; Ans. ¶ 9; CX-1, at 4.

²⁰² Tr. 422; CX-1, at 4.

and (b) failing to respond to a FINRA request for information during the two-year period after the date on which he ceased to be registered or associated with a FINRA member.²⁰³

B. Burden and Standard of Proof

In a FINRA disciplinary proceeding, Enforcement has the burden of proof,²⁰⁴ which consists of two components: the burden of production and the burden of persuasion. The burden of production means that Enforcement must go forward with proof of its claims. The burden of persuasion is the burden of persuading the Panel.²⁰⁵ The standard of proof in a FINRA disciplinary proceeding is preponderance of the evidence. This is equivalent to a “more likely than not” standard.²⁰⁶ Put another way, “[t]he preponderance of the evidence standard requires the party with the burden of proof to support its position with the greater weight of the evidence.”²⁰⁷ Thus, “[i]f the evidence is evenly balanced, Enforcement has not met its burden under the preponderance of the evidence standard.”²⁰⁸

We do not, however, “simply weigh mechanically the probative evidence offered by Enforcement against” Fetherston.²⁰⁹ “Instead, we must make a judgment about the persuasiveness of the evidence presented and decide whether it is more likely than not” that Fetherston engaged in the violations charged.²¹⁰

C. Enforcement Failed to Prove that Fetherston Violated FINRA Rules 2150(a) and 2010 By Engaging in Conversion and Improper Use of Funds

The First Cause of Action charged Fetherston with converting and improperly using the Gs’ funds in violation of FINRA Rules 2150(a) and 2010.²¹¹ FINRA Rule 2150(a) provides that “[n]o member or person associated with a member shall make improper use of a customer’s securities or funds.” Misuse occurs when “[a] registered person . . . fails to apply the funds or

²⁰³ Article V, Section 4 of FINRA’s By-Laws. Fetherston asserted as an affirmative defense that FINRA no longer had jurisdiction over him. Ans. ¶ 66. But at the final pre-hearing conference, Fetherston, through counsel, withdrew that defense and conceded that the Complaint was timely filed. Final Pre-hearing Conference Tr. 19–21 (Apr. 3, 2023).

²⁰⁴ *Morton*, 2019 FINRA Discip. LEXIS 19, at *32.

²⁰⁵ *Id.* (citing *Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986)).

²⁰⁶ *Id.* at *33 (citing *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011)).

²⁰⁷ *Id.* (citing *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006)).

²⁰⁸ *Id.* at n.44 (citing *Lightning Lube v. Witco Corp.*, 802 F. Supp. 1180, 1186 (D.N.J. 1992) (“If the evidence is in equipoise, the burden has not been met.”)).

²⁰⁹ *Id.* at *33 (citing *Almerfed v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011)).

²¹⁰ *Id.* at *34 (citing *Almerfed v. Obama*, 654 F.3d at 5).

²¹¹ Compl. ¶¶ 11–29.

securities, or uses them for some purpose other than as directed by the customer.”²¹² Conversion consists of an “intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.”²¹³ “Improper use rises to the level of conversion when the associated person intends permanently to deprive the customer of the use of his funds or securities.”²¹⁴ “[A]n associated person’s intentional use of funds for unauthorized purposes constitutes conversion, even when the owner of the funds voluntarily granted the associated person some control over them.”²¹⁵

FINRA Rule 2010 requires “[a] member, in the conduct of its business,” to “observe high standards of commercial honor and just and equitable principles of trade.” This rule, which also applies to associated persons,²¹⁶ “prohibits conduct that may operate as an injustice to investors or other participants in the securities markets.”²¹⁷ Both the Securities and Exchange Commission (“SEC”) and the National Adjudicatory Council (“NAC”) have held repeatedly that conversion violates FINRA Rule 2010.²¹⁸ Also, “[a] violation of another FINRA rule is a violation of FINRA Rule 2010.”²¹⁹

The Gs declined to testify or provide an affidavit. As a result, the main evidence supporting their version of events were the oral statements they made to the Compliance Advisor and FINRA staff, which these interviewers then memorialized in memoranda. These memoranda—and the testimony from the Compliance Advisor and Investigator 2 about their conversations with the Gs—constitute hearsay.²²⁰

²¹² *Dep’t of Enforcement v. Taboada*, No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *35–36 (NAC July 24, 2017).

²¹³ *Dep’t of Enforcement v. Mellon*, No. 201705276000, 2022 FINRA Discip. LEXIS 11, at *17 (NAC Oct. 18, 2022) (quoting FINRA Sanction Guidelines (2021), at 36 & n.2).

²¹⁴ *Dep’t of Enforcement v. Mission Securities*, No. 2006003738501, 2010 FINRA Discip. LEXIS 44, at *17 (NAC Feb. 24, 2010) (citation omitted).

²¹⁵ *Michael Joseph Clarke*, Exchange Act Release No. 97860, 2023 SEC LEXIS 1756, at *22–23 (July 10, 2023); see also *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23–25 (Sept. 30, 2016) (holding that an associated person committed conversion by representing that he would invest funds, and funds were transferred for that purpose, but he instead used the funds to pay personal expenses).

²¹⁶ *Dep’t of Enforcement v. Saliba*, No. 2013037522501, 2019 FINRA Discip. LEXIS 1, at *45 n.11 (NAC Jan. 8, 2019) (holding that FINRA Rule 2010 applies to associated persons through FINRA Rule 0140(a), which provides that the rules “shall apply to all members and persons associated with a member” and that “[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules.”).

²¹⁷ *Mellon*, 2022 FINRA Discip. LEXIS 11, at *17.

²¹⁸ See, e.g., *Clarke*, 2023 SEC LEXIS 1756, at *22; *Mellon*, 2022 FINRA Discip. LEXIS 11, at *17.

²¹⁹ *Taboada*, 2017 FINRA Discip. LEXIS 29, at *35 n.17 (citing *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *26 (July 2, 2013)), *aff’d sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014)).

²²⁰ The formal rules of evidence do not apply in FINRA proceedings. See FINRA Rule 9145. But “FINRA adjudicators may look to the Federal Rules of Evidence for guidance.” *Dep’t of Enforcement v. North*, No.

Hearsay is permissible in FINRA disciplinary proceedings.²²¹ When considering whether to rely on hearsay evidence, we must evaluate its

probative value, reliability, and the fairness of its use. The factors to assess include any possible bias of the declarant; the type of hearsay at issue; whether the hearsay statements are signed and sworn to or anonymous, oral, or unsworn; whether direct testimony contradicts the hearsay statements; whether the declarant was available to testify; and whether the hearsay is corroborated.²²²

Here, certain factors favor reliance on the Gs' statements or are neutral. Their statements were probative of whether Fetherston engaged in the misconduct alleged by Enforcement.²²³ Also, the Gs were unavailable to testify, as it is undisputed that they declined to testify and FINRA had no jurisdiction to compel their testimony.²²⁴ It concerned the Panel somewhat when assessing the reliability of the statements, that while the Gs agreed to be interviewed by Principal and FINRA several times, they would not make their statements under oath when asked to do so by FINRA. On the other hand, we recognize that the Gs cooperated throughout the investigation even though they had been reimbursed by Principal and notwithstanding their professed fears of retaliation by Fetherston. And while Fetherston directly contradicted the Gs' statements, we did not find his testimony credible in many respects, we as we discuss below.

Other factors, however, weigh against reliance. While the Gs' statements to Principal and FINRA were largely consistent, they were, nonetheless, oral, unsworn, disputed by Fetherston, and uncorroborated. Enforcement presented no testimony or documents showing that Fetherston told the Gs he was going to invest their funds or that the Gs had given him the checks for that

2012030527503, 2017 FINRA Discip. LEXIS 28, at *8 n.5 (NAC Aug. 3, 2017). Hearsay is generally defined as a statement made by a declarant, other than a statement made while the declarant is testifying at the current hearing, that is offered to prove the truth of the matter asserted in the statement. *See* Fed. R. Evid. 801(c). Here, the Gs were the declarants. Enforcement offered their statements into evidence through the Compliance Advisor and Investigator 2 to prove the truth of the matters asserted in them.

²²¹ *Morton*, 2019 FINRA Discip. LEXIS 19, at *46.

²²² *Dep't of Enforcement v. McGuire*, No. 20110273503, 2015 FINRA Discip. LEXIS 53, at *23–24 (NAC Dec. 17, 2015) (citing *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *47 (Jan. 30, 2009)).

²²³ *See McGuire*, 2015 FINRA Discip. LEXIS 53, at *24 (finding “undoubtedly probative” the testimony of three witnesses, including a FINRA examiner, who testified about statements the victim of respondent’s alleged conversion made to them).

²²⁴ *Harry Gliksman*, Exchange Act Release No. 42255, 1999 SEC LEXIS 2685, at *15 n.17 (Dec. 20, 1999), *aff'd*, 24 F. App'x 702 (9th Cir. Nov. 26, 2001) (stating that because “NASD lacks subpoena power, it [cannot] compel a customer’s attendance,” and finding that NASD had made a sufficient showing that hearsay declarant, over whom NASD lacked jurisdiction, was unavailable because FINRA staff contacted her counsel who said that she did not wish to testify in person or by telephone). *See also Dep't of Enforcement v. Brookstone Secs. Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *115–17 (NAC Apr. 16, 2015) (finding that customers were unavailable due to physical and cognitive infirmities and the hearsay testimony of customers’ sons was probative because it related to the charges against respondents).

purpose. Further, Fetherston's statement to the Compliance Advisor that he invested the funds does not constitute corroboration of the Gs' story; Fetherston told the Compliance Advisor that he invested the funds but did not admit telling the Gs he would do so. Moreover, he quickly abandoned the story he told the Compliance Advisor and did not repeat it. Additionally, the hearsay statements were not written by the Gs in the form of, for example, a complaint letter or questionnaire responses. Rather, the statements consisted of oral communications they made to others, who then memorialized the statements and testified about them.

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

Besides these reliability issues, the weight we give to the Gs' statements is lessened for additional reasons. Their version of events, as communicated to the Compliance Advisor and FINRA, is questionable. The Gs maintained they gave Fetherston \$89,000 without knowing how he would invest their funds and without receiving any documentation of the purported investment then, or later. Yet, the Gs were not novice investors. WG was an analyst at a large financial institution and the Gs had several decades of investing experience that included multiple accounts at more than one firm. And there is no evidence they ever gave Fetherston—or any other broker—discretionary trading authority over an account. Also, there is no evidence the Gs ever bought any investment, at any time, at any firm, by writing a personal check payable to a broker. Additionally, they apparently never asked any questions or raised any concerns with Fetherston or Principal about the disposition of their funds until they received a reimbursement check from Principal stemming from purported misconduct by Fetherston. Finally, the statements' credibility was undermined by the Gs' unlikely claim to the Compliance Advisor that they did not know if they had ever given money directly to Fetherston before he joined Principal.

Another impediment to accepting the Gs' account as true is that their statements (and the other evidence in the case) left many important questions unanswered. For example, (1) did the Gs review their monthly statements or confirmations from Principal, in which case they would have seen that Fetherston had not invested their funds through the firm;²²⁵ (2) did they ever question Fetherston about why he wanted the checks made out to him personally, rather than to Principal; (3) did WG's medical condition, or any medication he may have been taking for his illness, affect his memory—either when he gave Fetherston the checks or when he later related

²²⁵ Tr. 172, 179–80. The Compliance Advisor testified that the Gs would have received statements and confirmations with each transaction and that if Fetherston had made an investment for them through Principal, it would have appeared on the account statements. Tr. 170–71, 180.

events to the Compliance Advisor and FINRA staff; (4) if they told Investigator 1 that they could not remember the specifics about the reason they gave Fetherston the checks (and learned that Fetherston did not invest their money when Principal contacted them about the mutual fund improprieties), why did they later remember that the reason they gave him the checks was for commissions and to purchase an investment; (5) was giving checks payable to Fetherston inconsistent with how the Gs usually bought investments, and if so, why did they purportedly do it here; (6) how did the Gs pay for investments at other firms, that is, did they make payments to their broker or to the firm; (7) why did the Gs apparently never ask Fetherston for evidence that he had invested their funds; (8) did the Gs generally follow Fetherston's investment advice, and what kinds of instruments did they invest in; and (9) why did the Gs write a check payable to Fetherston purportedly for an investment yet, on the same day, purchase an annuity by writing a check to Principal Life Insurance rather than to him?

Without answers to these questions, the Gs' statements lacked the context necessary for us to evaluate fully their version of events.²²⁶ Because they did not testify, the parties and the Panel could not probe for the sorts of details, missing from their statements, that might have convinced us that Fetherston had converted their funds.²²⁷ Thus, we are unable to accept the Gs' version.

This does not mean, however, that we accept Fetherston's account of events. As counsel for the parties correctly said at the hearing, we are not required to credit one version over the other.²²⁸ Instead, the Panel can decide not to accept either version, which is what we do here.²²⁹ We are not persuaded by Fetherston's story for several reasons.

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

²²⁶ Cf. *Dep't of Enforcement v. Niekraas*, No. 2013037401001, 2018 FINRA Discip. LEXIS 25, at *2, 27 (NAC Oct. 4, 2018) (finding that Enforcement failed to prove its case because without testimony from certain witnesses, notably the customers, the NAC lacked the context necessary to evaluate the materiality of the respondent's representations in documents and in his discussions with the customers).

²²⁷ See *Dep't of Enforcement v. Puma*, No. C10000122, 2003 NASD Discip. LEXIS 22, at *17 (NAC Aug. 11, 2003) (declining to reverse the hearing panel's credibility determination where it found that because the customers did not appear at the hearing, "the parties and Panel were unable to probe for the sorts of details, missing from the customers' complaints and declarations, that might have convinced the Panel that the trades in question were, in fact, unauthorized.").

²²⁸ Tr. 889–93.

²²⁹ Cf. *United States v. Messina*, 806 F.3d 55, 64 (2d Cir. 2015) ("The law affords a factfinder considerable discretion in resolving evidentiary inconsistencies. Inconsistency may prompt a factfinder to reject both versions of an account").

support his statement in response to a FINRA Rule 8210 request that he used some of the funds to pay medical expenses.²³⁰ All of this undermined his credibility.²³¹

Second, we are not convinced that shortly after resuming their business relationship with Fetherston, the Gs would give him an unsecured loan amounting to three quarters of their yearly income, even taking into account that they had a net worth of several million dollars and assuming, according to Fetherston, that they were expecting an inheritance of about two hundred thousand dollars. We find it doubtful that without a close personal relationship with Fetherston, the Gs would provide him such a large amount of funds without a promissory note from him, with no clear terms of repayment, and no corroboration of the arrangement other than the Note, which Fetherston did not sign. For example, there were no text messages, emails, or witness testimony evidencing the existence of the arrangement. Fetherston's story might have some plausibility if he and the Gs had a close personal relationship, as he claimed. But the only evidence of this purported friendship is Fetherston's self-serving, uncorroborated testimony, which we find unpersuasive.

Third, further undercutting Fetherston's account is that at the time the Gs gave him the three checks, WG was (1) worried about how his serious health problems could impact his finances;²³² (2) on a leave of absence from his job; (3) worried about his daughter's health and was considering purchasing a new home for her; and (4) concerned about "future market uncertainty" and needed "future guaranteed income for increasing ongoing housing and living expenses for [WG's] new home that he recently purchased a few months earlier."²³³ According to Fetherston's testimony, WG's "health would go up and down, and he was going to do some experimental brain surgeries, that type of stuff. But there were assets that were going to them down the road. They just didn't know when."²³⁴ Fetherston's statement that WG anticipated a financial windfall is much like what he told Principal when it investigated his mutual fund activities. There is no evidence, however, that the Gs ever received this purported expectancy. We do not credit Fetherston's uncorroborated, self-serving testimony in light of our finding that he was not a generally credible witness.

Finally, while the Note, if authentic, would have corroborated Fetherston's story, the evidence made its legitimacy suspect. There are no written communications between Fetherston and the Gs referencing the Note. Moreover, Fetherston waited to tell FINRA staff about its

²³⁰ See *infra* page 48.

²³¹ The credibility of the Compliance Advisor and Investigator 2 was not at issue in this case. Even so, these witnesses were generally credible, and the evidence did not provide a basis to discount the accuracy of their testimony or their interview notes. They answered questions directly and candidly; their testimony was not contradicted in material respects by other credible evidence; and it was not discredited or called into question as a result of cross-examination.

²³² Tr. 492.

²³³ Tr. 493–94; CX-42, at 1.

²³⁴ Tr. 674.

existence until eight months after he was required to produce such a document. Given the Note's importance to the issue of why the Gs gave Fetherston the three checks, it is likely he would have produced it—or at least notified FINRA staff about it—when he first told his version of events to them on September 10, 2020. Instead, he waited until December 8 to do so. Finally, the Note is dated December 3, 2019, and this is suspicious. It coincides with the date on which the Gs gave Fetherston the last check. Yet, Fetherston never testified that at the time they gave him that check, he and they intended it to be the last check he would receive. This indicates the Note may have been written afterward and backdated at a time when Fetherston knew he received no additional checks. Accordingly, we did not accept Fetherston's version of events.

Nevertheless, the evidence fell short of proving Fetherston fabricated the Note. Fetherston testified under oath that it was genuine, while the Gs contradicted that testimony in their oral, unsworn statements to FINRA. Significantly, neither Enforcement nor Fetherston presented expert testimony about its authenticity. FINRA did not submit the Note to a handwriting expert for examination.²³⁵ Investigator 2 explained why: “number one, we did not have the original note, and number two . . . we believed what [the Gs] were telling us.”²³⁶ Investigator 2 then said that Enforcement only had a copy of the Note because that is what Fetherston produced. And, according to Investigator 2, while Fetherston would have had the original Note, Enforcement did not ask him to produce it.²³⁷ Ultimately, the evidence on the Note's legitimacy is inconclusive.

* * *

To prove that Fetherston converted or made an improper use of the Gs' funds, Enforcement had to show that Fetherston acted contrary to the Gs' instructions and permanently deprived them of their funds. Enforcement's case, however, rested on the Gs' uncorroborated, unsworn, disputed, oral statements that presented a doubtful story leaving many open questions. The NAC has recognized that “unsworn declarations of customers who have not testified, although hearsay, are admissible and can be reliable and probative if corroborated by other evidence.” But, the NAC continued, when there was “no circumstantial or direct evidence in the record to corroborate” a customer's statement, it found insufficient evidence to conclude that the respondent misled a customer.²³⁸ Likewise here, there was no circumstantial or direct evidence in the record corroborating the Gs' statements.

²³⁵ Tr. 370.

²³⁶ Tr. 370–71.

²³⁷ Tr. 399.

²³⁸ *Dep't of Enforcement v. Galasso*, No. C10970145, 2001 NASD Discip. LEXIS 2, at *61–62 (NAC Feb. 5, 2001), *rev'd, in part, on other grounds, sub nom. John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153 (Jan. 22, 2003); *cf. Dep't of Enforcement v. Stein*, No. C07000003, 2001 NASD LEXIS 38, at *2 n.3 (NAC Dec. 3, 2001) (concluding that hearsay statements were not reliable or probative because (1) the examiner's affidavit was second-hand hearsay, since it discussed details of the examiner's conversations with the customer; (2) the customer did not testify, so the respondent was unable to explore whether the customer might have been biased

Accordingly, we conclude that Enforcement failed to prove, by a preponderance of the evidence, that Fetherston violated FINRA Rules 2150(a) and 2010 as alleged in the First Cause of Action.

D. Enforcement Failed to Prove that Fetherston Violated FINRA Rules 8210 and 2010 By Providing False or Misleading Information, Documents, and Testimony to FINRA Staff

The Second Cause of Action charges Fetherston with violating FINRA Rules 8210 and 2010 in several ways. First, the Complaint alleges that he responded falsely on September 10, 2020, to a FINRA Rule 8210 request by (1) denying that he requested checks from the Gs and (2) stating that he shared his medical problems with them, after which they gave him the checks to help him pay off his medical bills and other expenses.²³⁹ Second, according to the Complaint, Fetherston submitted a fabricated document (the Note) to FINRA staff on December 8, 2020, in response to a FINRA Rule 8210 request.²⁴⁰ And, finally, Fetherston is charged with providing false testimony to FINRA at his March 11, 2021 OTR. The Complaint alleges that during the OTR, he falsely denied requesting the checks from the Gs, asserting, instead, that they gave him the checks voluntarily. Enforcement also claims that Fetherston falsely stated that SG prepared the Note and that both she and her husband signed it.²⁴¹

FINRA Rule 8210(a)(1) authorizes FINRA staff to “require a . . . person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation” FINRA Rule 8210(a)(2) gives FINRA staff “the right to . . . inspect and copy the books, records, and accounts” of any member or associated person “with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member’s or person’s possession, custody, or control.” Under FINRA Rule 8210(c), “no . . . person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.” A violation of any FINRA rule, including FINRA Rule 8210, is also a violation of FINRA Rule 2010.²⁴² Providing false or misleading information in response to a FINRA Rule 8210 request violates both FINRA Rules 8210 and 2010.²⁴³

against the respondent; (3) the customer’s statements (as communicated in the examiner’s affidavit) were contradicted by respondent’s sworn on-the-record testimony; (4) and there was little other reliable evidence to corroborate the customer’s statements).

²³⁹ Compl. ¶¶ 41–42.

²⁴⁰ Compl. ¶¶ 45–47.

²⁴¹ Compl. ¶¶ 48–50.

²⁴² *Mellon*, 2022 FINRA Discip. LEXIS 11, at *23 (citing *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23–24 (Aug. 22, 2008)).

²⁴³ *Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *5 (July 17, 2019).

Both the SEC and FINRA have repeatedly stressed the importance of FINRA Rule 8210. According to the SEC, the Rule is “at the heart of the self-regulatory system for the securities industry.”²⁴⁴ And compliance with it is “essential to enable [FINRA] to execute its self-regulatory functions.”²⁴⁵ Similarly, the NAC explained that “[b]ecause FINRA does not have subpoena power, it ‘must rely on Rule 8210 to obtain information . . . necessary to carry out its investigations and fulfill its regulatory mandate.’”²⁴⁶ Indeed, it “is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct.”²⁴⁷

Our legal conclusions relating to the FINRA Rule 8210 and 2010 charges in the Second Cause of Action stem from our factual findings and legal conclusions regarding the First Cause of Action. As discussed above, we find that Enforcement failed to prove by a preponderance of the evidence that Fetherston converted or improperly used the \$89,000 the Gs gave him, as alleged in the First Cause of Action. Nor did Enforcement prove that Fetherston lied about who drafted the Note, or that the Note was fabricated. For those reasons, we find that FINRA did not establish by a preponderance of the evidence the violations charged in the Second Cause of Action.

E. Fetherston Violated FINRA Rules 8210 and 2010 by Failing to Respond to a Written Request for Information

The Third Cause of Action charges Fetherston with not responding to a FINRA Rule 8210 request asking him to identify and provide certain information about the medical expenses he purportedly paid with the funds from the three checks. Enforcement alleges that on March 29, 2021, it issued the request “[t]o determine the veracity of Fetherston’s claim that he used the \$89,000 to pay for his medical expenses.”²⁴⁸ The parties do not dispute that Fetherston received the request and failed to respond to it. Fetherston justifies his failure to comply on several grounds, which we address and reject below.

²⁴⁴ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *petition for review denied*, 347 F. App’x 692 (2d Cir. 2009).

²⁴⁵ See *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008).

²⁴⁶ *Mellon*, 2022 FINRA Discip. LEXIS 11, at *23 (quoting *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009)).

²⁴⁷ *Dep’t of Enforcement v. Lundgren*, No. FPI150009, 2016 FINRA Discip. LEXIS 2, at *13–14 (NAC Feb. 18, 2016) (quoting *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 n.46 (Sept. 24, 2015)).

²⁴⁸ Compl. ¶ 55.

1. Fetherston’s Relevance/Materiality Defense Fails

Fetherston maintains that the requested information was irrelevant and immaterial to FINRA’s investigation into whether he violated FINRA rules or the federal securities laws.²⁴⁹ This argument fails. “[T]he language of Rule 8210 is ‘unequivocal’ regarding an associated person’s responsibility to comply with FINRA’s requests for information.”²⁵⁰ Responses must be full, complete, and truthful.²⁵¹ “[A]ssociated persons ‘may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to [a FINRA] investigation of their conduct.’”²⁵² They may not “second-guess whether compliance with a particular request is necessary,”²⁵³ or condition their compliance or question whether FINRA needs the requested information.²⁵⁴ Moreover, whether information and documents are needed in an investigation “is a determination made by the [FINRA] staff” and FINRA Rule 8210 “does not require that [FINRA] explain its reasons for making the information request or justify the relevance of any particular request.”²⁵⁵

2. Fetherston’s Privilege Defenses Fail

Fetherston argues—as he did during the investigation—that the request sought confidential medical information that was privileged and shielded from disclosure under HIPAA and New York State law.²⁵⁶ We considered these privilege claims and find them meritless. We begin with the HIPAA-based privilege defense.

HIPPA is the primary federal law which was passed to ensure an individual’s right to privacy over medical records. It governs the confidentiality of medical records and regulates how and under what circumstances “covered entities” may use or disclose “protected health information” about an individual. The term “covered entities” is defined to include health care plans, health care clearinghouses

²⁴⁹ Tr. 28–29, 816–17; Fetherston’s Post-Hr’g Br. 3–5, 10.

²⁵⁰ *Dep’t of Enforcement v. Reifler*, Exchange Act Release No. 94026, 2022 SEC LEXIS 167, at *13 n.16 (Jan. 21, 2022).

²⁵¹ *Taboada*, 2017 FINRA Discip. LEXIS 29, at *41–42.

²⁵² *Mielke*, 2015 SEC LEXIS 3927, at *54 n.48 (quoting *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *21).

²⁵³ *David K. Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *10 nn.18 & 19 (July 27, 2015) (citing *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *16 (Apr. 17, 2014)).

²⁵⁴ *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007), *petition denied*, 316 F. App’x 865 (11th Cir. 2008).

²⁵⁵ *Erenstein*, 2007 SEC LEXIS 2596, at *12–13; *Evansen*, 2015 SEC LEXIS 3080, at *32–33.

²⁵⁶ Tr. 29, 57, 875–76; Fetherston’s Post-Hr’g Br. 6–10 (addressing New York State physician/patient privilege law and affirming that Fetherston’s counsel continues to hold the position that the information requested “was privileged under federal and New York State law.”); *see also* Answer ¶ 68 (“The Department of Enforcement[’s] claims cannot be supported without the production of privileged material.”).

and health care providers. “Protected health information” includes all individually identifiable health information maintained or transmitted in any form, as well as any oral statement made about medical treatment or conditions. Generally, HIPAA prohibits the use and disclosure of an individual’s protected health information unless the individual has authorized its use and disclosure.²⁵⁷

Section 264 of HIPAA—cited in defense counsel’s letter to Enforcement counsel asserting privilege—includes a process for adopting “standards regarding the privacy of individually identifiable health information.”²⁵⁸

HIPAA’s protections, however, do not create a privilege against disclosure of an individual’s protected health information or any other type of information or communications.²⁵⁹ Nor does the Act create a physician-patient or medical records privilege.²⁶⁰ Moreover, “HIPAA applies only to ‘covered entities,’”²⁶¹ and Fetherston is plainly not a “covered entity.” Fetherston also failed to show that responding to FINRA’s request would have required him to disclose protected health information. Specifically, Enforcement did not request information about Fetherston’s medical condition, just his expense payments. As Enforcement pointed out in closing, to comply with the request, Fetherston “could have created an Excel spreadsheet with three columns and detailed each of the payments and the date and the method of payment”²⁶² Likewise, Enforcement wrote in its post hearing brief that “Fetherston could have fully complied with his obligation by writing down the amount(s), date(s), and method(s) of payment(s).”²⁶³ As a result, we reject Fetherston’s HIPAA-based defense.

Fetherston’s New York State physician/patient privilege defense fares no better. The privilege is found in CPLR Rule 4504, which states in relevant part:

Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information

²⁵⁷ *United States v. Elliott*, 676 F. Supp. 2d 431, 436–37 (D. Md. 2009) (citation omitted).

²⁵⁸ *Citizens for Health v. Leavitt*, 428 F.3d 167, 172 (3d Cir. 2005); *see also S.C. Med. Ass’n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003) (explaining that Section 264 outlines a “process to address the need to afford certain protections to the privacy of health information maintained under HIPAA.”).

²⁵⁹ *See Northwestern Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 925–26 (7th Cir. 2004); *Nat’l Abortion Fed’n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530, at *17–23 (S.D.N.Y. Mar. 18, 2004).

²⁶⁰ *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007).

²⁶¹ *Hutchins v. Willett*, No. 1:19cv149 (LO/IDD), 2021 U.S. Dist. LEXIS 29775, at *14 (E.D. Va. Feb. 16, 2021) (citing 45 C.F.R. § 160.102–160.103).

²⁶² Tr. 881–82.

²⁶³ Enf’t Post Hr’g Br. 15.

which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.²⁶⁴

“The information protected also includes the nature of the treatment rendered and the resultant diagnosis, but not the mere ‘facts and incidents’ of the patient’s medical history or the fact that treatment was rendered.”²⁶⁵ Nor does it protect billing information.²⁶⁶ “[T]he statute is phrased in terms of not allowing a medical professional to reveal information acquired in a professional capacity from a patient.” But “it serves also to protect the patient from being compelled to disclose the substance of a communication made to the medical professional in an attempt to obtain treatment.”²⁶⁷

As the party asserting the privilege, Fetherston “bears the burden of demonstrating ‘the existence of circumstances justifying its recognition.’”²⁶⁸ He failed to meet that burden. Fetherston cited no authority addressing whether New York’s physician/privilege has been recognized—or should be recognized—in FINRA disciplinary proceedings. And we have found none. Thus, it appears that this is a question of first impression. To answer it, we look to the Federal Rules of Evidence for guidance.²⁶⁹

To begin with, “[t]he Federal Rules of Evidence do not recognize a doctor-patient privilege.”²⁷⁰ Still, we find Fed. R. Evid. 501 instructive, as it addresses the application of privilege in federal court proceedings.²⁷¹ In general, that Rule “dictates that . . . ‘privilege’ is interpreted pursuant to federal common law except that ‘in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.’”²⁷² Under the Rule, federal common law governs privilege issues in federal question cases.²⁷³ There

²⁶⁴ CPLR 4504(a).

²⁶⁵ *People v. Elysee*, 49 A.D.3d 33, 38, (2d Dept 2007).

²⁶⁶ *Sterling v Ackerman*, 244 A.D.2d 170, 170 (1st Dept. 1997) (citing *Henry v Lewis*, 102 A.D.2d 430, 432 (1st Dept. 1984)).

²⁶⁷ *Williams v. Roosevelt Hosp.*, 66 N.Y.2d 391, 396 (1985).

²⁶⁸ *Ohnmacht v. State of New York*, 26 Misc. 3d 1216(A), 2009 N.Y. Misc. LEXIS 3598, at *3 (Ct Cl Dec.18, 2009) (quoting *Koump v Smith*, 25 N.Y.S.2d 287, 1969 N.Y. LEXIS 1112, at *17 (2d Dept. July 2, 1969)).

²⁶⁹ *See supra* note 220.

²⁷⁰ *Scoggins v. Floyd Healthcare*, No. 4:14-CV-274-HLM-WEJ, 2015 U.S. Dist. LEXIS 195668, at *11 (N.D. Ga. March 18, 2015) (citing *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977)).

²⁷¹ *See Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998) (“A proper analysis of privilege questions must begin with a determination of the applicable law. Federal Rule of Evidence 501 addresses that issue.”); *Dakota Energy Coop., Inc. v. E. River Elec. Power Coop., Inc.*, No. 4:20-CV-04192-LLP, 2021 U.S. Dist. LEXIS 196151, at *9 (S.D. Oct. 12, 2021) (“Federal Rule of Evidence 501 addresses the issue of privilege in federal court proceedings.”).

²⁷² *Tavares v. Lawrence Mem’l Hosp.*, No. 3:11-CV0770(CSH), 2012 U.S. Dist. LEXIS 134881, at *11 (D. Conn. Sept. 20, 2012) (quoting Fed. R. Evid. 501).

²⁷³ *Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999) (“Questions about privilege in federal question cases are resolved by the federal common law.”); *Burke v. Lawrence*, No. 1:11-cv-

is, however, no general federal common law physician/patient privilege.²⁷⁴ Nor does federal law recognize a general medical records privilege.²⁷⁵

Federal Rule of Evidence 501 also addresses the application of privilege in diversity cases. In such cases, state law governs²⁷⁶ and “controls the existence and scope of the physician-patient privilege.”²⁷⁷ New York has enacted a patient/physician privilege, as noted above. But Fetherston has not shown that New York State privilege law applies in this proceeding. And we do not find any basis for applying it. New York State law does not supply the “the rule of decision” in this case. Rather, Fetherston has been charged with violating FINRA Rules 8210 and 2010, and the law interpreting those rules governs here.²⁷⁸ Thus, New York State privilege law is inapplicable.

But even if FINRA recognized the New York privilege in its disciplinary proceedings, Fetherston has not shown that it protects the information FINRA sought. Fetherston did not prove that revealing information about the medical expenses paid with the checks would have required him to reveal confidential information privileged under CPLR 4504. He did not show: (1) the existence of a professional relationship between him and one of the healthcare professionals or providers specified in CPLR 4504(a); (2) that the information sought was acquired during this professional relationship and was necessary for the diagnosis or treatment;

1044, 2013 U.S. Dist. LEXIS 77384, at *2–3 (W.D. Mich. June 3, 2013) (citing *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992)) (“In federal-question cases, questions of privilege are governed by the federal common law.”).

²⁷⁴ *Bek*, 493 F. 3d at 801–02 (“Federal common law has not historically recognized a privilege between patients and physicians”) (citing *Northwestern Mem’l Hosp.*, 362 F.3d at 926). That said, “[d]espite the lack of a general federal doctor-patient privilege, ‘confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.’” *Aguilar v. Immigration & Customs*, No. 07 Civ. 8224 (JGK)(FM), 2009 U.S. Dist. LEXIS 99815 , at *11 (S.D.N.Y. Oct. 23, 2009) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996)). Fetherston, however, has not claimed or shown that responding to the request would have required him to disclose confidential communications between him and a licensed psychotherapist or psychiatrist.

²⁷⁵ *Burke*, 2013 U.S. Dist. LEXIS 77384, at *2–3 (citing *Hancock*, 958 F.2d 1367) (“Federal law does not recognize an evidentiary privilege for communications between doctor and patient or for general medical records.”).

²⁷⁶ See, e.g., *Frontier Refin. Inc. v. Gorman-Rupp Company, Inc.*, 136 F.3d 695, 699 (10th Cir. 1998) (“[S]tate law supplies the rule of decision in privilege in diversity cases.”); *Nalini Kumar v. Nationwide Mut. Ins. Co.*, No. 22-cv-03852-TLT (LJC), 2023 U.S. Dist. LEXIS 89999, at *6 (N.D. Cal. May 23, 2023) (“In diversity cases, a federal court must determine ‘the existence or extent’ of a privilege under the state law that otherwise governs decision of the case.”).

²⁷⁷ *Filz v. Mayo Found.*, 136 F.R.D. 165, 168 (D. Minn. 1991).

²⁷⁸ Cf. *Dep’t of Enforcement v. Grivas*, No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *13 n.19 (NAC July 16, 2015) (“We have previously held . . . that the standards for conversion under a state’s laws are not applicable in cases, such as this one, where a respondent has been charged with violating the high standards of commercial honor prescribed by FINRA Rule 2010”); *Dep’t of Enforcement v. Kirlin*, No. EAF0400300001, 2009 FINRA Discip. LEXIS 2, at *61 n.35 (NAC Feb. 25, 2009) (rejecting the argument that New York law governed the disciplinary proceeding).

or (3) that the information was meant to be kept confidential. Also, the information requested is expense information—essentially non-protected billing information.

Finally, in support of his argument that the information requested is privileged under CPLR 4504, Fetherston cites three cases for the proposition that medical records are shielded from disclosure absent a waiver by the patient.²⁷⁹ These cases are inapplicable. Each involved the applicability of the privilege to medical records, not expense information.

Accordingly, we reject Fetherston’s defense that the requested information was shielded from disclosure under New York’s patient/physician privilege.²⁸⁰

3. Fetherston’s Advice-of-Counsel Defense Fails

At the hearing, Fetherston asserted reliance on advice of counsel as a defense to liability and for mitigation of sanctions.²⁸¹ He did not, however, include this argument as an affirmative defense in his Answer. The Hearing Officer ruled that Fetherston should have done so if he intended to assert it as a defense to liability.²⁸² The Hearing Officer also pointed out that, in any event, reliance on advice of counsel is not a defense to a FINRA Rule 8210 charge.²⁸³ The law on this issue is clear. Reliance on advice of counsel is not relevant to liability if scienter is not an element of the violation;²⁸⁴ “scienter is not an element of a Rule 8210 violation”;²⁸⁵ and thus “advice of counsel is not a defense to liability under FINRA Rule 8210.”²⁸⁶ We therefore reject

²⁷⁹ *In re Litig.*, 2019 NYLJ LEXIS 2671, at *6 (Sup Ct July 24, 2019); *Ferguson v. Laffer*, 149 A.D.3d 908, 910 (2d Dept. 2017); and *Perez v Fleischer*, 122 A.D.3d 1157, 1159, (3d Dept. 2014).

²⁸⁰ Enforcement argued that even if Fetherston showed that CPLR 4504 applied to the requested information, he waived the privilege by placing his purported medical expenses at issue in this matter and by disclosing those purported expenses to third parties. *Enf’t Post-Hr’g Br.* 15–16. Given our determination that Fetherston’s CPLR 4504 defense fails on other grounds, we need not address this argument.

²⁸¹ Tr. 21, 29–30.

²⁸² Tr. 30–32. See FINRA Rule 9215(b) (“Any affirmative defense shall be asserted in the answer.”). *Cf. Dep’t of Enforcement v. Respondent Firm and Respondent*, No. C01040001, 2005 NASD Discip. LEXIS 47, at *29 n.18 (NAC Sept. 6, 2005) (referring to reliance on advice of counsel as an affirmative defense); see also *Sahoo v. Gleaton*, No. 5:16-CV-153-BO, 2018 U.S. Dist. LEXIS 180603, at *6 (E.D. N.C. Oct. 20, 2018) (same) (citing *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994)).

²⁸³ Tr. 30–32.

²⁸⁴ See *Berger*, 2008 SEC LEXIS 3141, at *39; see also *Dep’t of Enforcement v. McCrudden*, No. 2007008358101, 2010 FINRA Discip. LEXIS 25, at *22–23 (NAC Oct. 15, 2010) (explaining that the advice-of-counsel defense is not available to a cause of action that is not scienter-based).

²⁸⁵ *Berger*, 2008 SEC LEXIS 3141, at *39.

²⁸⁶ *Mellon*, 2022 FINRA Discip. LEXIS 11, at *25 (“[A]dvice of counsel is not a defense to liability under FINRA Rule 8210”) (quoting *Berger*, 2008 SEC LEXIS 3141, at *38).

the defense. That said, “it may be mitigating as to sanctions.”²⁸⁷ So we consider it for that purpose, below.

* * *

Based on the foregoing, we conclude that Fetherston violated FINRA Rules 8210 and 2010 by failing to respond to a written request for information under FINRA Rule 8210 asking him to identify the medical expenses that he paid with the proceeds of the three checks from the Gs by dollar amount, date, and method of payment.

IV. Sanctions

A. Overview

In considering the appropriate sanctions to impose on Fetherston, we begin our analysis with FINRA’s Sanction Guidelines (“Guidelines”) as a benchmark.²⁸⁸ In the Overview, the Guidelines explain that they “do not prescribe fixed sanctions to particular violations. Rather, they provide direction for Adjudicators in imposing sanctions consistently and fairly.”²⁸⁹ The Guidelines include “recommend[ed] ranges for sanctions and suggest[ed] factors that Adjudicators may consider in determining for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended ranges.”²⁹⁰ But, the Overview emphasizes, the “[G]uidelines are not intended to be absolute.”²⁹¹ Instead, “[b]ased on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended.”²⁹² Adjudicators may also “consider aggravating and mitigating factors in addition to those” in the Guidelines.²⁹³

The Guidelines contain: (1) General Principles Applicable to All Sanction Determinations (“General Principles”) “that should be considered in connection with the imposition of sanctions in all cases”; (2) a list of Principal Considerations in Determining

²⁸⁷ *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *41 n.56 (Apr. 1, 2016); *Dep’t of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *16 (NAC Feb. 25, 2014) (citation omitted) (finding that “reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions” for a FINRA Rule 8210 violation).

²⁸⁸ Guidelines (2022), <https://www.finra.org/sanctionguidelines>. See, e.g., *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *56 (Sept. 28, 2017) (finding that a sanctions analysis should begin with the Guidelines as a benchmark).

²⁸⁹ Guidelines at 1 (Overview).

²⁹⁰ *Id.*

²⁹¹ *Id.* (Overview); see also *Dep’t of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at *33 n.24 (NAC Feb. 12, 2007) (“Like all of the sanction ranges set forth in the Guidelines, those applicable to Procedural Rule 8210 violations are neither absolute nor mandatory.”).

²⁹² Guidelines at 1 (Overview).

²⁹³ *Id.*

Sanctions (“Principal Considerations”) “which enumerates generic factors for consideration in all cases”; and (3) guidelines applicable to specific violations (“Specific Considerations”), which “identify potential principal considerations that are specific to the described violation.”²⁹⁴

The General Principles explain that “sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct.”²⁹⁵ Adjudicators are therefore instructed to “design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct.”²⁹⁶ Further, sanctions should “reflect the seriousness of the misconduct at issue,”²⁹⁷ and should be “tailored to address the misconduct involved in each particular case.”²⁹⁸ It is paramount that “[a]djudicators . . . always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining remedial sanctions in each case” and “identify the basis for the sanctions imposed.”²⁹⁹

B. Fetherston is Suspended for Four Months from Associating with any Member Firm in any Capacity for Partially Failing to Respond to a FINRA Information Request.

1. Applicable Sanction Guidelines

A violation of FINRA Rule 8210 is serious and merits “stringent sanctions because it subverts [FINRA]’s ability to execute its regulatory functions.”³⁰⁰ The Guidelines reflect the seriousness of this violation. They provide for different sanctions depending on the type of FINRA Rule 8210 violation: (1) failing to respond or respond truthfully; (2) providing a partial but incomplete response; and (3) failing to respond in a timely manner.

If a respondent completely fails “to respond to a particular request in a matter that involved multiple separate requests for information or testimony, and the individual complied with at least some of the requests,” then the failure “is treated as a ‘partial but incomplete failure to respond.’”³⁰¹ In response to several FINRA Rule 8210 requests in connection with the

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 2 (General Principle No. 1).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 4 (General Principle No. 3).

³⁰⁰ *Dep’t of Enforcement v. Jones*, No. 2015044782401, 2020 FINRA Discip. LEXIS 45, at *35 (NAC Dec. 17, 2020) (quoting *Elliot M. Hershberg*, Exchange Act Release No. 53145, 2006 SEC LEXIS 99, at 10 (Jan. 19, 2006), *aff’d*, 210 F. App’x 125 (2d Cir. 2006)).

³⁰¹ *Jones*, 2020 FINRA Discip. LEXIS 45, at *33–34 (citing *John J. Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *55–56 (June 14, 2013) (holding that the determination of sanctions for a failure-to-

investigation that led to this disciplinary action, Fetherston produced information and documents—although untimely—and provided investigative testimony. He then failed to provide the requested information about the medical expenses he purportedly paid with the funds the Gs gave him. So we treat his failure to respond to that one requested item as a partial failure to respond.

The Guidelines advise that for an individual who provides a partial but incomplete response to a FINRA Rule 8210 request, “a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.” Further, if mitigation exists, the Guidelines recommend an all capacities suspension of up to two years. The Guidelines also suggest imposing a fine of \$5,000 to \$20,000.³⁰²

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

- (1) The importance of the information requested that was not provided as viewed from FINRA’s perspective, and whether the information provided was relevant and responsive to the request;
- (2) The number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and
- (3) The reasons offered by the respondent to justify the partial but incomplete response.³⁰³

2. Discussion of Aggravating and Mitigating Factors

a. Aggravating Factors

Aggravating factors are present here. The information requested, but not provided, was important. Investigator 2 testified that FINRA requested the information to see if it “could corroborate what we were told about that money going to medical expenses.”³⁰⁴ He further explained, regarding FINRA’s attempt to corroborate Fetherston’s claimed use of the funds, that after receiving Fetherston’s bank records, the staff reviewed them “to see where the money came in and where it went out to. We also issued another Rule 8210 request.”³⁰⁵

respond violation must take into account the extent to which the respondent complied with other requests made in the same investigation)).

³⁰² Guidelines at 93.

³⁰³ *Id.*

³⁰⁴ Tr. 347.

³⁰⁵ Tr. 330–31.

Given that the investigation involved Fetherston’s receipt and use of customer funds, it was important to the investigation for FINRA to understand how he used the funds. It was also important in assessing Fetherston’s credibility to determine if he had used the funds in the way he claimed.

Further, FINRA had to exert significant regulatory pressure to obtain the information that Fetherston did provide. Fetherston failed to timely respond to requests for information and documents; provided incomplete responses; and gave shifting explanations for why the Gs gave him the checks. As a result, FINRA had to issue follow-up requests and threaten filing an action against him seeking sanctions. FINRA should not have to go to these lengths to obtain compliance with its rules governing investigations.³⁰⁶ Additional aggravating factors are present. Fetherston failed to accept responsibility for his misconduct³⁰⁷ and deliberately chose not to respond to the request despite warnings from FINRA that failing to do so could result in the imposition of sanctions.³⁰⁸

Finally, while Enforcement did not charge Fetherston with the untimely production of requested information and documents, it alleged that by failing to respond to the one requested item, he “impeded and delayed FINRA’s investigation.”³⁰⁹ The Guidelines permit us to consider whether a respondent attempted to delay FINRA’s investigation or conceal information from FINRA.³¹⁰ Investigator 2 did not testify about how, if at all, Fetherston’s refusal to respond to the request impeded or delayed the investigation. But given the importance of the requested information to the investigation, it is likely that Fetherston’s failure to respond negatively impacted the investigation’s progress to some degree. The record on this point, however, is insufficient for us to assess fully its effect.³¹¹

b. Mitigating Factors

Weighed against the conduct that aggravated Fetherston’s violation, we considered whether there was any mitigation, beginning with Fetherston’s assertion of reasonable reliance on advice of counsel. This mitigation claim, however, failed. The Guidelines state that in determining sanctions for all violations, adjudicators should consider whether the respondent

³⁰⁶ *Dep’t of Enforcement v. Larson*, No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *114–15 (NAC Sept. 21, 2020).

³⁰⁷ Guidelines at 7 (Principal Consideration No. 2).

³⁰⁸ *Id.* at 8 (Principal Considerations Nos. 13 & 14).

³⁰⁹ Compl. ¶ 61.

³¹⁰ See Guidelines at 8 (Principal Consideration No. 12).

³¹¹ *Cf. Dep’t of Enforcement v. Hedge Fund Cap. Partners*, No. 2006004122402, 2012 FINRA Discip. LEXIS 42, at *88 (NAC May 1, 2012) (“FINRA staff testified that FINRA’s investigation took more than two years to complete primarily because of respondents’ misleading responses to numerous requests for information.”).

“demonstrated reasonable reliance on competent legal or accounting advice.”³¹² A reliance on advice of counsel “claim must have sufficient content and sufficient supporting evidence”³¹³ showing “that respondent consulted with and made full disclosure to counsel; asked for advice on the legality of the proposed course of action; received advice that it was legal; and relied on the advice in good faith.”³¹⁴ The claim fails when it rests on nothing more than the respondent’s “say-so.”³¹⁵ Instead, “the respondent asserting reliance must produce ‘actual advice from an actual lawyer,’”³¹⁶ in the form, for example, “of an opinion letter or the attorney’s live testimony.”³¹⁷ A respondent does “not satisfy any elements of” reasonable reliance on advice of counsel without proof of the actual advice, “either through testimony or written documentation of the advice.”³¹⁸

The evidence supporting Fetherston’s claim consisted of his testimony and the letter his attorney sent to Enforcement counsel stating that Fetherston would not respond to the request based on privilege. Fetherston testified as follows: he sought counsel’s advice on various matters, including whether he should respond to the FINRA Rule 8210 request that he identify the medical expenses,³¹⁹ and they discussed the subject of the medical records privilege

³¹² Guidelines at 7 (Principal Consideration No. 7); *see also Berger*, 2008 SEC LEXIS 3141, at *38 (stating that a valid claim of reliance on counsel could mitigate sanctions); *Dep’t of Enforcement v. Tysk*, No. 2010022977801r, 2019 FINRA Discip. LEXIS 10, at *39–40 (NAC Mar. 11, 2019) (“[R]easonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions.”), *aff’d*, Exchange Act Release No. 91268, 2021 SEC LEXIS 534 (Mar. 5, 2021). We need not address whether the legal advice that Fetherston purportedly relied on was “competent” given our finding, below, that he failed to establish the claim on other grounds.

³¹³ *Dep’t of Enforcement v. Reifler*, No. 2016050924601r, 2023 FINRA Discip. LEXIS 1, at *25 (NAC Jan. 17, 2023) (quoting *Berger*, 2008 SEC LEXIS 3141, at *38).

³¹⁴ *Dep’t of Enforcement v. DiPaola*, No. 2018057274302, 2023 FINRA Discip. LEXIS 4, at *59 n.43 (NAC Mar. 23, 2023) (citing *Berger*, 2008 SEC LEXIS 3141, at *40–41); *see also Dep’t of Enforcement v. Escobio*, No. 2018059545201, 2021 FINRA Discip. LEXIS 3, at *26 n.27 (NAC Mar. 10, 2021) (finding that reliance on advice of counsel does not mitigate a Rule 8210 violation “unless a respondent develops the record to show that he made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel’s advice.”) (citations omitted) (quoting *Berger*, 2008 SEC LEXIS 3141, at *38), *aff’d* 2023 SEC LEXIS 1532 (June 12, 2023).

³¹⁵ *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007) (rejecting defendant’s argument that reliance on advice of counsel exculpates his conduct because the defendant “offered nothing other than his say-so”).

³¹⁶ *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *52 (Sept. 13, 2010) (citation omitted); *see also Dep’t of Enforcement v. Cantone Research Inc.*, No. 2013035130101, 2019 FINRA Discip. LEXIS 5, at *103–04 (NAC Jan. 16, 2019), *appeal docketed*, No. 3-18999 (SEC Feb. 14, 2019) (“[I]t isn’t possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer.”) (quoting *Berger*, 2008 SEC LEXIS 3141, at *40–41).

³¹⁷ *R.E. Bassie*, Accounting and Auditing Enforcement Release No. 3354, 2012 SEC LEXIS 89, at *34 n.28 (Jan. 10, 2012) (citing *Berger*, 2008 SEC LEXIS 3141, at *40–41).

³¹⁸ *Cantone*, 2019 FINRA Discip. LEXIS 5, at *107 (affirming hearing panel’s rejection of advice of counsel defense and agreeing that “absent proof of the actual advice given, either through testimony or written documentation of the advice, Respondents did not satisfy any of the elements of their defense of advice of counsel”).

³¹⁹ Tr. 722–23.

specifically with respect to his response to that request.³²⁰ Fetherston stated that his attorney “had every piece of documentation since we met . . . I turned everything over to him” and that he provided his attorney with documentation regarding the specific request.³²¹ “[E]verything that I had that was asked for in any correspondence my attorney has,”³²² he said. “I turned over every piece of information to him.”³²³ Fetherston testified that after he gave his attorney the information, his attorney instructed him not to respond to the request.³²⁴ Reiterating, Fetherston said that counsel decided, with his consent, that the particular request “wouldn’t be addressed.”³²⁵ Fetherston recalled that his lawyer was “very matter of fact in what he told me. He just said the advice to me was not to respond” to the request for medical information on privilege grounds.³²⁶ Fetherston said that he followed counsel’s advice by not responding.³²⁷

Continuing, Fetherston testified that he did not recall if his lawyer gave him anything in writing specifically addressing his obligation to respond to the request.³²⁸ According to Fetherston, the advice was verbal, not written.³²⁹ That said, during his testimony, when he was shown his lawyer’s letter to FINRA staff asserting privilege, Fetherston confirmed his understanding that the letter contained the advice that his lawyer had given him and that he followed that advice.³³⁰

When pressed on cross-examination for more details, however, Fetherston’s recollection became somewhat vague and inconsistent. He could not remember: (1) the specifics of his conversation with his lawyer about his obligation to respond to the request or counsel’s specific advice;³³¹ (2) the advice his lawyer gave him regarding his FINRA Rule 8210 obligations;³³² (3) what documents he had turned over to his lawyer in connection with the request;³³³ (4) if he provided counsel with documents sufficient to identify the medical expenses by date, amount,

³²⁰ Tr. 771.

³²¹ Tr. 725–26.

³²² Tr. 726–27.

³²³ Tr. 727.

³²⁴ Tr. 755–56.

³²⁵ Tr. 757–58.

³²⁶ Tr. 807–08, 810.

³²⁷ Tr. 696–97, 721–22, 760–61, 764.

³²⁸ Tr. 759.

³²⁹ Tr. 759–60.

³³⁰ Tr. 763.

³³¹ Tr. 755, 759.

³³² Tr. 756–57.

³³³ Tr. 725–26.

and method of payment;³³⁴ (5) if counsel specifically asked Fetherston to provide all documents to him sufficient to identify the medical expenses;³³⁵ or (6) if he saw his lawyer's letter to FINRA staff asserting privilege before it was sent.³³⁶

Nevertheless, we credit Fetherston's testimony that he relied on his attorney's advice that he did not have to respond to the request. His attorney asserted privilege as the basis for not responding. A privilege objection is one typically asserted by an attorney. It is reasonable to conclude that a lay client, such as Fetherston, would defer to their lawyer's assessment of a privilege's applicability. Also, Enforcement did not discredit Fetherston's claim that he relied on his lawyer's advice.

Even so, Fetherston did not meet the other requirements of reasonable reliance on advice of counsel. He failed to produce the actual advice he received. He did not introduce an opinion letter from his attorney. And counsel's letter to FINRA asserting privileges does not constitute legal advice to Fetherston.³³⁷ Nor did Fetherston's attorney testify. Instead, in Fetherston's post-hearing brief, his counsel describes the advice he purportedly gave Fetherston about responding to the request.³³⁸ We give his statements no weight; "unsworn representations by counsel contained in briefs or memoranda are not evidence of the facts they purport to recount."³³⁹ Additionally, Fetherston failed to show he made full and complete disclosure to his lawyer of all relevant facts before counsel rendered his advice. Fetherston gave only a generalized description of his production of documents to his lawyer. And the record is silent about what he actually told his lawyer about the specific medical expenses, if any, he paid with the funds the Gs gave him. Thus, for these reasons, we do not credit Fetherston's mitigation claim that he reasonably relied on competent legal advice in not responding to the request regarding the medical expenses.

Although Fetherston's reliance-on-advice-of-counsel argument fails, we do find several mitigating factors, which, while not numerous, are nonetheless significant. Fetherston provided documents that substantially complied with the request. First, he produced his bank statements. Responding to the request that he "[p]rovide documentation regarding the eventual disposition of the funds," he wrote: "Bank records attached and proceeds used to pay

³³⁴ Tr. 752–53.

³³⁵ Tr. 752–53.

³³⁶ Tr. 761–62.

³³⁷ Cf. *Allen Holeman*, Exchange Act Release No. 86523, 2019 SEC LEXIS 1903, at *28 (July 31, 2019) (characterizing a letter from counsel to FINRA explaining why it should not bring a disciplinary action against his client as a response to FINRA and not legal advice to the client.).

³³⁸ Fetherston's Post-Hr'g Br. 9–10.

³³⁹ *Cleantech Innovations*, Exchange Act Release No. 69968, 2013 SEC LEXIS 1998, at *6 n.7 (July 11, 2013); see also *Wood ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002) (explaining that unsupported factual assertions by counsel in a brief or other pleading "are not evidence.").

medical bills, etc. during a hardship.”³⁴⁰ He also produced his credit card statements.³⁴¹ Investigator 2 reviewed the documents and saw no evidence of medical expense payments, only payments for household and similar expenses.³⁴² Thus, while Fetherston did not identify the medical expenses he purportedly paid with funds from the three checks, the documents he produced enabled FINRA to see how he spent the funds, including whether he used a portion of them to pay medical expenses.

Additionally, the NAC considered it mitigative when a respondent’s failure to answer only one question during his OTR resulted from his lawyer’s apparently good-faith objection and when the respondent ultimately produced a requested document relating to that question.³⁴³ Likewise, we considered it mitigative that Fetherston’s failure to respond related only to one request, in the context of having responded (although belatedly) to other requests for documents and information. And his violation resulted from his attorney’s apparently good-faith objection that the requested information was privileged.³⁴⁴ Moreover, as noted above, Fetherston produced requested bank and credit card statements showing how he spent the funds.

3. Conclusion

After considering the relevant aggravating and mitigating factors discussed above, we conclude that the appropriately remedial sanction for Fetherston’s violation of FINRA Rules 8210 and 2010 for partially failing to respond to a FINRA request for information is a four-month suspension in all capacities from association with any FINRA member firm.³⁴⁵

³⁴⁰ CX-7, at 1; CX-48, at 1; CX-61, at 1.

³⁴¹ Fetherston’s checking account statements reflect that shortly after depositing the three checks into his bank account, he made payments to American Express in amounts that exceeded the pre-deposit account balances. Tr. 334–37. Besides the American Express payment, Fetherston used a portion of \$40,000 given to him on December 3, 2019, to pay for household expenses. Tr. 336–38. Fetherston also produced statements for three credit cards: a Chase Slate credit card, CX-63; a Sears Mastercard, CX-64; and an American Express credit card. CX-65; Tr. 338, 607–08.

³⁴² Tr. 341, 343, 345–46. The Complaint did not charge Fetherston with providing a false response to a FINRA Rule 8210 request when he stated that he used the funds, in part, to pay off medical expenses.

³⁴³ See *Dep’t of Enforcement v. Erenstein*, No. C9B040080, 2006 NASD Discip. LEXIS 31, at *19 (NAC Dec. 18, 2008), *aff’d*, 2007 SEC LEXIS 2596. In *Erenstein*, the respondent refused to answer one question at his OTR based on his lawyer’s relevance objection. Respondent, through his lawyer, also objected to producing documents related to the unanswered question. He later complied with the document request after Enforcement notified him that it intended to bring a disciplinary action against him. The NAC found it mitigating that respondent’s “refusal to answer one question during the OTR, while a violation of Procedural Rule 8210, was based on his counsel’s apparently good-faith objection, and, most importantly, [respondent] ultimately produced the requested document.”

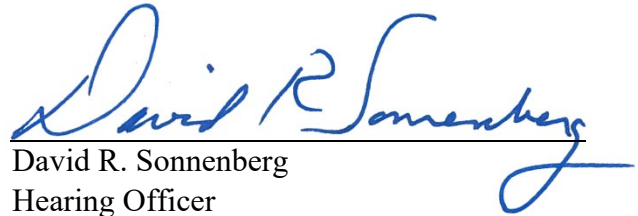
³⁴⁴ Guidelines at 93.

³⁴⁵ In light of the suspension, we exercise our discretion and do not also impose a fine as it would not serve a remedial purpose. See Guidelines at 9 (Technical Matters) (“Adjudicators may exercise their discretion in applying

V. Order

Enforcement failed to prove that Fetherston converted or improperly used customer funds or that he provided false or misleading information, documents, or testimony to FINRA staff in violation of FINRA Rules 2150(a), 8210, and 2010. Accordingly, the First and Second Causes of Action are dismissed. For failing partially to respond to a FINRA request for information in violation of FINRA Rules 8210 and 2010, as alleged in the Third Cause of Action, Fetherston is suspended in all capacities from association with any FINRA member firm for four months.³⁴⁶

If this decision becomes FINRA's final disciplinary action, Fetherston's suspension will begin with the opening of business on Monday, November 20, 2023. He is ordered to pay costs in the amount of \$7599.12, which includes a \$750 administrative fee and \$6849.12 for the cost of the transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.


David R. Sonnenberg
Hearing Officer

Copies to:

Peter J. Fetherston (via overnight courier and first-class mail)
Clifford B. Olshaker, Esq. (via email)
Robert Miller, Esq. (via email)
Michelle Galloway, Esq. (via email)
John Luburic, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

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

³⁴⁶ The Extended Hearing Panel considered and rejects without discussion all other arguments of the parties.