BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Peter J. Fetherston Garden City, NY, Respondent.	DECISION Complaint No. 2020065396501 Dated: December 9, 2024

The Hearing Panel found the Department of Enforcement did not demonstrate that the registered representative converted customer funds, or that he provided a false document, information, and testimony to FINRA concerning the purpose of those funds. Separately, the Hearing Panel found the registered representative liable for failing to provide information requested under FINRA Rule 8210 and, for this misconduct, imposed a four-month suspension. Held, the Hearing Panel's decision is reversed, in part, and the case is remanded to the Office of Hearing Officers for further proceedings.

Appearances

For the Complainant: Jennifer Crawford, Esq., Michelle Galloway, Esq., Loyd Gattis, Esq., and Robert Miller, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Clifford B. Olshaker, Esq.

Decision

The primary focus of this appeal is an allegation that Peter Fetherston converted funds from a married couple who were his customers at a member firm. It is undisputed the couple gave Fetherston three checks totaling $89,000 and Fetherston used this money for personal expenses. In dispute is whether the couple authorized Fetherston to take the funds for his personal use.

The Hearing Panel did not accept Fetherston's account that the checks were a personal loan, but it also found unreliable the customers' statements to the firm and FINRA investigators

that the checks were for their investments. Because the Hearing Panel found the customers' statements unreliable, it determined that the Department of Enforcement ("Enforcement") did not establish that Fetherston converted the couple's funds, as alleged in cause one of the complaint, or that he provided a false document, information, and testimony concerning the purpose of those funds, as alleged in cause two. Separately, the Hearing Panel found Fetherston violated FINRA Rule 8210 by failing to respond to an investigative request, as alleged in cause three. For this misconduct, the Hearing Panel suspended Fetherston from associating with a member firm in any capacity for four months. Enforcement appealed the Hearing Panel's dismissals of causes one and two, as well as the sanction it imposed for cause three.

We find that the Hearing Panel did not adequately support its determinations to dismiss causes one and two. While the Hearing Panel based these dismissals on concerns it had with the reliability of the customers' statements, it failed to specify the evidentiary weight it accorded those statements, if any. Moreover, the Hearing Panel failed to address evidence relevant to its concerns with the statements' reliability, and its analysis indicates that it applied a stricter standard of proof than the applicable preponderance standard. Accordingly, we reverse the Hearing Panel's dismissals of causes one and two and remand those causes for further consideration, consistent with our discussion herein.

We agree with the Hearing Panel's determination that Fetherston failed to comply with a Rule 8210 request, as alleged in cause three. In imposing the sanction for that cause, however, the Hearing Panel misapprehended facts and law applicable to the analysis. Accordingly, we set aside the sanction and, because we otherwise find it appropriate to remand this matter, instruct the Hearing Panel to redetermine the sanction consistent with our discussion.

I. Facts

A. Fetherston's Background and the Disclosures Prompting FINRA's Investigation

During the relevant period, Fetherston was associated with Principal Securities, Inc. ("Principal") and was registered as a general securities representative and an investment company and variable contracts products representative. Principal terminated Fetherston's association with the firm in January 2020. In a Uniform Termination Notice for Securities Industry Registration ("Form U5") filed with FINRA, Principal reported that it discharged Fetherston because he "did not follow Firm policies and procedures regarding some replacement and switch transactions."

In March 2020, Principal amended the Form U5 with information that provides the basis for the present disciplinary action. Specifically, Principal disclosed that it had reimbursed a total of $89,000 to two of Fetherston's clients, who had alleged that they "provided multiple checks made payable directly to [Fetherston] for what he said were [] commissions and investments."

Fetherston is not currently associated with a FINRA member.

B. The Gs Contact Fetherston and Open New Accounts at Principal

WG and SG (together, the "Gs") are a married couple who were in their fifties during the relevant period. WG was an analyst and SG was a teaching assistant at a college. They were Fetherston's customers at the firm now known as MML Investors Services, LLC ("MML") beginning around 2012 and ending when MML terminated Fetherston's employment in October 2017.

For more than a year after he was terminated from MML, Fetherston had no contact with the Gs. In February 2019, however, the Gs emailed Fetherston at Principal to request a meeting to discuss their financial plans. In their email, the Gs explained that they learned of Fetherston's position at Principal when they received a flyer in the mail.

Fetherston subsequently met with the Gs and learned that WG had taken a leave of absence from work because he had Parkinson's disease. The Gs' account forms reflect that WG had annual income of $90,000 and a net worth of $2 million, and the Gs jointly had annual income of $120,000 and a net worth of $2.7 million. In a note on one of the account forms, Fetherston stated that WG "is no longer a full-time employee . . . and wants more control of his assets."

The Gs opened several brokerage accounts at Principal with Fetherston as their registered representative. The Gs' transactions through Fetherston at Principal included the purchase of $750,000 in Class A mutual fund shares in May 2019. In October 2019, the Gs liquidated more than $384,000 of these shares and, on November 4, 2019, they used $320,000 of the proceeds to fund a Principal deferred income annuity.

C. The Gs Write Fetherston Three Checks Totaling $89,000, Which He Uses for Personal Expenses

Principal's written policies and procedures prohibited registered representatives from accepting from customers gifts, loans, or funds otherwise made payable to them. Nevertheless, between September and December 2019, Fetherston accepted from the Gs three checks made out to him personally. The Gs wrote the first of these checks, in the amount of $19,000, on September 12, 2019. Several days later, Fetherston deposited the check into his personal checking account at Chase Bank ("Chase account") and applied the funds towards a $23,922.49 payment to an American Express account.[1]

The Gs wrote the second check to Fetherston, in the amount of $30,000, on November 4, 2019. On the same day, Fetherston deposited the check into his Chase account and used the funds to make a $27,317.11 payment to an American Express account and pay other personal expenses.

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[1] As discussed in further detail below (*infra* at 22 & n.32), Fetherston never provided the statements for this particular American Express account.

The Gs wrote the final check to Fetherston, in the amount of $40,000, on December 3, 2019.[2] Fetherston deposited the money into his Chase account the next day. He used the funds to make an $18,202.32 payment to an American Express account and pay other personal expenses.

When Fetherston cashed the Gs' checks, he was experiencing financial difficulties that included credit card debt exceeding $85,000. The monthly balances on his credit accounts were near or exceeded the credit limits.

D. Principal Terminates Fetherston's Employment and Investigates the Checks He Received from the Gs

1. Principal Terminates Fetherston's Employment Following an Internal Investigation

Between November 2019 and January 2020, Principal investigated Fetherston's book of business out of concern that Class A mutual fund shares were liquidated shortly after purchase in several of his clients' accounts.[3] As part of the investigation, Principal asked Fetherston to respond to written questions concerning those transactions. With respect to the Gs, Principal asked Fetherston to describe the Gs' liquidity needs and explain why they had liquidated more than $380,000 in Class A shares only five months after purchase.

On January 7, 2020, Fetherston responded that the Gs liquidated the Class A shares because they faced rising income needs in October 2019. Fetherston wrote that WG's health "drastically changed for the worse over the summer into the fall of 2019" and he was facing multiple brain surgeries. In addition, Fetherston stated that the Gs were considering moving or making major home renovations, as well as purchasing a home for their daughter, who also was experiencing health issues. According to Fetherston, WG feared "not having enough liquid cash for possible events down the road" and wished to have guaranteed income and more control over his money.

Following its investigation, Principal terminated Fetherston's association with the firm effective January 23, 2020. On or near February 12, 2020, the firm mailed the Gs a check in the amount of $26,623.83, along with a letter explaining that this sum was a reimbursement for

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[2] In its subsequent investigation, Principal determined that the Gs' checks to Fetherston coincided with "significant" withdrawals from their Principal accounts, although those withdrawals were not in the same amounts as the checks.

[3] Class A mutual fund shares typically have front-end sales charges and generally are intended to be long-term investments. FINRA, "Mutual Funds – Share Classes", https://www.finra.org/investors/investing/investment-products/mutual-funds#share-classes; *Winston H. Kinderdick*, 46 S.E.C. 636, 639 (1976) ("Mutual fund shares generally are suitable only as long-term investments . . . especially where such trading involves new sales loads.").

annuity surrender charges[4] as well as missed breakpoints[5] associated with mutual fund liquidations. The letter was signed by Todd Schwickerath, a compliance advisor at Principal.

2. Principal Investigates the Checks the Gs Wrote to Fetherston

The Gs called Schwickerath on February 24, 2020, and Schwickerath memorialized the call in a same-day memorandum.[6] The memorandum reflects that the Gs asked Schwickerath why they had received the February 12, 2020, reimbursement check and if they were at risk of losing their money. When Schwickerath told the Gs they would not lose their investments, the Gs informed him they "had written multiple checks directly to Fetherston." The Gs told Schwickerath that one of the checks was for financial planning services, and the others were for investments. The Gs stated they would research the matter and follow up with Schwickerath, but it could take them several weeks to do so because WG was scheduled to have brain surgery later that week.

Later the same day, however, the Gs called Schwickerath to advise that they had written three checks to Fetherston: a $19,000 check for commissions and financial planning fees, a $30,000 check for an investment, and a $40,000 check for an investment.[7] The Gs did not know what kind of investments the money was for.

The following day, the Gs emailed Schwickerath copies of the checks. Schwickerath reviewed the Gs' accounts and found no evidence that the funds were invested. Moreover, as Schwickerath later explained at the hearing, any commissions due to Fetherston would be paid by the firm, not directly by a client. Accordingly, Principal staff decided to reimburse the Gs and recoup the funds from Fetherston. In a form requesting approval for a reimbursement check,

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[4] A surrender charge is a sales charge for selling or withdrawing money from a variable annuity during the surrender period—a set period after purchase. Surrender charges reduce the value and the return of the investment. Securities and Exchange Commission, "Variable Annuity Surrender Charges," https://www.investor.gov/introduction-investing/investing-basics/glossary/variable-annuity-surrender-charges. Of the $26,623.83 reimbursed to the Gs, $16,000 was meant as reimbursement for an annuity they replaced that incurred a surrender charge.

[5] The term "breakpoints" refers to the "investment levels required to obtain a reduced sales load." Securities and Exchange Commission, "Introduction to Investing – Breakpoint Discounts", https://www.investor.gov/introduction-investing/investing-basics/glossary/breakpoint-discounts.

[6] Schwickerath testified that Principal did not require the use of telephone memoranda, but that he used memoranda to document important issues. Schwickerath also documented his telephone calls in email summaries.

[7] Schwickerath summarized this call with the Gs in an email he sent to Principal's chief compliance officer on February 27, 2020.

Schwickerath wrote that the reason for the check request was misconduct by a registered representative—specifically, misappropriation. Principal reimbursed the Gs $89,000 by check dated February 28, 2020.

Schwickerath called Fetherston on February 26, 2020. Schwickerath advised Fetherston that Principal was aware of the checks he received from the Gs and asked him where that money had been invested. Fetherston responded that the money was for a "fixed investment," but was unable to tell Schwickerath when or where the investment was made or provide documentation for the purported investment. When Schwickerath pointed out that documentation would exist if the funds had been invested, Fetherston responded, "I understand." Schwickerath told Fetherston he needed to repay the firm by March 4, 2020, and Fetherston agreed that he would work on reimbursing the firm, without disputing his need to do so. Fetherston expressed concern regarding the possible ramifications on his career but did not provide further information about the checks.[8]

Schwickerath next spoke with Fetherston on March 4, 2020, when Fetherston called him to advise that he was working on securing funds to reimburse the firm but needed more time to do so. Schwickerath responded that he was unable to grant more time but encouraged Fetherston to continue to work on reimbursing the firm.[9] Fetherston never provided additional information or documentation concerning the checks to Schwickerath and never reimbursed the firm. He never claimed to Schwickerath the checks were a gift or loan.[10]

E. FINRA Investigates the Checks Fetherston Received from the Gs

Principal's Form U5 disclosures concerning Fetherston's departure from the firm prompted FINRA to investigate. FINRA investigators interviewed the Gs on several occasions, took Fetherston's on-the-record testimony ("OTR"), and issued to Fetherston several investigative requests under Rule 8210.

1. FINRA Interviews the Gs in March 2020

A FINRA investigator, Leslie Jackson, interviewed the Gs by telephone on March 19, 2020, and documented the conversation in an undated memorandum. The memorandum reflects that the Gs told Investigator Jackson they relied on their investments to subsidize their income, as WG was no longer working due to Parkinson's disease and SG had taken a leave of absence

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[8] Schwickerath summarized this call with Fetherston in his February 27, 2020, email to Principal's chief compliance officer.

[9] Schwickerath summarized this phone call in a March 5, 2020, email to a senior special investigator at Principal.

[10] For purposes of this decision, we do not determine whether, under Fetherston's version of events, the Gs' checks are more properly characterized as a gift or a loan. The relevant issue is whether the Gs authorized Fetherston to take the checks for his own personal use, whether by way of a gift or a loan.

from her job to care for WG. They stated that they met Fetherston through a close friend, that they spoke with him weekly, and that Fetherston assisted them with their wills and other matters such as finding a mortgage broker.[11]

The Gs also told Investigator Jackson that they made the checks out to Fetherston at his request and Fetherston picked the checks up from their home. The Gs "could not remember any specific details concerning the purpose of the three checks," and Fetherston did not give them a receipt. The Gs learned that Fetherston had not invested their money after they received Principal's letter concerning the mutual fund activity in their account. The Gs advised Investigator Jackson that they felt threatened by Fetherston after the issue of their checks arose. In this respect, they explained that Fetherston had come to their home unannounced after they contacted Schwickerath about the checks, and they did not answer the door.

2. FINRA Issues Investigative Requests to Fetherston

a. FINRA Issues Several Rule 8210 Requests Asking Fetherston to Explain Why the Gs Wrote Him the Checks

After Investigator Jackson interviewed the Gs, she issued to Fetherston a March 31, 2020, Rule 8210 request for information and documents. The request sought information concerning Fetherston's termination from Principal and the mutual fund liquidations in his clients' accounts, including the Gs' accounts. The request also directed Fetherston to provide information about the Gs' checks, including the purpose of each check and an explanation of why he accepted checks from these customers in violation of firm policy. The Rule 8210 request further directed Fetherston to provide a copy of "any written document" evidencing the purpose of the Gs' checks and the eventual disposition of the funds.

After receiving a couple of extensions, Fetherston responded to the Rule 8210 request by email on June 1, 2020. In his response, Fetherston stated that the relevant client files were at Principal's office, and he was unable to access them due to a continuing COVID-19 lockdown in New York City. From memory, Fetherston provided details concerning the mutual fund liquidations in the Gs' and other client accounts, including the reasons for the liquidations and specifics as to how the funds were subsequently invested.

In response to the request for information concerning the Gs' checks, Fetherston stated:

> I did not have access to the client's files as [stated] above, personal notes and bank account questioned and I am unable to proceed with this question with any degree of certainty. I will be glad to answer this question in [its] entirety once I have had a chance to review the files, notes and bank account in question . . . at this time I am unable

[11] The Gs also told Jackson that Fetherston suggested that he be the successor executor to their wills.

> to provide the information and answers needed to reply to you on this question.

Fetherston's response provided no further information concerning the checks and did not indicate that the checks were a gift or loan.

Investigator Jackson issued a follow-up Rule 8210 request to Fetherston on June 10, 2020. This request noted that Fetherston had failed to provide all the information and documents sought in the initial request, including information and any documents concerning the Gs' checks. The request set a deadline of June 24, 2020, for Fetherston to provide the outstanding information and documents and warned that his continued failure to comply could result in sanctions, including a bar.

Fetherston did not respond to the follow-up request. Accordingly, on September 1, 2020, FINRA Enforcement issued another follow-up request under Rule 8210. This second follow-up request advised Fetherston that the information and documents identified in the previous request remained outstanding and warned him that his continued failure to comply could result in sanctions, including a bar.

Fetherston responded to the Rule 8210 request on September 10, 2020. In that response, Fetherston claimed for the first time that the Gs had given him the checks for his personal use. He wrote, "I never requested that the [Gs] give me checks. I shared with them my health issues and financial concerns and they were kind enough to offer help in a serious time of need. We were very close." Fetherston also wrote that "[t]he purpose of each check was the same: [to] help me to pay off my medical bills and expenses that were overwhelming." Fetherston stated that the funds came from the Gs' checking account and that, as of December 2019, the Gs had "excellent" liquidity and "their needs were much lower than previously expected." Fetherston stated that he deposited the checks into his personal Chase account and attached statements for that account.

b. Enforcement Seeks Any Loan Agreements between Fetherston and the Gs

Enforcement sent Fetherston a new Rule 8210 request on October 15, 2020. The request directed Fetherston to provide all documents supporting his claim that the Gs voluntarily gave him the checks to help him with financial difficulties, as well as any loan agreements between him and the Gs. The request also directed Fetherston to provide a written account of all conversations he had with the Gs concerning the checks and set a response deadline of October 30, 2020.

Fetherston did not respond to the request by the deadline and, accordingly, Enforcement sent him a follow-up Rule 8210 request for the same information and documents on November 4, 2020.[12] After receiving an extension, Fetherston responded to the request on December 8, 2020.

[12] Like the previous follow-up requests under Rule 8210, this request warned Fetherston that his failure to respond could result in sanctions, including a bar.

With respect to his conversations with the Gs, Fetherston stated they discussed his "personal needs and situation" approximately six times between August and December 2019. According to Fetherston, the Gs were "sympathetic and willing to help."

Fetherston attached to his response a copy of a handwritten note on Principal letterhead dated December 3, 2019 (the "Note")—the same day the Gs wrote the final check to Fetherston. The Note stated:

> For Recordkeeping – We have given Peter Fetherston a total of 3 checks equaling $89,000 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.

Two signatures appeared at the bottom of the Note, and the Gs' names and social security numbers were printed underneath the signatures.

c. Enforcement Takes Fetherston's Testimony and Requests Information Concerning His Medical Expenses

Pursuant to a Rule 8210 request, Fetherston appeared for an OTR on March 11, 2021. Fetherston, who by then was represented by counsel, testified that he used personal bank and credit accounts, including an American Express credit account, to pay his medical expenses during the relevant period. When asked if he would provide evidence of his medical expenses, Fetherston, through counsel, advised that he would not provide information or documents pertaining to those expenses on grounds of privilege.[13]

Following the OTR, Enforcement issued a March 29, 2021, Rule 8210 request for Fetherston's American Express credit card statements for the period between June 1, 2019, and March 31, 2020.[14] The request also directed Fetherston to "[i]dentify the medical expenses you paid with the proceeds of the three checks from the [Gs] by dollar amount, date, and method of payment." The deadline for a response was April 16, 2021.

Fetherston did not respond to the request and, accordingly, Enforcement sent a follow-up Rule 8210 request for the same information and documents to Fetherston's attorney on April 19, 2021. On May 4, 2021, Fetherston's attorney sent Enforcement a letter asserting that the requested information concerning the date, amount, and method of payment for Fetherston's medical expenses was privileged under federal and New York state law. In support of this

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[13] During the OTR, Fetherston's counsel stated, among other things, that "I've instructed [Fetherston] not to provide any medical records, including medical bills."

[14] Fetherston previously had provided Enforcement with statements for the Chase account and other personal bank and credit accounts but had not provided American Express statements.

assertion, Fetherston's attorney cited to a provision of the Health Insurance Portability and Accountability Act ("HIPAA") and a New York state statute.[15]

On June 23, 2021, Fetherston provided to Enforcement American Express account statements for the specified period, which reflected charges for household expenses. These statements, however, did not reflect the payments Fetherston made to American Express using the proceeds of the Gs' checks. Fetherston never provided the requested list of any medical expenses he paid using the Gs' checks.

3. FINRA Conducts Additional Interviews with the Gs and Asks Them to Provide Testimony in the Disciplinary Proceeding

FINRA staff subsequently conducted several additional telephone interviews with the Gs, which are detailed below.

a. The September 30, 2021 Interview

A FINRA investigator, Robert Sica, interviewed the Gs on September 30, 2021, and memorialized the conversation in a same-day memorandum.[16] The memorandum reflects that the Gs told Investigator Sica they did not write the Note, the handwriting and signatures on the Note were not theirs, and they had no knowledge of the health concerns referenced in the Note.[17]

The Gs also told Investigator Sica they wrote checks to Fetherston "to pay commissions Fetherston said they owed and for future investments." According to the Gs, Fetherston picked up each of the three checks from their home, as WG was ill and preparing to undergo brain surgery. The Gs advised Investigator Sica that they had severed ties with Fetherston and wished to avoid future involvement with him, as they believed he had anger issues and felt afraid of him. The Gs told Investigator Sica that Fetherston had come to their home unannounced in February or March 2020, and that they had responded by contacting the police.

b. The May 3, 2022 Interview

Investigator Sica next interviewed the Gs on May 3, 2022, and he again memorialized the conversation in a same-day memorandum. The memorandum reflects that the Gs told Investigator Sica their relationship with Fetherston was "strictly business" when he was their registered representative at MML. They did not have any contact with Fetherston between the time he left MML and the time they contacted him at Principal in 2019. When the Gs wrote the checks to Fetherston, they considered their relationship to be a "friendly business relationship"

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15 On May 3, 2021, Fetherston's attorney sent an email to Enforcement advising that Fetherston had requested account statements from American Express but had not yet received them.

16 Investigator Sica was assigned to take over the investigation in July 2021, replacing Investigator Jackson.

17 Enforcement previously had sent a copy of the Note to the Gs by email.

and not a close personal friendship. Although Fetherston would come to their home, it was only for business purposes such as delivering documents for them to sign or picking up a check.

The memorandum further reflects that the Gs recounted much of the same information they previously provided—namely, that they gave Fetherston the checks for investments and fees purportedly owed, not as a loan or a gift; they did not write the Note; and they were unaware of any financial or medical issues Fetherston may have experienced. The Gs stated that, when they gave Fetherston the checks, "he did not tell them exactly what investments he was going to use the money for."

The Gs reiterated to Investigator Sica that they feared Fetherston, stating that he had come to their home in February 2020. They expressed to Investigator Sica that they still feared what Fetherston might do to them in connection with this matter.

c. The September 14, 2022 Interview

Investigator Sica's final interview with the Gs took place on September 14, 2022. As with the previous interviews, he memorialized the conversation in a same-day memorandum. The memorandum reflects that the Gs advised Investigator Sica they would not testify in the scheduled disciplinary hearing in this case, as they were afraid that Fetherston might seek "payback" for their testimony. The Gs explained that Fetherston had come to their home unannounced and that, after conducting an internet search for Fetherston's name, they discovered that he had been arrested for assault and intimidating a witness.[18]

d. WG Declines to Sign an Affidavit

After the Gs decided not to testify, Enforcement asked WG to sign an affidavit for use in this disciplinary proceeding. Although WG initially agreed to sign the affidavit, he ultimately reconsidered. On November 11, 2022, WG sent an email to Enforcement stating:

> After carefully reconsidering the matter, I have decided not to sign the affidavit. 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, 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. I would respectfully request that this answer be accepted as final.

[18] In October 2017, Fetherston was charged in Massachusetts state court with intimidation of a witness and assault and battery. The court dismissed the charges for failure to prosecute in January 2018.

II. Procedural History

A. Enforcement Commences a Disciplinary Proceeding and the Parties Participate in a Hearing

Enforcement commenced a disciplinary proceeding against Fetherston on May 3, 2022, when it filed a three-cause complaint. Under cause one, Enforcement alleged that Fetherston converted and improperly used the Gs' checks in violation of FINRA Rules 2150 and 2010. Under cause three, Enforcement alleged that Fetherston violated Rules 8210 and 2010 when he failed to identify the medical expenses he paid with the proceeds from the Gs' checks.

Under cause two, Enforcement alleged that Fetherston violated Rules 8210 and 2010 in three ways: by providing false information in response to a Rule 8210 request, by providing a fabricated document in response to a Rule 8210 request, and by testifying falsely during his OTR. Specifically, Enforcement alleged that the Note was fabricated and Fetherston testified falsely during his OTR when he stated the Gs signed that document. Enforcement further alleged that Fetherston made false statements in a Rule 8210 response when he stated the Gs voluntarily gave him the checks to help with medical expenses, and also testified falsely when he made the same claim during his OTR.

The Hearing Panel held a hearing, during which Schwickerath, Investigator Sica, and Fetherston testified. Schwickerath and Investigator Sica described their interviews with the Gs and confirmed that the details of these interviews were recorded in their memoranda and emails.

Fetherston testified that the Gs were his close friends and they volunteered to give him the checks based on conversations concerning his health, medical bills, and financial hardship. Fetherston acknowledged that he did not comply with FINRA's Rule 8210 request to identify the medical expenses he paid with the proceeds of the Gs' checks, but said his attorney advised him not to respond because that information is privileged.

B. The Hearing Panel Issues a Decision Dismissing the Allegations of Conversion and Providing a False Document, Information, and Testimony

The Hearing Panel issued a September 26, 2023, decision dismissing the allegations that Fetherston converted and misused the Gs' funds (cause one) and provided a false document, information, and testimony to FINRA (cause two). The Hearing Panel determined that Fetherston was liable as alleged in cause three, finding that he failed to comply with his obligation to identify by date, amount, and method of payment the medical expenses he purportedly paid with funds from the Gs' checks. In this respect, the Hearing Panel rejected Fetherston's argument that this information was subject to a medical records privilege. For Fetherston's violation, the Hearing Panel imposed a four-month suspension in all capacities.[19]

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[19] This sanction was stayed automatically by Enforcement's appeal to the NAC. FINRA Rule 9311(b).

III. Discussion

A. The Hearing Panel Should Consider Further Fetherston's Liability for Conversion

FINRA defines conversion as the "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." *Thomas Lee Johnson*, Exchange Act Release No. 99596, 2024 SEC LEXIS 444, at *11-12 (Feb. 23, 2024) (citing *FINRA Sanction Guidelines*, at 36 n.2 (Oct. 2020)). To demonstrate Fetherston's liability for conversion, Enforcement was required to show by a preponderance of the evidence that he lacked authorization to take the Gs' checks for his personal use.[20] *See Johnson*, 2024 SEC LEXIS 444, at *11-12; *David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003) (confirming that the preponderance standard applies to disciplinary proceedings before self-regulatory organizations), *aff'd*, 407 F.3d 178 (3d Cir. 2005). As its primary evidence that Fetherston lacked such authorization, Enforcement presented the Gs' statements to Schwickerath and FINRA investigators, which are hearsay.

"It is well-established that hearsay evidence is admissible in administrative proceedings and can provide the basis for findings of violation, regardless of whether the declarants testify." *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *36 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). "In determining whether to rely upon hearsay evidence, it is necessary to evaluate its probative value, and reliability, and the fairness of its use." *Epstein*, 2009 SEC LEXIS 217, at *37 (internal quotation omitted). The Hearing Panel expressed concerns with the reliability of the Gs' statements to FINRA and Schwickerath, finding the statements uncorroborated and the Gs' version of events questionable in several respects.[21] Based on these concerns, the Hearing Panel concluded that Enforcement did not meet its burden.

The Hearing Panel's conclusion lacks sufficient support. The Hearing Panel failed to specify whether, in light of its concerns with the Gs' statements, it accorded those statements no weight or reduced probative weight. And, as discussed in greater detail below, the Hearing Panel failed to address evidence relevant to its concerns with the statements' reliability. Moreover, the Hearing Panel's evaluation of the statements reflects a pressing demand for certainty not required under the applicable preponderance standard. *See Lindsay v. Nat'l Transp. Safety Bd.*,

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[20] It is undisputed that Fetherston intentionally took the Gs' funds for his personal use. Accordingly, the only issue before us is whether the Gs authorized Fetherston to do so.

[21] The Hearing Panel found no problem with the relevance of the Gs' statements or the fairness of admitting those statements. We agree that the statements are relevant. We also find that their admission was fair, as the Gs were unavailable to testify and Enforcement timely disclosed its intent to offer their statements in lieu of their testimony. *See Edgar B. Alacan*, 57 S.E.C. 715, 731 (2004) (finding the use of hearsay statements fair when the declarants were unavailable and the Commission's Division of Enforcement provided "ample notice" of its intent to use the statements).

47 F.3d 1209, 1213 (D.C. Cir. 1995) (discussing the preponderance standard and explaining that it does not require certainty).

Accordingly, we remand cause one for further consideration. *Cf. Verisign, Inc. v. XYZ.COM LLC*, 891 F.3d 481, 486 (4th Cir. 2018) (explaining that a remand is generally the prudent course when a lower court applies the incorrect burden of proof); FINRA Rule 9348 (providing that the National Adjudicatory Council may "remand the disciplinary proceeding with instructions"). In doing so, we remind the Hearing Panel that the preponderance standard does not require certainty or "the absence of any reasonable doubt." *Lindsay*, 47 F.3d at 1213. Rather, the standard requires the factfinder to "make a comparative judgment" as to what more likely than not took place. *Id*.; *see also Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) (explaining that the preponderance standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation omitted).

Consistent with the preponderance standard and our discussion below, the Hearing Panel should consider further the reliability of the Gs' statements. The Hearing Panel should explain any continuing concerns with the statements' reliability, specify the probative weight it accords the statements, and address how that weight impacts the rest of its analysis. If the Hearing Panel accords the Gs' statements any probative weight, we direct it to also consider whether Fetherston's testimony, which it found not "fully credible," provides further evidence of his liability. *See United States v. Marchand*, 564 F.2d 983, 986 (2d Cir. 1977) (explaining that "a jury is free, on the basis of a witness' demeanor, to assume the truth of what he denies although a court cannot allow a civil action [or criminal prosecution] to go to the jury on the basis of this alone") (internal quotation omitted).

1. The Hearing Panel Should Consider the Corroborative Value of Fetherston's Conversations with Schwickerath

While the Hearing Panel found the Gs' statements to be uncorroborated, it did not consider the potential corroborative value of Fetherston's conversations with Schwickerath.[22] During their initial conversation, Schwickerath pointed out that Fetherston did not invest the funds from the Gs' checks (as Fetherston initially claimed) and provided him the opportunity to explain the true purpose of the checks. Fetherston did not explain that the checks were a gift or loan, nor did he otherwise claim any entitlement to the funds. Instead, Fetherston acknowledged that he had not invested the money and agreed to repay the firm for the $89,000 it reimbursed to the Gs.

[22] In the Hearing Panel's view, Fetherston's statement to Schwickerath that the checks were for a fixed investment did not demonstrate that he told the Gs the checks were for an investment. But the Hearing Panel did not consider the corroborative value of Fetherston's agreement to repay the firm and failure to claim that the Gs gave him the funds for personal use. We note that Fetherston has never explained his repeated failures to provide his version of events to Schwickerath, even though his version, if true, would exculpate him of conversion.

At the hearing, Fetherston testified that he felt shocked and confused during his initial call with Schwickerath and blamed this for his failure to explain that the Gs had given him the funds for his personal use.[23] But a week later, Fetherston called Schwickerath to ask for additional time for the reimbursement. Having had time to reflect, Fetherston still did not claim that the Gs had given him the funds for his personal use, raised no other argument that he was entitled to the funds, and confirmed his previous agreement to repay the firm. Based on these conversations, it appears that Fetherston may have implicitly acknowledged to Schwickerath that he used the Gs' checks in an unauthorized manner. *Cf. Johnson*, 2024 SEC LEXIS 444, at *14-15 (observing that "Johnson's immediate return of the excess funds once RBC reversed the error—without a hint of protest or first asking for an explanation from RBC—supports FINRA's finding that Johnson knew the funds were 'never his to spend.'").

On remand, the Hearing Panel should address whether Fetherston's conversations with Schwickerath corroborated the Gs' statements and, if so, how that corroboration impacts the reliability of those statements. The Hearing Panel should consider that these conversations took place in late February and early March 2020—less than three months after Fetherston received the final check from the Gs and six months before he first told FINRA that the checks were a gift or a loan. *Cf. Dep't of Enf't v. Brian Michael White*, Discip. Proc. No. 2012033128703, 2015 FINRA Discip. LEXIS 48, at *31 (FINRA Hearing Panel June 30, 2015) (explaining that the panel credited the respondent's "OTR testimony over his contrary hearing testimony . . . as it was given closer in time to the events at issue in this proceeding, before Enforcement notified [him] that it intended to recommend charges against him and, therefore, before he could better evaluate the impact on him of one answer or response versus another"); *United States v. Williams*, 800 F. App'x 734, 737 (11th Cir. 2020) (evaluating the reliability of hearsay and explaining, "statements close in time to the events at issue are more likely to be based on fresh recollection and carry a diminished likelihood of deliberate or conscious misrepresentation"). If the Hearing Panel determines that Fetherston's conversations with Schwickerath do not corroborate the Gs' statements, it should explain why it reached that conclusion despite the timing of those conversations, Fetherston's failure to assert any entitlement to the funds, and Fetherston's agreement to repay Principal.

2. The Hearing Panel Should Consider Other Evidence Relevant to the Reliability of the Gs' Statements

The Hearing Panel also found the Gs' statements to be questionable in several respects but failed to consider evidence relevant to its concerns. For instance, the Hearing Panel expressed doubt concerning the Gs' version of events because "the Gs were not novice investors," "WG was an analyst at a large financial institution," and "the Gs had several decades of investing experience." But even assuming the Gs were experienced investors—and we do not agree that they were—this does not mean they would have been prepared to detect deceit by a

[23] This is the only explanation Fetherston has offered for his failure to provide his current version of events to Schwickerath.

securities professional they trusted.[24] *Cf.* Donald Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 Calif. L. Rev. 627, 631, 671-72, 678, 683 (May 1996) (discussing that even sophisticated investors place trust in their brokers, and that trust can be exploited); *Joseph H. O'Brien*, 51 S.E.C. 1112, 1117 (1994) (observing that "trust [] is the cornerstone of the relationship between a securities professional and his customer"); *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *43-44 (Jan. 9, 2009) (noting "the foundation of trust and confidence crucial to any professional advising relationship"), *aff'd*, 586 F.3d 122 (2d Cir. 2009). On remand, the Hearing Panel should consider evidence that the Gs trusted Fetherston in a professional capacity and, therefore, may not have doubted his direction to write checks made out to him personally.[25]

The Hearing Panel also referred to a purported inconsistency in the Gs' statements—namely, that the Gs told Investigator Jackson they could not remember specific details concerning the purpose of the checks, only to later remember that the checks were for commissions and investments. But in February 2020—the month before they spoke with Investigator Jackson—the Gs told Schwickerath that the checks were for commissions and investments. Accordingly, it is impossible that the Gs remembered the checks were for investments only after they spoke with Investigator Jackson. Read in its entirety, Investigator Jackson's memorandum reflects that the Gs told her the checks were for investments, but they did not know the specific details of those investments. This is consistent with the Gs' prior statements to Schwickerath and subsequent statements to Investigator Sica.[26]

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[24] The record does not support the Hearing Panel's portrayal of the Gs as relatively sophisticated investors. Although WG worked at a large financial services company, there is no indication that his position involved or required knowledge of finance or investments. Moreover, Fetherston himself told Principal investigators that the Gs were "very unorganized" when they met with him to discuss their finances in 2019, and the fact that Principal had to reimburse the Gs for annuity surrender fees and missed mutual fund breakpoints belies the Hearing Panel's implication that the Gs were well equipped to detect potential misconduct regarding their investments.

[25] This includes evidence that the Gs named Fetherston, at his suggestion, as a successor executor to their wills and relied on him for referrals for other professional services. In addition, the Gs previously worked with Fetherston at MML, with no apparent problems. Based on this prior experience, the Gs may not have interpreted Fetherston's request that their checks be made payable to him as a red flag.

[26] In her memorandum, Investigator Jackson wrote that the Gs "could not remember any specific details concerning the purpose of the three checks." She also wrote that the Gs "were informed that Fetherston did not invest their money when they were contacted by [Principal] as a result of the mutual fund switching in their account." Reading these statements together, we do not see an inconsistency with the Gs' statements to Schwickerath and Investigator Sica that their checks were for investments but they did not recall the specifics of those investments. To the

[Footnote continued on next page]

In addition, the Hearing Panel expressed doubt that the Gs would not have raised a concern about their checks until February 2020, when Principal sent them the reimbursement check related to annuity surrender fees and missed breakpoints. The Gs told Schwickerath, however, that their initial check to Fetherston (written in September 2019) was meant to pay for commissions Fetherston told them they owed. If the Gs believed the first check was for that purpose, it follows that they would not have looked for confirmation of an investment in that amount. Moreover, the periods between the Gs' final two checks (written in November and December 2019) and their February 2020 inquiry were a little over three and two months, respectively. During this period, WG struggled with his health and was preparing to undergo brain surgery. Considering these circumstances, we do not agree that the relatively modest delay before the Gs contacted Principal about the checks undermines the reliability of their statements.

We acknowledge that the Gs' statements were verbal and unsworn. *See Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4166, at *37 (Dec. 11, 2009) (explaining that the Commission considers a number of factors to evaluate the reliability of hearsay, including whether the statements are verbal or written and sworn or unsworn), *aff'd*, 627 F.3d 1230 (D.C. Cir. 2010), *overruled on other grounds by Kokesh v. SEC*, 581 U.S. 455 (2017). Under the circumstances, however, we are not persuaded that these factors substantially undermine the reliability of the Gs' statements. *See Dep't of Enf't v. McGuire*, Complaint No. 20110273503, 2015 FINRA Discip. LEXIS 53, at *23-24 (FINRA NAC Dec. 17, 2015) (finding probative of misconduct the testimony of three witnesses who described verbal, unsworn statements made by a customer). Because Principal promptly reimbursed the Gs after they contacted Schwickerath by telephone, there was no need for them to lodge a written complaint with the firm. Moreover, as Fetherston acknowledged, he typically communicated with the Gs by phone or in person rather than by text or email. We therefore find it unsurprising that there are no written statements by the Gs concerning the purpose of their checks. And, while the Gs declined to testify or provide an affidavit, they consistently stated over the course of nearly three years that they felt threatened by Fetherston and feared retaliation if they testified. *Cf. Charles Tom*, 50 S.E.C. 1142, 1145 (1992) (finding probative statements a customer made in a letter and an unsworn declaration when the customer "was reluctant to have any type of a confrontation with" the respondent, was not subject to FINRA's jurisdiction, and therefore was unavailable). Accordingly, the other evidence relevant to the reliability of the Gs' statements is particularly important and warrants further consideration.

On remand, the Hearing Panel should further consider the reliability of the Gs' statements in light of evidence that: (1) the Gs trusted Fetherston in a professional capacity and were not sophisticated investors; (2) the Gs consistently told investigators, including Investigator Jackson, that the checks were for their investments and related costs; (3) WG struggled with his health during the period before he contacted Principal about the checks; (4) the Gs and Fetherston communicated primarily by telephone or in person; (5) Principal promptly addressed the Gs' concerns about the checks based on their verbal complaint, without requiring a written

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contrary, the Gs consistently told Schwickerath and both FINRA investigators the checks were meant for investment purposes.

complaint; and (6) the Gs consistently told FINRA investigators over the course of several years that they feared Fetherston.

3. If the Hearing Panel Accords Any Probative Weight to the Gs' Statements, It Should Consider Whether Fetherston's Testimony Provides Further Evidence of Liability

Finally, if the Hearing Panel accords the Gs' statements any probative weight, it then should consider whether Fetherston's testimony about the circumstances surrounding the checks and the Note, which it found not "fully credible," provides further evidence of liability. A factfinder may infer culpability from incredible testimony, at least when there otherwise is evidence of the misconduct. *See Wright v. West*, 505 U.S. 277, 296 (1992) ("[I]f the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."); *Marchand*, 564 F.2d at 986; *Joseph C. Ruggieri*, Exchange Act Release No. 81143, 2017 SEC LEXIS 2193, at *14 & n.13 (July 13, 2017) (explaining that "a respondent's implausible explanations for his trades may, together with other facts, be sufficient to infer that the respondent was tipped with material non-public information"); *Dep't of Enf't v. Joseph Butler*, Complaint No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *25 (FINRA NAC Sept. 25, 2015) (concluding that the respondent was liable for conversion based, in part, on his incredible testimony), *aff'd*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989 (June 2, 2016); *McGuire*, 2015 FINRA Discip. LEXIS 53, at *21-22 (same). Thus, if the Hearing Panel accords the Gs' statements any probative weight on remand, it should explain whether it infers culpability from Fetherston's testimony, when it found Fetherston to be "not generally a credible witness."

In this respect, we agree with the Hearing Panel that there is reason to doubt Fetherston's version of events. As the Hearing Panel observed, Fetherston changed his story about the purpose of the Gs' funds, first telling Schwickerath that the money was for an investment and later telling FINRA that the money was a loan. It also seems that Fetherston changed his story concerning the Gs' financial circumstances in late 2019. During Principal's internal investigation focusing on mutual fund liquidations, Fetherston stated that the Gs sold mutual fund shares in October of 2019 because they needed liquidity for "rising income needs." During FINRA's investigation concerning the Gs' checks, Fetherston stated that, as of December 2019, the Gs' liquidity was "excellent" and their needs "were much lower than previously expected." Based on these statements, it appears that Fetherston's description of the Gs' financial needs may have shifted to suit his own interests.[27]

The Hearing Panel found that Fetherston's testimony "was at times vague, inconsistent, and evasive." It appears this was the case, particularly when Fetherston was asked to provide important details: the timing of his production of the Note; how the Gs determined the amounts of the checks; and why the Gs would loan him $89,000 when WG's health was deteriorating and they desired to purchase an apartment for their daughter, who also was experiencing health

[27] It seems that Fetherston also provided inconsistent testimony concerning who wrote the Note. During his OTR, he stated that both he and SG wrote the Note. In his testimony at the hearing, however, Fetherston stated that only SG wrote the Note.

issues. Moreover, his account of the circumstances surrounding the checks and the Note was uncorroborated and appears implausible. On remand, the Hearing Panel should consider the overall plausibility of Fetherston's account—that, shortly after resuming a business relationship with Fetherston, the Gs felt such sympathy for him that they gave him an open-ended loan of $89,000, only to place his career in jeopardy several months later by falsely claiming this money was for their investments.

As the Hearing Panel observed, Fetherston's credibility is further called into question by the lengthy delays before he provided FINRA with his account of the circumstances surrounding the Gs' checks and disclosed the existence of the Note. *Cf. Williams*, 800 F. App'x at 737; *White*, 2015 FINRA Discip. LEXIS 48, at *31. Fetherston first received a Rule 8210 request seeking information and any documents concerning the purpose of the Gs' checks on March 31, 2020. After a delay, he responded that he was unable to provide information about the checks without consulting the Gs' client file. This appears implausible given the recency of the checks and the amount of money involved, which Fetherston admitted was "a lot." *See Butler*, 2015 FINRA Discip. LEXIS 35, at *21 (observing that, "[g]iven the amounts at issue [], it defies belief that Butler would have forgotten such generous gifts"). By contrast, in the same response, Fetherston was able to provide from memory details about the mutual fund liquidations in the Gs' and other clients' accounts. Ultimately, Fetherston did not provide his current account of the circumstances surrounding the Gs' checks until September 2020—nearly six months after he received the initial Rule 8210 request and after he received multiple follow-up notices warning that his failure to provide this information could result in a bar. And he did not disclose the existence of the Note until December 8, 2020, more than eight months after FINRA first asked him to provide any existing documents concerning the purpose of the checks. It appears that Fetherston failed to provide a credible explanation for these lengthy delays, especially considering that the information and Note he eventually provided would, if true, exculpate him of the serious misconduct under investigation.[28]

In sum, the Hearing Panel should consider further the consistency and plausibility of Fetherston's account of why the Gs gave him $89,000 and the origin of the Note. If the Hearing Panel finds the Gs' statements are entitled to any probative weight on remand, it should explain whether it views Fetherston's testimony on these critical points as evidence of misconduct. *See Wright*, 505 U.S. at 296; *Marchand*, 564 F.2d at 986.

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[28] Fetherston's only explanation for the delay before he provided information concerning the Gs' checks was that he did not have access to their client file. As noted above, however, Fetherston provided other information from memory in response to the same Rule 8210 request. Moreover, Fetherston agreed that it was unnecessary for him to review any documents before he ultimately provided his account of the purpose of the checks in September 2020. And, while Fetherston testified that he had trouble locating the Note, his sole explanation for why he did not disclose its existence in response to FINRA's Rule 8210 requests was that he "didn't know what to do" during a difficult time.

B. The Hearing Panel Should Further Consider Fetherston's Liability for Providing a False Document, Testimony, and Information to FINRA

For the reasons discussed above, we also direct the Hearing Panel to further consider Fetherston's liability for providing a false document, information, and testimony to FINRA in violation of Rules 8210 and 2010, as alleged in cause two. The Hearing Panel's dismissal of this cause stemmed from its factual findings and legal conclusions concerning the conversion allegation. Therefore, the considerations discussed above will be relevant to the Hearing Panel's determination of Fetherston's liability under cause two.[29]

C. Enforcement Did Not Procedurally Default Certain Arguments Concerning Fetherston's Liability

We reject Fetherston's contentions that Enforcement has procedurally defaulted certain arguments concerning his liability under causes one and two.

First, relying on FINRA Rule 9347, Fetherston urges us to disregard Enforcement's argument that the Gs' statements were supported by other evidence because, in his view, Enforcement does not support this argument in its opening brief with citations to the record. As relevant here, Rule 9347 provides that "[a]n exception to findings, conclusions, or sanctions shall be supported by citation to relevant portions of the record, including references to specific pages relied upon." FINRA Rule 9347(a). Enforcement included specific page citations to the relevant portions of the record in its Statement of Facts. Indeed, Enforcement included not only the page numbers, but also parentheticals further identifying which document or whose testimony it cited. While Enforcement did not repeat most of these record citations in the Argument section of its brief—and we encourage parties to include record citations in that section—the brief, read as a whole, provides sufficient notice of the portions of the record Enforcement relies upon to support its arguments on appeal.

Second, Fetherston contends that Enforcement waived its argument that he provided false testimony during his OTR because the record does not include the OTR transcript. This argument lacks merit. During the hearing, the parties read the relevant portions of the OTR transcript into the record and, accordingly, agreed that the transcript need not be introduced as a hearing exhibit.[30] Having agreed to this method of presenting the relevant OTR testimony,

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[29] While Fetherston faults Enforcement for failing to obtain a handwriting expert's opinion as to whether the Note is genuine, Enforcement is not required to present such evidence to establish that a document is fabricated. *See McGuire*, 2015 FINRA Discip. LEXIS 53, at *31-32 (citing cases). Nevertheless, this decision does not preclude the parties or the Hearing Panel from considering further proceedings on remand as needed, whether related to the authenticity of the Note or other matters.

[30] The record includes a copy of the OTR transcript because Fetherston's attorney attached it as an exhibit to his December 9, 2022, motion to strike the memoranda of the Gs' statements and several emails between Enforcement and the Gs. As noted above, however, the OTR transcript was not submitted as a hearing exhibit.

Fetherston cannot complain about it now. *See Dep't of Enf't v. North,* Complaint No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *43 (FINRA NAC Mar. 15, 2017) (respondent waived an issue raised for the first time on appeal), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *aff'd*, 828 F. App'x 729 (D.C. Cir. 2020); *Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (same).

D. Fetherston Violated FINRA Rule 8210 by Failing to Provide Information Concerning His Medical Expenses

Fetherston did not cross-appeal the Hearing Panel's decision and, in his brief, he does not contest liability for his failure to provide information requested under Rule 8210, as alleged in cause three. Nevertheless, we briefly address Fetherston's liability for this cause to provide a basis for our review of the sanction the Hearing Panel imposed.

As relevant here, Rule 8210 grants FINRA the authority to require a "person subject to [its] jurisdiction to provide information . . . with respect to any matter involved in [an] investigation." FINRA Rule 8210. As a person subject to FINRA's jurisdiction, Fetherston had a duty to respond to FINRA's requests for information "fully and promptly." *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009). It is undisputed that he received FINRA's Rule 8210 requests to list the medical expenses he paid with the proceeds of the Gs' checks by date, amount, and method of payment, and that he refused to provide this information.

We conclude that the limited information requested concerning Fetherston's medical expenses was "with respect to" FINRA's investigation, as it related to Fetherston's claim that the Gs gave him the checks to assist with such expenses. *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *12-13 (Nov. 8, 2007) ("Whether a requested record is 'with respect to any matter involved in' a [FINRA] investigation, is a determination made by the [FINRA] staff."), *aff'd*, 316 F. App'x 865 (11th Cir. 2008). In addition, the Hearing Panel correctly determined that the requested information is not privileged and that reliance on advice of counsel is not a defense to liability under FINRA Rule 8210.[31] *Howard Brett Berger*,

[31] Before the Hearing Panel, Fetherston continued to argue (as he did to Enforcement) that information concerning his medical expenses is privileged under the HIPAA and a New York state statute, N.Y. C.P.L.R. § 4504. During oral argument before the NAC, however, Fetherston conceded that these statutes do not provide a privilege against disclosing this information under Rule 8210. We agree. Fetherston made no showing that these statutes apply to FINRA disciplinary proceedings or that, even if they were applicable, they would protect from disclosure the limited information FINRA sought. *See United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007) (explaining that "HIPAA did not give rise to a physician-patient or medical records privilege"); *S.M. v. City of New York*, 207 N.Y.S.3d 482, 484 (N.Y. App. Div. 2024) (explaining that "information of a nonmedical nature . . . is subject to disclosure" under § 4504); *Mohr v. Hillside Children's Ctr.*, 766 N.Y.S.2d 565, 565 (N.Y. App. Div. 2003) (explaining that nonmedical information in a party's medical records is subject to disclosure, while information that "relate[s] to diagnosis, care, treatment, therapeutic programs and prognosis" is privileged).

Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (explaining that reliance on advice of counsel is not a defense to a Rule 8210 violation), *aff'd*, 347 F. App'x 692 (2d Cir. 2009), *cert. denied*, 559 U.S. 1102 (2010). Accordingly, we agree with the Hearing Panel's determination that Fetherston violated Rule 8210, as alleged in cause three.

IV. Sanctions

For Fetherston's failure to provide information requested under Rule 8210, as alleged in cause three, the Hearing Panel imposed a four-month suspension in all capacities. In selecting this sanction, the Hearing Panel misapprehended facts and law relevant to the analysis.

The Hearing Panel's sanction was based, in part, on its determination that Fetherston substantially complied with FINRA's request to list the medical expenses he paid using the Gs' checks when he provided personal bank and credit card statements. In the Hearing Panel's view, those statements "enabled FINRA to see how [Fetherston] spent the [Gs'] funds." That finding is inaccurate. Fetherston used the vast majority of the Gs' funds to make payments to an American Express credit account, but he did not provide the statements for that account.[32] And the other statements Fetherston provided did not appear to include any medical expenses. Without the relevant American Express statements or the list Enforcement requested, FINRA staff could not determine whether Fetherston used the Gs' checks to cover the medical expenses Fetherston himself claims was the reason the Gs gave him the money. Accordingly, the Hearing Panel erred when it concluded that Fetherston substantially complied with the relevant Rule 8210 request. *See FINRA Sanction Guidelines*, at 93 (2022) (hereinafter "*Guidelines*") ("Where the respondent provided a partial but incomplete response, a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.") (emphasis added).

In addition, the Hearing Panel did not apply the appropriate standard for mitigation based on reliance on counsel. The Hearing Panel concluded that it could not accord mitigation because Fetherston did not satisfy the formal elements of an advice-of-counsel defense.[33] But "even if a respondent cannot meet the requirements necessary to invoke reliance on counsel as an

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[32] Fetherston used the full amount of the first check ($19,000), the vast majority of the second check ($27,317 of $30,000), and nearly half of the third check ($18,202 of $40,000) to make payments to an American Express account. These payments amounted to approximately $64,519—more than 70% of the $89,000. While Fetherston provided statements for an American Express credit account, it was not the American Express account to which he made payments using the Gs' checks. And, while Fetherston's Chase bank records show that he used a portion of the Gs' funds (approximately $24,480) to cover household and other personal expenses, these records do not shed light on how he used the remaining $64,519.

[33] "To establish the defense of reliance on advice of counsel, a respondent must show that he: (1) made complete disclosure to counsel; (2) sought counsel's advice as to the legality of his conduct; (3) received advice that the conduct was legal and (4) relied in good faith on that advice." *Dep't of Enf't v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *46 (NASD NAC May 17, 2001), *aff'd sub nom.*, *Frank Thomas Devine*, 55 S.E.C. 1180 (2002).

affirmative defense, adjudicators may still consider reasonable reliance on counsel as a mitigating factor." *Dep't of Enf't v. Erenstein*, Complaint No. C9B040080, 2006 NASD Discip. LEXIS 31, at *19 n.14 (NASD NAC Dec. 18, 2006) (internal quotation omitted), *aff'd*, 2007 SEC LEXIS 2596; *see also Fergus*, 2001 NASD Discip. LEXIS 3, at *46-47 (the standard for "analyzing whether reliance on advice of counsel may serve as a substantive defense to a finding of violation [] is not controlling in analyzing whether reliance on counsel may mitigate sanctions under the [] Guidelines"). "[F]or a reliance on the advice of counsel claim to be successful mitigation under the Guidelines, [a Respondent] must demonstrate his reasonable reliance on competent legal advice." *Dep't of Enf't v. Reifler*, Complaint No. 2016050924601r, 2023 FINRA Discip. LEXIS 1, at *24-25 (FINRA NAC Jan. 17, 2023) (internal quotation and alteration omitted); *Guidelines*, at 7 (Principal Consideration No. 7) ("Whether the [] respondent [] demonstrated reasonable reliance on competent legal [] advice."). "To constitute mitigation, [] the claim must have sufficient content and sufficient supporting evidence." *Reifler*, 2023 FINRA Discip. LEXIS 1, at *25 (internal quotation omitted).

On remand, the Hearing Panel should apply the standard articulated in the Guidelines to evaluate whether Fetherston should receive mitigation for reliance on advice of counsel. *Guidelines*, at 7 (Principal Consideration No. 7); *Reifler*, 2023 FINRA Discip. LEXIS 1, at *24-25. We express no opinion as to how the Hearing Panel should resolve this issue under that standard.[34]

The Hearing Panel's determination to impose a four-month suspension for cause three rested, in part, on misapprehensions concerning Fetherston's compliance with the relevant Rule 8210 request and the legal standard for mitigation based on reliance on advice of counsel. Because we remand this matter for reconsideration of causes one and two, we also direct the Hearing Panel to redetermine the sanction for cause three consistent with our discussion herein. In addition, the Hearing Panel should determine in the first instance the appropriate sanctions for causes one and two if it finds Fetherston liable for those causes.

In summary, we instruct the Hearing Panel to do the following on remand:

As to causes one and two, the Hearing Panel should:

- Apply the preponderance of the evidence standard in determining liability;

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[34] The Hearing Panel faulted Fetherston for "fail[ing] to produce the actual advice he received," either by producing the written advice or his attorney's testimony. On remand, the Hearing Panel should consider that the advice Fetherston received was verbal, and having his attorney testify in this proceeding potentially could raise ethical and logistical issues. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994) (observing that "there is no obligation to ensure that a litigant has conflict-free representation" in a civil suit but noting that the former NASD had raised the issue of whether, under N.Y. Code of Responsibility Discip. R. 5-102, the petitioner's counsel should represent him when counsel was likely to testify). Again, however, we express no opinion as to how the Hearing Panel ultimately should decide the mitigation issue.

- Reevaluate the reliability of the Gs' statements, addressing possible corroboration for those statements and the evidence described in Section III.A.2, and explain any continuing concerns with the reliability of the Gs' statements;

- Specify what probative weight, if any, the Hearing Panel accords the Gs' statements and explain how that determination impacts the rest of its analysis;

- If the Hearing Panel accords the Gs' statements any probative weight, address whether it considers Fetherston's testimony to be further evidence of the alleged misconduct; and

- If the Hearing Panel finds Fetherston liable for causes one or two (or both), determine in the first instance the appropriate sanction or sanctions for those causes.

As to the sanction imposed for cause three, the Hearing Panel should:

- Redetermine the sanction without according mitigation based on substantial compliance; and

- Apply the standard in the Guidelines to evaluate whether Fetherston should receive mitigation for reliance on advice of counsel.

V. Conclusion

We reverse the Hearing Panel's dismissals of the allegations that Fetherston converted customer funds and provided to FINRA a false document, information, and testimony, as alleged in causes one and two, and we remand these causes to the Hearing Panel for further consideration. We agree with the Hearing Panel's finding that Fetherston failed to provide information requested under Rule 8210, as alleged in cause three. We set aside the four-month suspension the Hearing Panel imposed for this cause and direct it to redetermine this sanction on remand, consistent with our discussion herein.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell

Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary