FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. AUSTIN WAYNE MORTON (CRD No. 5538108), Respondent.	Disciplinary Proceeding No. 2016052347901 Hearing Officer–RES **HEARING PANEL DECISION** March 14, 2018

Department of Enforcement did not meet its burden of proof that Respondent committed conversion or that Respondent was compensated for allegedly engaging in an undisclosed outside business activity.

Appearances

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

For Respondent Austin Wayne Morton: Jon-Jorge Aras, Esq., Spadea Lignana LLC.

DECISION

I. Introduction

Department of Enforcement filed a Complaint against Respondent Austin Wayne Morton consisting of two causes of action. The first cause of action alleges that, on two separate occasions in September and October 2016, Morton converted a total of $36,000 from "GR" in violation of FINRA Rule 2010. The Complaint alleges that the first conversion occurred when Morton allegedly took possession of $20,000 cash that GR had withdrawn from his bank account. The Complaint further alleges that the second conversion occurred when Morton obtained, filled out, and cashed a check signed by GR for $22,000, when GR had intended the check to be for $6,000. At the time of the alleged conversions, GR was 82 years old and had been diagnosed with dementia. He had been a customer of Morton's at FINRA member Edward D. Jones & Co until mid-September 2016.

The second cause of action alleges that Morton was compensated in the amount of $2,000 cash for assisting GR in locating and cashing out a variable annuity and thereby engaged in an undisclosed outside business activity in violation of FINRA Rules 3270 and 2010.

A hearing was held in Fayetteville, Arkansas on December 5-6, 2017.[1] A majority of the Hearing Panel concludes that Enforcement failed to meet its burden of proving the two causes of action: conversion of funds from GR and receipt of compensation in the amount of $2,000 cash for an alleged undisclosed outside business activity.[2]

II. Findings of Fact

A. Respondent

Morton was registered as a General Securities Representative through his association with Edward Jones.[3] He worked in Edwards Jones' branch office in Sallisaw, Oklahoma. His client base consisted of 350 consistently active households.[4] His assets under management ranged from $35 million to $40 million.[5] His annual salary in 2016 was $106,821.[6]

In addition to his employment in the securities industry, Morton was an avid gambler. He gambled on horse races, which he characterized as a hobby.[7] At times his gambling winnings and losses exceeded his $106,821 income from Edward Jones.[8] For example, on his 2016 income tax return, he reported gambling winnings of $143,037 and gambling losses of $143,037.[9] After cancelling out his gambling winnings and losses, Morton's actual net gambling losses were $4,680.[10]

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[1] GR did not testify in the hearing.

[2] The Hearing Panel applied the preponderance of the evidence as the standard of proof. The hearing transcript is cited as "Tr." Enforcement's exhibits are cited as "CX." Morton's exhibits are cited as "RX."

[3] CX-1, at 2-3. Edward Jones filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") terminating Morton's employment on November 18, 2016, soon after discovering he had completed a blank check that had been signed by GR, making it payable to himself in the amount of $22,000, and cashing it. CX-1, at 2; Tr. 241.

Two conditions of FINRA's jurisdiction are met: (1) Enforcement filed the Complaint on February 24, 2017—within two years after the termination of Morton's registration with Edward Jones on November 18, 2016; and (2) the Complaint charged Morton with violations he allegedly committed while he was registered.

[4] Tr. 317.

[5] Tr. 317.

[6] RX-24, at 1.

[7] Tr. 210.

[8] Tr. 197-98; RX-24, at 1.

[9] RX-24, at 1, 5; Tr. 198-99.

[10] CX-26, at 1.

Morton gambled on on-line racing websites and at live race tracks.[11] When he gambled at live tracks, he took his winnings home in the form of cash.[12] He frequently conducted his personal business with cash;[13] and, on an as-needed basis, he deposited cash from his gambling into his bank account.[14] A review of his bank statements for the first ten months of 2016 confirms that he made multiple cash deposits in varying amounts, ranging from $420 to $16,200.[15] For example, in April 2016, Morton made seven cash deposits into his bank account totaling $8,440.[16]

Morton did not carefully monitor his bank account balances. He had a negative month-end balance in his bank account in seven of the first ten months of 2016.[17] The bank charged an overdraft fee whenever Morton withdrew more money than he had available in his account, and charged a nonsufficient funds fee whenever one of Morton's checks bounced. In 2015, he incurred overdraft fees of $2,100 and nonsufficient funds fees of $140.[18] In the first ten months of 2016, he generated $840 in overdraft fees and $196 in nonsufficient funds fees.[19]

Morton also failed to satisfy his outstanding obligations in a timely manner. For example, he had outstanding state tax warrants against his residence in 2015 and 2016, in the amounts of $1,606 and $4,055 respectively.[20] Ultimately, he paid the 2015 tax warrant on April 21, 2016, and the 2016 tax warrant on September 13, 2016.[21]

At times, Morton failed to make required payments on time but would pay them later.[22] For example, he failed to make his car payment of approximately $800 in January, February and March 2016, but then made two payments in April: one for the April car payment and the other to cover the January, February and March car payments.[23] Similarly, he failed to pay his monthly

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[11] Tr. 197.

[12] Tr. 354-55. In 2016, Morton came into possession of $111,138 in cash gains from live horse racing tracks. Morton won $82,746 cash from Remington Park, and he won $28,392 cash from Fair Meadows. CX-26, at 1 ($82,746 + $28,392 = $111,138); Tr. 207.

[13] Tr. 333.

[14] Tr. 357-58.

[15] CX-15, at 1.

[16] CX-15, at 2. Similar activity occurred in other months in 2016. *See generally* CX-15.

[17] CX-16; Tr. 244, 344.

[18] CX-17, at 24.

[19] CX-17, at 125; Tr. 243.

[20] CX-2, at 2-3.

[21] CX-17, at 73, 118.

[22] Morton was not opposed to withdrawing money from his retirement fund if necessary. On April 1, 2016, he withdrew $7,436.33 from his pension. CX-17, at 65.

[23] CX-17, at 68.

home mortgage of approximately $800 in August and September 2016, but then made a three-month payment in October 2016.[24]

In short, Morton was not concerned about paying his financial obligations on time. He paid such obligations when he had disposable income, from gambling or otherwise. There is no evidence that Morton was in financial distress or overwhelmed by past-due debts.

B. GR Opens a Brokerage Account with Morton

Morton had known GR since Morton was five years old.[25] Morton's grandfather and GR had been good friends.[26] GR had a high school education. He did not have any investment experience with stocks or bonds.[27]

In December 2014, GR opened a brokerage account at Edward Jones with Morton as his Financial Advisor.[28] His net worth was $300,000, and all his assets were deposited in the bank.[29] To fund his brokerage account with Morton, GR effected an IRA rollover in the amount of $21,694.30.[30] A couple of weeks later, GR added his daughter, KF, as a beneficiary of the account.[31]

Two years before GR opened his brokerage account with Morton at Edward Jones, two doctors diagnosed him with vascular dementia.[32] One doctor stated GR "is unable to understand the implications of his care and unable to care for his financial affairs."[33] The other doctor noted that GR's dementia "causes him to be unable to understand the implications of his care and be unable to attend to his own finances and well being."[34] Despite the doctors' concerns, GR continued to handle his own finances.[35]

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[24] CX-17, at 107-22, 128; Tr. 220.

[25] Tr. 50; RX-5, at 8.

[26] Tr. 50.

[27] Tr. 48-49.

[28] CX-3, at 2; Tr. 184. GR's wife was already a customer of Morton's. GR and his wife divorced in July 2016. *See* Tr. 123.

[29] Tr. 48.

[30] CX-3, at 2; Tr. 184.

[31] CX-6, at 10.

[32] Tr. 37, 41-43. In early November 2016, GR's doctor recommended that he stop driving because he was getting lost. The doctor also recommended that GR move closer to KF, which occurred on November 10, 2016 when GR moved into assisted living. Tr. 39.

[33] CX-9, at 1.

[34] CX-9, at 2.

[35] Tr. 81-82.

C. Morton Helps GR Find and Cash Out a Missing Annuity

When GR opened his brokerage account with Morton, GR told Morton that he owned an annuity worth $200,000; however, GR had not understood what the investment was when he had bought it and knew only that it had been offered by "some outfit in Texas."[36] Morton agreed to help GR locate and cash out the annuity.[37] Morton was successful[38] and, on February 16, 2016, the annuity company issued a check payable to GR in the amount of $182,321.32.[39]

Both GR and KF offered to compensate Morton for his help locating and cashing out the annuity.[40] According to Morton, GR offered compensation "[m]ultiple, multiple, multiple times."[41] Morton told GR and KF he could not accept any compensation.[42] Morton denied ever receiving compensation from either GR or KF.[43]

KF deposited the annuity check at a bank with which she had a close banking relationship. She invested the total amount in two certificates of deposit.[44] According to KF, using this bank would enable her to oversee GR's money.[45] KF testified that she had earlier given the bank instructions to contact her if GR attempted to effect a banking transaction of $500 or more.[46]

D. GR Makes Cash Withdrawals from His Bank

Despite the concerns of his doctors regarding GR's ability to handle his own finances, in 2016 GR made two large cash withdrawals from his bank account.

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[36] Tr. 186; CX-6, at 11. According to Morton, his role "was to track down where [the annuity] was." Tr. 186.

[37] Tr. 99. Morton testified he did not think the annuity was suitable for GR because "it had a long surrender penalty on it" and GR was in his early eighties. Tr. 186.

[38] To track down the annuity, Morton used an old business card that the two salesmen from the annuity company had left with GR. Tr. 226. KF also got involved. She went to the Edward Jones branch with GR for an appointment GR had with Morton to discuss the annuity. CX-6, at 5. KF met Morton for the first time in February 2016. Tr. 51.

KF also requested that Morton help recover the surrender fee the annuity company charged. KF testified that Morton suggested she pursue the surrender fee because both of them suspected elder abuse of GR when the salesmen had sold the annuity to him. Tr. 54.

[39] CX-4, at 1; Tr. 186-87. The annuity company sent the check to Morton at the Edward Jones branch. Either Morton forwarded the check to GR, or GR and KF picked up the check at Edward Jones. Tr. 51, 100.

[40] Tr. 100-01. Morton helped GR with the annuity from December 2014 to February 2016. CX-6, at 5, 12.

[41] Tr. 187.

[42] Tr. 53, 105.

[43] Tr. 335.

[44] Tr. 54; *see* CX-4, at 2-5.

[45] Tr. 54-55.

[46] Tr. 61.

1. GR Withdraws $10,000 Cash

On August 3, 2016, GR bought a $7,000 car for his sister.[47] To make the purchase, he withdrew $10,000 cash from his bank account.[48] According to KF, GR telephoned her before he made the withdrawal:

> Well, he told me that [his sister's] car had worn out and that he thought that he was going to go and try to find her a better one … and they located one and then he went back, withdrew the cash and purchased it.[49]

After the purchase, GR put the remaining $3,000 cash in a drawer in his bedside table.[50] KF found the $3,000 several weeks later.[51] She and GR re-deposited the $3,000 into GR's bank account.[52]

On September 2, 2016, KF spoke by telephone with SW, the Edward Jones Office Administrator.[53] KF told SW that GR took medication for memory loss.[54] SW documented this in the Relationship Notes that Morton kept for each of his customers ("Relationship Notes").[55] SW testified that, until she spoke with KF, she did not know GR had issues with his memory.[56] According to Morton, he saw the September 2 entry in the Relationship Notes for the first time on October 20, 2016, after meeting with KF on October 19.[57]

2. GR Withdraws $22,000 Cash

Late in the morning on September 13, 2016, GR drove to Edward Jones' branch office to meet Morton.[58] In the meeting, GR told Morton to close his brokerage account.[59] According to

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[47] Tr. 65; *see* CX-14, at 2.

[48] Tr. 82. To KF's knowledge, GR did not make large cash withdrawals from his bank account. Tr. 82.

[49] Tr. 92.

[50] Tr. 64-65.

[51] Tr. 64-65; CX-13, at 3.

[52] Tr. 64-65; CX-13, at 3.

[53] According to KF, SW initiated the call. Tr. 58.

[54] Tr. 58-59, 95-96.

[55] CX-6, at 13. KF testified she did not know GR had a brokerage account at Edward Jones until September or October 2016. Tr. 97, 124. The fact that KF believed it was necessary to inform SW that GR took medication for memory loss shows KF knew of the account at least by September 2, 2016.

[56] Tr. 287.

[57] Tr. 232-33. The entry appeared on the computer monitor only if the user clicked the "Home Button." Tr. 307. If the user accessed the Relationship Notes without clicking the Home Button, the first items that would appear on the monitor were the customer's stock holdings, mutual fund holdings, and other account information. Tr. 307-08. There is no evidence Morton read the information accessible through the Home Button before October 20.

[58] CX-6, at 3.

Morton, GR's reason for closing the account was to buy his sister another car.[60] SW also testified that GR had talked about buying his sister a car.[61]

Because the brokerage account was an IRA, closing it triggered the requirement that GR pay taxes on any income that had been earned. Although Morton testified that he advised GR to take out only what he needed because of the tax consequences, GR stated he wanted to close the account.[62] Morton then placed sell orders for all the securities held in GR's account and directed that the proceeds of $22,359.11 be transferred to GR's bank account.[63] Edward Jones transferred the proceeds and closed the brokerage account on September 16.[64]

Morton testified that in the meeting he learned that GR had gone through a divorce.[65] GR asked Morton if his money on deposit at his bank was protected from his ex-wife, and Morton said that depended on whether GR had a transfer-on-death document filed with the bank.[66] Because GR did not know whether he had one or not, he asked Morton to go to the bank with him to check.[67]

Morton and GR drove—in Morton's car—from Edward Jones to GR's bank.[68] Morton testified that, as they walked together into the bank, GR again said he was going to take out money to buy an additional car for his sister and, for the first time, said he was going to buy a 1940 model collector's car for himself.[69] When GR and Morton asked the bank teller about a transfer-on-death document, the bank teller called a manager to the counter. The manager could not find such a document on file for GR's account.[70] The manager drafted the paperwork, which GR executed.[71]

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[59] Tr. 210.

[60] Tr. 317-18.

[61] Tr. 304-05. GR had bought a car for his sister on August 3. Morton's knowledge of this earlier purchase is shown by the fact that the September 13, 2016 Relationship Notes referred to GR's need to buy his sister a "different car." CX-6, at 3.

[62] Tr. 318.

[63] *See* CX-3, at 62.

[64] CX-3, at 61.

[65] Tr. 318.

[66] Tr. 319.

[67] Tr. 319; *accord* Tr. 351-52.

[68] Tr. 216.

[69] Tr. 319.

[70] Tr. 320.

[71] Tr. 320.

GR made a $22,000 cash withdrawal that day ("September 13 Withdrawal").[72] Morton testified that he did not participate in any way. [73] GR requested the withdrawal and signed the $22,000 withdrawal slip.[74] Bank employees put the cash in a plastic shopping bag.[75] At approximately 1:00 p.m., GR and Morton walked together out of the bank, with GR holding the $22,000 in the bag.[76]

GR and Morton drove to a restaurant, where they ate lunch.[77] Before they went into the restaurant, GR locked the $22,000 cash into the glove compartment of Morton's car.[78] After lunch, Morton drove GR back to the Edward Jones branch. On the way back, Morton unlocked the glove compartment.[79] Morton testified that GR took out the cash, which was still in the plastic bag, and held it between his legs.[80] Morton claims he never touched the cash.[81] In the Edward Jones parking lot, Morton parked behind GR's truck.[82] According to Morton, GR got out of Morton's car with the cash and got in his truck. Morton went inside the Edward Jones office.[83]

Beginning at approximately 2:30 p.m., Morton had two meetings with customers in the Edward Jones branch.[84] He testified that a typical customer meeting lasted "[t]hirty minutes to an hour, depending on the need."[85] After the customer meetings, Morton was in his office for the rest of the day.[86]

Morton testified that, early in the afternoon on September 13, he made a state tax payment in the amount of $4,325.85, which posted to his bank statement two days later.[87]

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[72] CX-5, at 3; Tr. 216.

[73] Tr. 320.

[74] Tr. 68-69; CX-5, at 3.

[75] Tr. 320.

[76] CX-36.

[77] Tr. 216.

[78] Tr. 216.

[79] Tr. 321.

[80] Tr. 321.

[81] Tr. 321.

[82] Tr. 321.

[83] Tr. 321.

[84] Tr. 300-01, 322-23; RX-27, at 2.

[85] Tr. 324.

[86] Tr. 324-25.

[87] Tr. 189; *see* CX-17, at 118; Tr. 328. The state tax warrant was released October 31, 2016. CX-2, at 2-3; Tr. 248-49.

At approximately 3:10 p.m., a deposit of $6,200 cash was made into Morton's bank account.[88] According to Morton, this "was a deposit made by my dad … It was money that came out of his safe."[89] Morton testified his father made the deposit to enable him to make his state tax payment.[90] Morton noted that not only was he in one of his customer meetings when the deposit was made,[91] but his office was quite a distance (29 miles) from his bank.[92]

In the next few weeks after the September 13 Withdrawal, Morton made four cash deposits into his bank account: (1) $3,300 on September 16; (2) $3,600 on September 19; (3) $800 on September 30; and (4) $800 on October 3.[93] Excluding the deposit of $6,200 on September 13, which Morton states his father made, the deposits added up to $8,500.[94] Morton explained that the post-September 13 deposits consisted of "money that I already had in cash."[95] According to Morton, both the $3,300 deposit on September 16 and the $3,600 deposit on September 19 came from his personal safe that he had in his home.[96] As discussed above, it was not uncommon for Morton to make multiple deposits of cash into his bank account.

E. GR Gives a Check to Morton

On Sunday, October 9, 2016, Morton visited GR in GR's home.[97] A neighbor of GR's testified that he happened to walk in on this visit and saw GR give Morton a check ("October 9 Check"):

> I … knocked on the door and come in and Wayne [Morton] and [GR] was talking. [GR] went in the bedroom, got his checkbook and handed Wayne the checkbook and said, "I signed the check. Just fill it out," and Wayne was there for a few minutes … after that.[98]

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[88] CX-17, at 115; RX-22; RX-23.

[89] Tr. 325.

[90] Tr. 328.

[91] Tr. 326.

[92] Tr. 326.

[93] CX-17, at 115-23, 125; Tr. 217-18.

[94] CX-15, at 1; Tr. 245.

[95] Tr. 348.

[96] Tr. 357.

[97] Morton did not state a reason for visiting GR.

[98] Tr. 139. The neighbor went to GR's house "[j]ust to check on him," as the neighbor did every evening. Tr. 139, 145.

A few minutes later, Morton said "I got it filled it out. What do you want me to do with the checkbook?"[99] Morton left the checkbook on the counter because that was where GR told him to leave it.[100] GR did not ask to see the check.[101] Morton, GR, and the neighbor spent the next ten minutes talking. Then Morton got a phone call and left.[102] After Morton left, the neighbor did not ask GR about the check.[103]

The next day, Morton cashed the check at GR's bank.[104] The amount of the check was $22,000.[105]

F. KF Discovers Two $22,000 Debits from GR's Bank Account

On October 19, 2016, KF went through GR's monthly bank account statement and discovered two debits for $22,000 each. She asked GR what the debits related to but he only stated that they had "something to do with Wayne [Morton]."[106] KF and GR went to Morton's home and discussed the debits with him ("October 19 Meeting").[107]

KF testified about her interaction with Morton during the October 19 Meeting. With regard to the September 13 Withdrawal, KF stated that Morton told her that after lunch, he took GR back to his truck and GR got out with the plastic bag of cash, which Morton stated was the last time he saw the cash.[108]

According to KF, Morton admitted to her that, out of the $22,000 cash, GR had paid him $2,000 for helping to locate and cash out the annuity. Specifically, KF testified that Morton told her GR withdrew the $22,000, paid him $2,000, and put the remaining $20,000 in the plastic bag.[109] KF testified:

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[99] Tr. 146. Morton admits that, except for GR's signature, all of the handwriting on the check is his. Tr. 218.

[100] Tr. 146.

[101] Tr. 150.

[102] Tr. 146. While Morton, GR, and the neighbor were talking, Morton held the check in his hand. Tr. 152.

[103] Tr. 146.

[104] CX-5, at 2.

[105] CX-5, at 2.

[106] Tr. 60. KF testified that GR had a friend with whom he liked to spend time. KF did not think GR would have given the money to her as he knew that she liked to gamble at casinos and GR was opposed to that. Tr. 70-71.

[107] Tr. 62. KF and GR first went to the Edward Jones branch, but Morton was not there. Tr. 60.

[108] Tr. 62-63.

[109] Tr. 76-77, 105.

> I think I asked him, "How much did dad pay you," and he said, "I can't remember for sure. It's in a file at the office," and then a little later in the same conversation, he told me that dad had paid him $2,000.[110]

KF also testified, "they could have put the whole 22,000 in a white plastic bag. I don't know."[111]

With regard to the October 9 Check, KF testified Morton told her it represented a loan for one year at six percent interest:

> [Morton] told me that dad had lent him that money because dad said he had it and Wayne needed some—he had some medical expenses that needed to be taken care of and that Wayne could use it. And so he told dad that he would borrow it from him for a year and pay him six percent in interest.[112]

Morton's recollection regarding his conversation with KF during the October 19 Meeting differs from what KF described. According to Morton, KF asked him if GR had tried to give him $2,000. Morton told KF that GR tried to give him $2,000 at his office.[113] Morton denied that he admitted in the October 19 Meeting to having accepted $2,000 in compensation for helping to locate and cash out the annuity.[114]

According to Morton, he acknowledged he borrowed money from GR and asked if that was a problem.[115] Morton explained that KF was troubled that she did not know about the loan.[116] Morton testified GR had told him that "it was his money, it was no one else's business."[117] According to Morton, he offered to rescind the loan, but KF said that was not necessary as long as it did not go beyond a year.[118] KF said she would like to memorialize the loan.[119] So, Morton offered to pick up GR and the two of them could go to a local attorney to get

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[110] Tr. 63-64; *accord* Tr. 104-05.

[111] Tr. 105.

[112] Tr. 72; *accord* Tr. 63.

[113] Tr. 330.

[114] Tr. 330. Insofar as the paragraph above may be construed as crediting Morton's testimony over KF's testimony about the October 19 Meeting, the Hearing Officer disagrees with such a finding.

[115] Tr. 329-30.

[116] Tr. 330.

[117] Tr. 330.

[118] Tr. 330.

[119] Tr. 331.

the loan documented.[120] According to Morton, KF said that would be a good thing to do and requested a copy of the documentation when completed.[121]

Morton testified that the October 19 Meeting was the first time KF mentioned to Morton that GR had memory trouble. At no time before October 19 did Morton know anything about such trouble or have any concern that GR could not remember things.[122]

KF testified that, after the October 19 Meeting with Morton, she and GR went to GR's home and extensively searched his truck and home for the cash from the September 13 Withdrawal, but were unable to find it.[123] Later that night, at about 10:30 p.m., KF sent Morton a text message about the loan: "After some further thought, I've decided I want to be there when Dad signs the note, so I'll have it drawn up and bring it with me the next time I come down."[124]

The next day, KF requested that the Edward Jones branch provide her with all of the Relationship Notes for GR's account.[125]

G. Edward Jones Investigates KF's Concerns Regarding the Missing Money

On October 27, 2016, KF sent an email to the Compliance Department of Edward Jones expressing her concerns about the September 13 Withdrawal and the October 9 Check.[126] A compliance investigator conducted an investigation, which included: (1) a telephone interview of GR; (2) a telephone interview of GR and KF at the same time, which was attended by the investigator's supervisor; and (3) an in-person meeting with Morton, which was also attended by the supervisor.[127]

The investigation showed the following:

- GR liquidated his account at Edward Jones on September 13, 2016.
- On October 9, 2016, GR signed a check drawn on his personal account and gave it to Morton. Morton filled out the rest of the check.

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[120] Tr. 331.

[121] Tr. 331.

[122] Tr. 233; *accord* Tr. 229.

[123] Tr. 69-70. The fact that KF searched for the cash shows that she also thought there was a possibility that GR had misplaced the cash somewhere, similar to what he had done with the $3,000 cash left over from the purchase of his sister's car.

[124] RX-9.

[125] CX-6, at 2.

[126] CX-11; Tr. 75-76.

[127] The investigator interviewed GR on November 4, 2016, and GR and KF at the same time on November 9, 2016. The day after the second interview, GR went into assisted living because he frequently got lost while driving. Tr. 36, 39, 85-86.

- The check was made payable to Morton for $22,000.

- Morton characterized the transaction as a loan from GR to Morton.[128]

The investigator's notes reflect that GR confused the September 13 Withdrawal with the October 9 Check and stated that Morton had taken two checks.[129] KF told the investigator that, in regard to the September 13 Withdrawal, GR "doesn't remember where the money went or really even going to the bank."[130] The investigation made no findings about the September 13 Withdrawal.

With regard to the October 9 Check, although GR could only tell KF that the two debits had something to do with Morton, GR told the investigator that he had agreed to loan Morton $6,000, not $22,000. According to the investigator's notes of the meeting she and her supervisor had with Morton, Morton said the October 9 Check was a loan so Morton could pay for cataract surgery for himself and Lasik surgery for his daughter:

> [Morton] said he was at [GR's] house and they were talking about healthcare and he mentioned that he was saving up for his cataract surgery and his daughter's Lasik surgery and [GR] offered him the money. Wayne explained he couldn't take the money so they decided they would do a loan.[131]

When the investigator asked Morton how they determined the interest rate, Morton said GR told him to pick a fair rate so they decided on six percent for a one-year loan.[132]

After the investigation, Edward Jones terminated Morton's employment on the ground that he had improperly obtained, filled out, and cashed the October 9 Check.[133]

III. Conclusions of Law

After careful consideration of the hearing testimony and exhibits, a majority of the Hearing Panel concludes that Enforcement did not meet its burden of proof that Morton converted funds from GR, in violation of FINRA Rule 2010. A majority of the Hearing Panel also concludes that Enforcement did not meet its burden of proof that Morton was compensated

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[128] CX-1, at 2.

[129] The investigator's notes stated "I asked [GR] to explain the cash withdraw that occurred at the bank with Wayne [Morton]. [GR] stated he told Wayne he would loan him money and he didn't realize that it would be 2 checks." CX-8, at 1. The notes then stated "I asked [GR] if he would explain the cash withdraw and he stated he wrote Wayne a check and Wayne went to the bank without him." CX-8, at 1.

[130] CX-8, at 2.

[131] RX-5, at 8.

[132] RX-5, at 8. This corresponded to what Morton told KF in the October 19 Meeting.

[133] CX-1, at 10.

for engaging in an alleged undisclosed outside business activity, in violation of FINRA Rules 3270 and 2010. The legal bases for these conclusions are as follows.

A. Enforcement did not meet its Burden of Proof that Morton Committed Conversion, in Violation of FINRA Rule 2010

FINRA Rule 2010 provides that "[a] member in the conduct of its business shall observe high standards of commercial honor and just and equitable principles of trade." Conversion is the intentional and unauthorized taking of or exercise of ownership over money or property by one who neither owns the money or property nor is entitled to possess it.[134] Conversion is fundamentally dishonest, reflects negatively on a person's ability to comply with regulatory requirements, and shows the person is a risk to investors, firms, and the securities markets.[135] Converting a person's money or property is antithetical to high standards of commercial honor and just and equitable principles of trade.[136]

1. The September 13 Cash Withdrawal

A majority of the Hearing Panel concludes that Enforcement did not meet its burden of proving conversion with regard to the September 13 Withdrawal. There is no evidence that Morton took possession or ownership of the $22,000 cash either while GR was in Morton's car or after GR got out of the car. The last person known to have had possession of the $22,000 was GR, a person with dementia and memory problems. When KF questioned GR about the circumstances of the $22,000 cash withdrawal on October 19, he could not remember anything about it. Similarly, GR could not remember what happened to the money when interviewed by the investigator from Edward Jones, and confused the September 13 Withdrawal with the October 9 Check. Thirty-five to forty days passed between the September 13 Withdrawal and KF's discovery on October 19 that the $22,000 cash was missing.[137]

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

[135] *Dep't of Enforcement v. Doni*, No. 2011027007901, 2016 FINRA Discip. LEXIS 10, at *43 (OHO Apr. 18, 2016) ("conversion … is fundamentally a dishonest act that reflects negatively on a person's ability to comply with regulatory requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets").

[136] *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *24 (June 2, 2016) ("Converting a customer's funds 'is extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote.'") (quoting *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *73 (Feb. 10, 2012)); *Dep't of Enforcement v. Wiley*, No. 2011028061001, 2014 FINRA Discip. LEXIS 21, at *29 (OHO Apr. 29, 2014) (same).

[137] Tr. 83-84.

Enforcement argues that circumstantial evidence demonstrates that Morton converted the funds. First, Enforcement relies on the cash deposits made into Morton's bank account after the September 13 Withdrawal.[138] At the outset, the total amount of Morton's cash deposits in September and early October 2016—$14,700—does not match the $22,000 amount of the September 13 Withdrawal.

While it is true that a deposit of $6,200 was made into Morton's bank account on the afternoon of September 13, Morton's uncontradicted testimony was that his father made the deposit to enable him to pay a tax bill. Morton testified that the $6,200 came from his father's personal safe.[139] Enforcement admits it does not know whether Morton drove to his bank and made the $6,200 deposit.[140] It does not know the source of the deposit.[141]

Morton made four cash deposits into his bank account in the weeks following the September 13 Withdrawal: (1) $3,300 on September 16; (2) $3,600 on September 19; (3) $800 on September 30; and (4) $800 on October 3. Those deposits total $8,500. As discussed above, it was not uncommon for Morton to make multiple deposits of cash into his bank account. In fact, his deposits in April 2016 were very similar to his deposits in September 2016. In April 2016, Morton made seven cash deposits into his bank account totaling $8,440.

Simply put, Morton had access to significant amounts of cash. In 2016, he came into possession of $111,138 in net cash gains from live horse racing tracks.[142]

Second, Enforcement relies on Morton's alleged financial distress.[143] While the Hearing Panel notes that Morton appeared to live from paycheck to paycheck and did not have significant savings, Morton did not have any large debts. His largest past-due liability in 2016 was the state tax warrant in the amount of $4,055.

Last, Enforcement relies on Morton's gambling and contends he incurred gambling losses of at least $143,037. But, this number does not take into account his winnings; Morton's actual net gambling losses were $4,680.[144]

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[138] Tr. 369-70.

[139] Tr. 325.

[140] Tr. 372-73.

[141] Tr. 261.

[142] CX-26, at 1; Tr. 207.

[143] Tr. 364-65.

[144] CX-26, at 1.

The inferential connections Enforcement asks the Hearing Panel to draw are tenuous. Enforcement did not prove by a preponderance of the evidence that Morton took possession or ownership of the $22,000 cash that GR withdrew from his bank.

2. The October 9 Check

A majority of the Hearing Panel concludes that Enforcement did not meet its burden of proving conversion with regard to the $22,000 represented by the October 9 Check. Here, the evidence clearly shows Morton took possession of the October 9 Check with GR's authorization and that the check represented a loan.[145] The testimony of GR's neighbor establishes that GR gave Morton authorization to take possession of the October 9 Check. GR handed Morton the checkbook. GR told Morton he had signed the check and told Morton to fill it out. GR did not ask to see the check after Morton filled it out. All this transpired in the presence of GR's neighbor.

What is at issue is the amount of the loan. Enforcement contends the loan was for $6,000 whereas Morton states it was for $22,000. Enforcement did not present evidence proving Morton had anything but a good-faith belief the amount of the loan was $22,000. Although in two telephone interviews with the Edward Jones investigator in early November 2016, GR thought the amount was $6,000, when KF first asked GR about the $22,000 debit on October 19, he could not recall any details about it and simply stated it had something to do with Morton. GR suffers from dementia, and had been diagnosed with this condition approximately four years before these events transpired. His confusion and lack of memory about the September 13 Withdrawal further supports the fact that he is not a competent or reliable witness about the October 9 Check.

Because Enforcement did not meet its burden of proving conversion with regard to either the September 13 Withdrawal or the October 9 Check, we dismiss the first cause of action.[146]

B. Enforcement did not Meet its Burden of Proving that Morton Violated FINRA Rules 3270 and 2010

FINRA Rule 3270 prohibits a registered person from engaging in an outside business activity without prior notice to and approval by his employer firm:

> No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her

[145] The Complaint alleges that the October 9 Check was a loan. Compl. ¶¶ 30-31.

[146] Hearing Panelist 1 dissents from Part III.A. of this Decision and would find that Morton committed conversion with regard to the September 13 Withdrawal and the October 9 Check.

member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.

A majority of the Hearing Panel concludes that Enforcement did not meet its burden of proving an undisclosed outside business activity.[147] First, it is not clear that a registered person helping a customer cash out an annuity is a business activity outside the scope of the relationship with the registered person's firm. If successful, this activity benefits the customer. It also benefits the firm if the registered person reasonably expects the customer will invest the proceeds of the annuity with the firm. The activity runs afoul of FINRA Rule 3270 if the registered person accepts undisclosed compensation directly from the customer, instead of from the firm in the form of, for example, commissions or a bonus.[148]

Second, Enforcement did not establish by a preponderance of the evidence that Morton was compensated in the amount of $2,000 cash. Enforcement claims the alleged compensation of $2,000 came from the September 13 Withdrawal, and bases that claim on KF's testimony that Morton admitted as much in the October 19 Meeting. According to KF, Morton told her that GR withdrew the $22,000 from his bank, paid Morton $2,000 in fees, and put the remaining $20,000 in a white plastic bag.[149] Morton, on the other hand, denies he made any admissions of fact in the October 19 Meeting. There are no notes or audio recording of the October 19 Meeting. The issue of whether Morton admitted taking $2,000 cash as compensation boils down to a "he said, she said" situation. The majority of the Panel declines to credit KF's recollection over Morton's.

There is no evidence Morton was compensated with $2,000 out of the September 13 Withdrawal. Either Morton converted all of the withdrawal (which a majority of the Hearing Panel concludes he did not), or he took none of it. Because Enforcement did not prove Morton was compensated, the Rule 3270 claim fails for lack of evidence. We therefore dismiss the second cause of action.

C. Conclusion

The dismissal of the charges in the Complaint should not be construed as the Panel majority's approval of Morton's conduct with regard to the events in question. Rather, the majority has determined that Enforcement did not prove the charges alleged in the Complaint.

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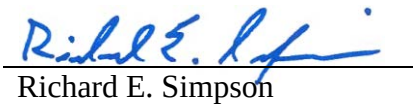
[147] The Hearing Officer dissents from this Part of the Decision.

[148] Edward Jones' written supervisory procedures prohibited the firm's associated persons from charging customers a fee for special services, but do not appear to have prohibited associated persons from performing special services for customers for no fee. CX-33, at 5.

[149] Tr. 76-77, 105.

IV. Order

Enforcement did not meet its burden of proving that Respondent Austin Wayne Morton converted funds from GR or received compensation for engaging in an undisclosed outside business activity. The Complaint is dismissed.[150]



Richard E. Simpson
Hearing Officer
For The Hearing Panel[151]

V. Dissent of Hearing Panelist 1

Hearing Panelist 1, dissenting from the conclusions of the Hearing Panel majority in Part III.A. of this Decision:

I disagree that Enforcement failed to prove Morton converted funds. Morton's testimony about the September 13 Withdrawal does not hold together. According to Morton, on September 13, GR announced he wanted to close his $22,359 Edward Jones IRA brokerage account because he may have needed to buy his sister a different car.[152] But GR had already bought his sister a car five weeks earlier,[153] and there was no evidence that anything was wrong with the first car. Morton knew about the first car because the Relationship Notes refer to GR's alleged need to buy his sister a "different" car.[154]

Even if GR's sister needed a different car, it was not necessary for GR to close his brokerage account with Morton to buy one. The uncontradicted testimony was that GR had a net worth of $300,000 and all of his assets were in the form of money deposited in the bank. It does not make sense that: (1) GR would close his $22,359 IRA account, and (2) incur a significant tax penalty, (3) to buy his sister a different car, (4) when he had plenty of money in the bank.

If the price of the alleged different car[155] were $7,000 (the same as the price for the first car), the $22,000 amount of the September 13 Withdrawal was three times the amount needed. In

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[150] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

[151] With regard to those parts of this Decision with which the Hearing Officer or one of the Hearing Panelists dissents, the Hearing Officer signs this Decision on behalf of the Hearing Panel majority.

[152] Tr. 288-89; *see* CX-6, at 3 ("[GR is] taking care of [his sister's] home and may need to buy her a different car."). At the time she purportedly needed a different car, GR's sister was in the hospital. CX-6, at 3.

[153] CX-14, at 2.

[154] CX-6, at 3. Morton was the source of this information in the Relationship Notes. Tr. 304.

[155] There is no evidence that GR had a particular different car in mind at the time of the September 13 Withdrawal.

an attempt to explain this discrepancy, Morton testified GR expressed an interest in also buying a car for himself: a 1940 model collector's car.[156] There is no evidence to support this testimony. No other witness had ever heard GR express such an interest. If the amount GR wanted to spend for this purpose were $15,000 ($22,000 - $7,000), that amount does not seem enough to buy a 1940 model car. Thirty-five to forty days passed from the September 13 Withdrawal to KF's discovery on October 19 that the $22,000 cash was missing. In this period, GR did nothing to further his alleged purpose of buying a different car for his sister or a 1940 model car for himself.[157]

With regard to the October 9 Check, GR's neighbor testified that Morton filled out the check after GR had signed it.[158] In other words, GR was unsophisticated enough, and trusted Morton enough, to hand Morton a blank check. There is no evidence, other than Morton's self-serving testimony, that GR authorized Morton to fill out the check for $22,000.[159]

The circumstances of the alleged $22,000 loan were highly suspicious. Morton did not offer any document evidencing the loan. Thus, GR did not have a realistic ability to enforce repayment of the loan if Morton defaulted. It was Morton's word against GR's. No one knew about the loan except Morton and GR. Morton obtained the loan in GR's home, on a Sunday. GR gave Morton a blank check, and Morton filled it out. There is no evidence that Morton sought the loan from an outside lender.

To disregard GR's statements that the amount of the loan was $6,000 shows an inconsistency: the Hearing Panel majority considers GR mentally incompetent to provide evidence about the amount of the loan, but at the same time considers him to have sufficient capacity to make an unsecured, undocumented advance of $22,000. GR is assumed to have been able to fend for himself where the person on the other side of the transaction was a member of the financial industry and, less than a month before, GR's financial advisor. A more realistic view of GR's financial capability was provided by his doctors in 2012, when one stated GR was "unable to care for his financial affairs," and the other stated GR was "unable to attend to his own finances."[160]

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[156] Morton testified that GR described this car as "a 1940 model, some sort of collector's. [GR] kept saying 'Oh, it's sharp,' and told me about the two men that worked there at the place where he intended on buying this." Tr. 319.

[157] RX-5, at 8 (investigator's notes of the interview with Morton) (the Edward Jones supervisor "asked if [Morton] followed up to see if [GR] bought a car for his sister like he said he was going to with the $22,000 cash. He stated no.").

[158] Tr. 139-40, 146.

[159] *Butler*, 2016 SEC LEXIS 1989, at *20 ("The burden was on Butler to produce credible evidence to support his claim that his withdrawals were authorized by [the customer], and he failed to meet that burden."); *Mullins*, 2012 SEC LEXIS 464, at *40-41 ("there is sufficient evidence in the record, irrespective of [the customer's] testimony, to support a finding that J. Mullins did not act with permission and that he intentionally converted the [customer's] property").

[160] CX-9, at 1-2.

The closeness in time between the September 13 Withdrawal and the October 9 Check is suspicious. On two occasions less than a month apart, GR had a personal, private interaction with Morton and each time ended up with a $22,000 debit to his bank account. On October 19, when KF asked GR the reasons for the debits, GR immediately and spontaneously responded: "I don't know … But I remember it having something to do with Wayne [Morton]."[161] A reasonable inference is that Morton recognized GR to be a vulnerable person with access to substantial amounts of money. The October 9 Check was the second time Morton took advantage of this easy source of funds.

I believe Morton had a compelling motive to convert the money from the September 13 Withdrawal and the October 9 Check. In 2016, the gambling winnings and losses he reported on his income tax return were $143,037.[162] Adding on the $4,680 net gambling loss,[163] the volume of his gambling was $147,717 ($143,037 + $4,680). This was $40,896—or 38 percent—more than his $106,821 income from Edward Jones.[164] Clearly, gambling was more than a hobby for Morton.

The evidence shows that Morton lived from paycheck to paycheck, bounced checks, overdrew his bank account, missed car and mortgage payments, missed payments on his state taxes, had to draw from his pension to pay an unforeseen expense, and either had to start saving or to borrow $22,000 to pay for eye surgery. For a broker experiencing such financial stresses, combined with a $147,717 per-year gambling "hobby," the temptation to convert money from a customer or former customer[165] was probably too great to resist.

Taking all the facts and reasonable inferences together, I would conclude that Enforcement proved it was more likely than not Morton committed conversion with regard to the September 13 Withdrawal and the October 9 Check.

VI. Dissent of the Hearing Officer

The Hearing Officer, dissenting from the conclusions of the Hearing Panel majority in Part III.B of this Decision:

I disagree that Enforcement did not prove Morton accepted $2,000 cash as compensation for an undisclosed outside business activity in violation of FINRA Rules 3270 and 2010. KF

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[161] Tr. 60.

[162] RX-24, at 5; Tr. 198-99.

[163] CX-26, at 1; *accord* Tr. 200, 334.

[164] Tr. 197; RX-24, at 1.

[165] GR's Edward Jones account was not liquidated and officially closed until September 16, 2016, so GR was still a customer of Morton's at the time of the September 13 Withdrawal. Tr. 162.

testified that, in the October 19 Meeting, Morton admitted accepting $2,000 out of the $22,000 cash GR had withdrawn on September 13.[166]

In her complaint to Edward Jones, sent by email on October 27, KF stated Morton admitted that from the September 13 Withdrawal GR withdrew $22,000 in cash, paid Morton $2,000 in fees, and put the remaining $20,000 in a white plastic bag:

> [GR] said he owed Wayne [Morton] some fees for helping him retrieve some money from an early withdrawal on an annuity from another institution … When I approached Wayne, he told me that Dad came into his office that day wanting to close his $22,000 IRA and pay his fees. According to Wayne, he drove my Dad to the bank and went in with him. Dad withdrew the cash, paid Wayne $2,000 in fees, and put the remaining $20,000 in a white plastic bag.[167]

In the hearing, KF testified that she had obtained this information—that GR withdrew $22,000 in cash and paid Morton $2,000 in fees—from Morton.[168]

In her November 9 telephone interview with the Edward Jones investigator, KF made consistent statements about Morton's admissions regarding the $2,000 in fees:

> [KF] asked Wayne [Morton] about the $22K cash withdraw from the bank. Wayne told [KF] that [GR] came in and wanted to close his IRA account. Wayne went to the bank with [GR] b/c he wanted to give him $2,000 in fees for helping him out with getting his $187K insurance policy back. Wayne said [GR] put the other $20K in a white bag and locked in the glove box of Wayne's car while they went to lunch.[169]

KF made consistent statements about Morton's admissions in her hearing testimony:

> Q. So with regard to the $22,000 withdrawn from the account on September 13th, 2016, it's your understanding that your dad withdrew the cash, paid Wayne [Morton] 2,000 in fees and put the remaining 20,000 in a white plastic bag. Can you break down for me this sentence starting with "Dad [withdrew] the cash, paid Wayne 2,000 in fees and put the remaining 20,000 in a white plastic bag"?[170] Can you break down your source of knowledge for the 2,000 and then for the 20,000 in a white plastic bag?

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[166] Tr. 76-77, 105.

[167] CX-11, at 1.

[168] Tr. 76-77.

[169] CX-8, at 1.

[170] The source of this quoted passage is KF's October 27, 2016 complaint to Edward Jones. CX-11, at 1.

A. That came from Wayne.

Q. Okay.

A. Wayne told me—yes, that came from Wayne. Wayne told me that dad had paid him and that—and it—and that could—you know, at the time, they could have put the whole 22,000 in a white plastic bag. I don't know.

Q. Okay.

A. But that information came from Wayne.[171]

Although Morton denied making these admissions,[172] there is no compelling reason to credit his testimony over that of KF. The proposition that KF testified falsely about Morton's admissions is not plausible. She has never been registered with FINRA or been associated with a FINRA member, and thus would not have the background to know what is entailed in FINRA Rule 3270's prohibition against undisclosed outside business activities. Yet as early as her October 27 complaint to Edward Jones, and her November 9 telephone interview with Edward Jones, KF recounted the admissions Morton had made in the October 19 Meeting. Having evaluated KF's demeanor while she testified, I find it difficult to believe she would make up Morton's admissions out of whole cloth. I believe Morton made these admissions to KF, and that the admissions are sufficient to support a finding of liability.

For these reasons, I would conclude that Enforcement proved it was more likely than not that Morton accepted $2,000 cash as compensation for an undisclosed outside business activity in violation of FINRA Rules 3270 and 2010.

Copies to:

Austin Wayne Morton (via overnight courier, email, and first-class mail)
Jon-Jorge Aras, Esq. (via email and first-class mail)
Michael J. Rogal, Esq. (via email and first-class mail)
Jonathan I. Golomb, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)

[171] Tr. 104-05.

[172] Tr. 330-31.