FINRA

Financial Industry Regulatory Authority

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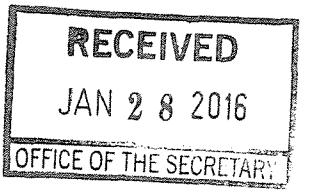

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January 27, 2016

VIA MESSENGER AND FACSIMILE

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

RE: In the Matter of the Application of Joseph R. Butler
Administrative Proceeding File No. 3-16912

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8985 if you have any questions.

Very truly yours,

Celia L. Passaro

Enclosures

cc: Todd K. Pounds, Esq. (via FedEx)

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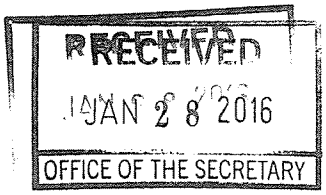
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC



In the Matter of the Application of

Joseph R. Butler

For Review of Disciplinary Action Taken by

FINRA

File No. 3-16912

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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January 27, 2016

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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Joseph R. Butler

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File No. 3-16912

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

This case concerns applicant Joseph R. Butler's brazen and unapologetic violation of his most basic ethical obligations and the fundamental trust owed to customers—that registered representatives refrain from converting customer property. The record convincingly demonstrates that Butler took advantage of the trust and dependence of an elderly neighbor and customer, who – as described by Butler himself — was suffering from diminishing [redacted] health. While purporting to care for her and encouraging her dependence on him, Butler took control of her finances and walked away with over $170,000 that he withdrew from her bank accounts. During the time he controlled her finances, Butler also took his customer to his attorney, who prepared paperwork granting Butler her power of attorney and naming Butler the primary beneficiary of her almost $500,000 estate. Significantly, Butler made himself the primary beneficiary on an annuity he had sold to his customer by falsely representing on the paperwork submitted to the insurer that he was her son. FINRA's National Adjudicatory

Counsel ("NAC") concluded that Butler's intentional and egregious misconduct violated the high ethical standards required of securities professionals and warranted a permanent bar from the industry.

The NAC's findings and sanctions are well supported in the record, and the Commission should affirm the NAC's decision. In fact, Butler's own statements during his firm's investigation and his sworn on-the-record testimony during FINRA's investigation establish his conversion of customer funds. During Butler's pre-hearing on-the-record examinations, when FINRA was only aware that he withdrew from the customer's account approximately $21,000, Butler testified openly and repeatedly about the signs of his customer's declining [redacted] health, and represented that he was added as a joint account holder on her bank accounts for the sole purpose of helping her pay her bills because she could no longer manage her finances. Butler stated unequivocally that all the withdrawals from the customer's accounts were made for her benefit and that he had not received any compensation or gifts from his customer. Butler also submitted a list of items, allegedly accounting for the $21,000 in question at the time, which he claimed he had paid on his customer's behalf and for which he purportedly reimbursed himself from her accounts. He could not, however, provide a single receipt, bill, or even the name of a vendor to support these alleged expenses (all of which he claims to have paid in cash), and there is evidence in the record contradicting certain of them.

By the time of the hearing, FINRA had learned that Butler had actually taken more than $170,000 from his customer's accounts, and Butler was forced to change his story. He now claims that his customer authorized and approved of every withdrawal, was competent and capable of managing her finances and balancing her checkbook, and that she made substantial gifts to him or, as he calls them, "treats." This account is undercut by, among other things,

Butler's own prior words, and its falseness is demonstrated by the fact that he only made these claims after FINRA discovered the full extent of his conversion and it was no longer possible to claim that the amounts taken from the account were for reimbursement of expenses Butler incurred on his customer's behalf.

Rather than address the contradictions and lack of credibility in his testimony, for which he can have no satisfactory explanation, Butler's primary arguments on appeal attempt to obfuscate and deflect attention from his blatant misconduct. Butler focuses on the supposed insufficiency of the evidence, including FINRA's failure to call his customer to testify—a woman suffering from [redacted] who, when contacted by FINRA, no longer knew who Butler was. Moreover, Butler repeatedly casts aspersions on his customer's family, suggesting that they didn't care for her and are less deserving than he to inherit her money. Butler attempts to make this case about his customer's freedom to give her money to whomever she pleased and accuses FINRA of making a judgment about whom should inherit her assets. This characterization of the case is flatly wrong. The issue is not whether his customer had the right to give Butler gifts; it is about Butler taking advantage of a vulnerable, dependent, and trusting customer, taking control of her finances, and converting more than $170,000.

The NAC rightly found that Butler converted his customer's funds, submitted a false annuity beneficiary change form, and that his abuse of an elderly woman who depended upon and trusted him was egregious misconduct. The NAC barred Butler in all capacities and ordered him to pay restitution and costs. Butler's misconduct is inexcusable, and his continued insistence that he did nothing wrong demonstrates that he poses a continuing danger to the investing public. The Commission should affirm the NAC's findings and sanctions and dismiss applicant's appeal.

II. FACTUAL BACKGROUND

A. Joseph R. Butler

Butler entered the insurance industry in 1967 and has owned his own insurance agency, J.R. Butler & Associates, for approximately 35 years. (RP 642, 757.)[1] In January 1994, Butler registered with Woodbury Financial Services, Inc. ("Woodbury") as an investment company and variable contracts products limited representative. (RP 946.) Butler remained associated with Woodbury until August 2, 2012, when he was discharged for failing to disclose that he was listed as the beneficiary on multiple customer accounts and for taking control of a customer's personal banking accounts. (RP 641, 946.)

B. Butler's Relationship With Lolita Williamson

The misconduct in this case arises out of Butler's relationship with an elderly neighbor, [redacted] Williamson ("Williamson"). Butler met Williamson in approximately 1984, and befriended her in mid-2006. (RP 643, 750.) At the time, Williamson was [redacted] years-old and a widow living alone. (RP 643, 1305.) Her husband had died [redacted] and her only child, a son, had also died. (RP 643.) Butler had not known Williamson's husband or son. (RP 763.) Williamson's immediate family consisted of two elderly sisters and two granddaughters. (RP 792, 1008, 1311.)

In November 2007, Williamson became Butler's customer when Butler sold her a $453,000 variable annuity, which Williamson funded with the proceeds of several certificates of deposit that she liquidated. (RP 643-44, 985-1003.) Butler completed, signed, and submitted Williamson's account opening documents. (RP 644-46.) The account opening documents

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[1] "RP" refers to the page number in the certified record. "Butler Br. __" refers to Butler's Initial Brief served on December 21, 2015.

indicated that Williamson was almost [redacted] years old and retired. (RP 985, 991.) Butler recorded her net worth as $900,000, consisting of $450,000 cash, $100,000 in annuities, and $400,000 in personal property, excluding her primary residence, and her annual income as $88,000. (RP 646, 994.) Butler testified that Williamson also owned a residence worth approximately $250,000. (RP 663.) The annuity application indicated that Williamson was interested in monthly income, and had no prior investment experience. (RP 646, 994, 997.) Williamson named her two granddaughters as equal beneficiaries of the annuity.[2] (RP 985.)

Butler began to have more frequent contact with Williamson and began assisting her with daily tasks. As Butler himself characterized it, Williamson became completely dependent upon him and trusted him to take care of her. (RP 1374.) Butler stated that he drove her to doctor's appointments, the pharmacy to pick up prescriptions, church, the grocery store, and the beauty parlor, and that he took her to lunches and dinners. (RP 1215.) Butler also claimed to have helped her with household tasks and repairs. (*Id.*) Butler testified that he told Williamson's doctors and family members that her health was declining and she was becoming increasingly dependent on him. (RP 1369.)

C. Butler Takes Control of Williamson's Finances as He Sees Signs of Her Diminishing [redacted] Health

In 2009, Butler noticed signs that Williamson's [redacted] health was declining and that she was having trouble taking care of her finances. (RP 1366.) Butler said that he found unpaid bills lying around her house. (*Id.*) In one incident, he discovered a notice indicating that

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[2] Butler, seemingly in support of his claim that he did not convert Williamson's funds, states that this investment was suitable for her and cites to a section of the hearing transcript in which an Enforcement attorney states that Butler did not make an unsuitable recommendation in connection with this annuity. Butler's Brief, at 2, 17. Butler's argument has no bearing on the case currently before the Commission.

Williamson's house was to be auctioned because she had failed to pay her property taxes. (RP 707-08, 1216.) Butler said that he quickly arranged for payment of the taxes and prevented the sale. (*Id.*) Because of Williamson's increasing forgetfulness, Butler explained that he and Williamson agreed that he would help her pay her bills, and on April 16, 2009, Butler was added as a joint account holder on her bank accounts. (RP 669-70, 1366.) That same day, Butler transferred $25,000 from Williamson's account to his own bank account.[3] (RP 747.) In addition, in 2009, Butler wrote and cashed three checks from Williamson's accounts, all payable to cash, totaling $34,250. (RP 1269-71.) Butler never deposited his own money into Williamson's accounts and testified that he was added to the accounts for the sole purpose of helping Williamson pay her bills. (RP 672-73, 1334, 1337.) Until this appeal, he has never suggested otherwise.[4]

During the next two and a half years, Williamson's [redacted] and [redacted] health continued to decline. In June 2009, just two months after being added to her bank accounts, Butler applied for the "meals-on-wheels" senior food delivery program for Williamson because Butler had noticed that she was forgetting to eat and was losing weight. (RP 718, 1359, 1381, 1444-53.) The meals-on-wheels paperwork indicates that Butler cited "forgetting to eat" as the reason for the application. (RP 1447.)

On Thanksgiving Day in 2009, Butler became concerned when he could not locate Williamson. (RP 1312-13, 1361-62, 1366.) He later learned that she had gotten lost driving to

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[3] At the hearing, Butler testified that he didn't remember what he did with the $25,000 he transferred and that "[m]oney was not an object between [Williamson and him]." (RP 746-47.)

[4] On appeal, Butler implies that he was added to the account for more than just assisting Williamson with her bills by arguing that he could not legally convert Williamson's funds because he was a joint owner of the account. *See* Butler's Brief, at 16. We address this argument in IV.B below.

the grocery store she had frequented for years. (RP 719, 1312-13, 1361-62, 1366.) In early 2010, Butler noticed some damage on Williamson's car. (RP 1362.) She told him the she had backed into the garage. (*Id.*) After this incident, Williamson no longer drove. (*Id.*)

During 2010, Butler took additional steps to deal with Williamson's declining [redacted] health. Butler attached her pill box to her kitchen table with Velcro because she often forgot to take her medications. (RP 1364.) Butler said he called Williamson as often as three times a day to remind her to take her pills. (RP 1364.) Butler also disabled her gas stove because he felt it was not safe for her to use it and stated that Williamson became unable to work her microwave to heat her meals—something she was previously able to do. (RP 1372.) Butler also claimed that he learned that Williamson's granddaughter had been using Williamson's credit card without her knowledge, further indicating her inability to manage her finances. (RP 1216.)

As her [redacted] state continued to decline, Butler took Williamson to at least three visits with her doctor [redacted] (RP 1296-1303, 1370.) In the later part of 2010, Butler told Williamson's doctor that she was getting more forgetful. (RP 1369.) In a survey conducted by meals-on-wheels in September 2010, Butler indicated that she was suffering [redacted] (RP 1452.)

While the signs of Williamson's declining [redacted] health and the onset of [redacted] continued to mount, Butler continued to write and cash checks drawn on her bank accounts. In 2010, Butler wrote six checks drawn on Williamson's accounts. (RP 1272-76, 1281.) Five of these checks totaling $52,500 were made payable to "cash" or to Butler and were cashed by him. (RP 1272-76.) A sixth check for $18,846 was written to pay Butler's federal taxes. (RP 700-03, 710, 713, 1381-82, 1281.)

In approximately early June 2010, Butler took Williamson to his attorney to discuss preparing her last will and testament. (RP 1216, 1315.) On June 9, 2010, Butler drove Williamson back to this attorney to sign the documents that had been prepared, which included a Last Will and Testament, a Durable Power of Attorney naming Butler her attorney-in-fact, and a health care directive allowing Butler and her sister to make health care decisions for her. (RP 1216, 1241-53, 1315.)

The Last Will and Testament named Butler the primary beneficiary of Williamson's estate. (RP 663, 666, 1249-53.) Under its terms, Butler would inherit Williamson's home (which he testified was worth approximately $250,000), and the remainder of her estate with the exception of her personal property, which was left to her granddaughters, and some small charitable gifts. (*Id.*)

In January 2011, Butler brought Williamson to see her family doctor who diagnosed her [redacted]. (RP 1296-97.) The report of a CAT scan ordered by her doctor at the same time also noted a history of possible [redacted] (RP 1293.) Around the same time, Butler arranged to have Williamson's monthly bank account statements delivered to his home address. (RP 1332, 1373.) He claimed that he did this because Williamson misplaced bills and could not reconcile her accounts, and it was easier for him to have the statements mailed directly to him. (*Id.*)

After her [redacted] diagnosis, Butler continued to withdraw money from Williamson's accounts. From January 2011 through January 2012, Butler wrote and cashed six checks totaling $24,500. (RP 1261-65, 1277-78.) He also electronically transferred $5,000 from Williamson's account to his bank account, and wrote a check for $10,262 from her account to pay his own state property taxes. (RP 1257-58, 1279, 1344, 1381-82.) He claimed that the $5,000 transfer had been a "test" to see if he could successfully make online payments, but he was unable to say

whether or how he ever returned the money to Williamson, finally concluding that he probably kept it as reimbursement for some undocumented expense he had purportedly incurred on Williamson's behalf. (RP 681-83, 1344-47.)

On May 20, 2011, Butler submitted an annuity beneficiary change form for Williamson's annuity, removing her granddaughters as beneficiaries and naming Butler the 90% beneficiary. (RP 653, 1005-08.) Butler filled out the form and in the section asking for his relationship to Williamson, Butler wrote that he was her "son." (RP 1006, 1318.)

In December 2011, Butler brought Williamson back to her family doctor. (RP 1300-01.) The doctor's notes indicate that by this point Williamson was suffering from [redacted]" and that he was to follow-up with Butler concerning her estate and affairs. (RP 1301.) Butler testified that he had asked the doctor about taking the next step because Williamson could no longer live alone. (RP 1314, 1375.)

When Williamson's doctor failed to follow-up, Butler brought her to see another doctor, who admitted her to the hospital. (RP 1305, 1374.) The doctor determined that Williamson was suffering from [redacted], experiencing [redacted] and had a [redacted]. (*Id.*) During her hospitalization, Butler made arrangements to have her moved to an assisted living facility. (RP 1375.) At this time, Williamson's family members became involved, Butler's power of attorney was revoked, and arrangements were made for Williamson's care in her own home. (RP 1217.) After this, Butler had no further contact with Williamson. (*Id.*)

D. Butler's Statements During Woodbury's and FINRA's Investigations

On May 29, 2012, Williamson's friend filed a complaint with FINRA and Woodbury on behalf of Williamson, her sister, and her granddaughters (the "Complaint Letter"). (RP 949-50.) The Complaint Letter alleged that Butler had: (1) sold Williamson an unsuitable annuity; (2)

added himself as a joint account holder on Williamson's bank accounts and used her funds for his own personal expenses; and (3) submitted a beneficiary change form for Williamson's annuity naming himself as the beneficiary and falsely representing himself as her son. (*Id.*) The Complaint Letter also stated that the family was concerned that Butler had taken advantage of Williamson while she was in poor health. (*Id.*) Woodbury and FINRA each began investigations into Butler's conduct.

1. Woodbury's Investigation

On June 7, 2012, Woodbury forwarded the Complaint Letter to Butler and asked him to submit a detailed written statement responding to the allegations, along with supporting documentation. (RP 983.) On June 11, 2012, Butler submitted a statement to Woodbury ("Butler's Statement"). (RP 1215-18.) In it, he explained that Williamson had become dependent on him "for everything." (RP 1215.) Butler stated that he noticed changes in her condition and that she had "begun becoming negligent on [sic] paying her bills." (RP 1216.) Butler described the 2009 incident where Williamson's house was going to be auctioned off in just a few days for failure to pay her taxes and he quickly arranged to pay the taxes. (*Id.*) The Butler Statement provides that Williamson asked Butler to help her with her finances after this incident. (*Id.*)

The Butler Statement also described how Butler discovered that one of Williamson's granddaughters had been making numerous unauthorized charges on Williamson's credit cards. (*Id.*) Butler canceled the cards and had new ones issued. (*Id.*) After a another similar incident, in which Butler says this same granddaughter again "stole" one of Williamson's credit cards, Butler said he was added as a joint account holder in order to pay her bills and monitor her

finances. (*Id.*) Butler also claimed that it was Williamson's wish to name him as beneficiary of her will and annuity and to give him a power of attorney. (*Id.*)

2. FINRA's Investigation

FINRA simultaneously began its own investigation of Butler's conduct with respect to Williamson. In June 2012, FINRA sent Rule 8210 requests to both Woodbury and Butler. (RP 1009-11.) In July 2012, Butler submitted a written response to FINRA's request through counsel. (RP 1179-86.) In his response, Butler admitted that he did not inform Woodbury that he had been added as a joint account holder on Williamson's accounts or that she had given him a power of attorney. (*Id.*) He also claimed that he wrote "son" on the annuity beneficiary change form because Williamson called him her son. (RP 1183.) While he claimed to have used all the money withdrawn from Williamson's account for her benefit, Butler said that he had not retained any receipts for expenses that he had allegedly incurred on her behalf. (*Id.*)

a. Butler's First OTR

In September 2012, Butler appeared for his first on-the record interview with FINRA investigators (the "First OTR"). (RP 1307-51.) At this point, FINRA was aware of only five checks totaling $21,500 that Butler had written and cashed from Williamson's accounts, and a $5,000 wire transfer from one of her accounts to his bank account. (RP 1184-85, 1333-40.) FINRA also knew of a $10,262 check used to pay Butler's property taxes, although it mistakenly assumed that it was to pay Williamson's taxes. (RP 1332-33.)

During the First OTR, and similar to the contents of the Butler Statement, Butler testified candidly about his awareness of Williamson's diminishing [redacted] health. He testified that Williamson was not paying her bills and that he believed she had gotten lost driving to a grocery store she had frequented for years. (RP 1312-13, 1366.) He admitted that he believed

Williamson was in the beginning stages of [redacted] and that she eventually became "very sick." (RP 1313-14.)

Also during the First OTR, Butler stated unequivocally that all the checks he had cashed were to reimburse himself for expenses he had incurred on Williamson's behalf. (RP 1333-40.) He claimed he would often pay for repairs and other expenses with his own cash, and then write a check from Williamson's accounts to reimburse himself.[5] (*Id.*) He claimed to have incurred a number of expenses on Williamson's behalf, including repair of a furnace, painting her house, and extermination of snakes in her home, but had no receipts for these expenses and, incredibly, could not recall the name of a single person or company that had provided any of the claimed services. (RP 1333-40, 1357-58.)

Importantly, Butler stated that he had never been compensated by Williamson for anything he had done for her, and he had never received any cash gifts from her. (RP 1340-42.) Butler denied pocketing any of the money from the checks. (RP 1337, 1339.) When asked how he could be sure the money had been used for Williamson's benefit when he could not recall the specific purpose of any check, Butler replied that he knew the money had been for her benefit "[b]ecause I know it wasn't for mine." (RP 1341.) When asked if Williamson ever said take something from my account for helping me, Butler replied with a simple "no." (RP 1340.) Finally, when asked if Williamson had ever given him any cash gifts, Butler also answered "no." (*Id.*) In short, Butler's testimony was unequivocal that every single withdrawal from Williamson's account had been to reimburse him for expenses he had incurred for her benefit.

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[5] This did not include Williamson's regular monthly bills, which Butler paid for by check. (RP 1312, 1336, 1361.)

In October 2012, FINRA sent a follow-up Rule 8210 request to Butler's counsel asking about the $10,262 check paid to the Maryland comptroller. (RP 1255-56.) In the response Butler submitted through counsel, Butler admitted that the check had been written to pay his own state property taxes. (RP 1257.) He claimed, contrary to his unequivocal and repeated statements at the First OTR, that the check had been written with Williamson's approval and that it had been a gift to thank him for his assistance. (RP 1257, 1381-82) Butler now claimed that Williamson did "at times [] endow him with gifts." (*Id.*) He has never explained this sudden change in his story.

Butler also submitted a list of items that he claimed to have purchased for Williamson, for which he reimbursed himself approximately $30,000. (RP 704, 1260.) While Butler did not provide any receipts or other documentation to support his claims of expenses, his list purported to account for the total amount of money withdrawn from Williamson's accounts that FINRA was aware of at the time. (RP 1260, 1335, 1343.)

b. Butler's Second OTR

In May 2013, Butler appeared for a second on-the-record interview with FINRA (the "Second OTR"). (RP 1353-87.) During the Second OTR, Butler continued to maintain that all the amounts he had withdrawn from Williamson's accounts were to pay her bills or reimburse himself for expenses he had incurred on her behalf, even though he had no receipts or other documentation to support his claims, and could not identify the specific purpose of any single check. (RP 1356-59, 1364-65.) While he acknowledged that, contrary to his earlier statements, the payment of his state taxes from Williamson's account had been a "gift," he denied that she had ever given him any other gifts. (RP 1381-83.)

At the Second OTR, Butler also continued to acknowledge his awareness of Williamson's declining [redacted] health and described many of the same incidents beginning in 2009 that lead him to conclude that Williamson's [redacted] health was declining. (RP 1361-70, 1377.) Butler also testified that Williamson was always wearing the same clothes, something he viewed as a sign that "something was wrong," and which he said he understood to be a sign of [redacted] (RP 1374.) Further, Butler stated that he told Williamson's doctor and family of the symptoms he was observing. (RP 1365, 1369, 1380.) As a result, Williamson's family doctor was monitoring her [redacted] state. (RP 1370.) Butler admitted that Williamson's "condition was changing," and he "picked up" that something was wrong. (RP 1373, 1380.)

c. FINRA Obtains Evidence of Numerous Additional Withdrawals

In October 2013, FINRA received from the legal guardian that had been appointed for Williamson copies of medical records and evidence of numerous additional checks Butler had cashed. (RP 1289-1304.) Suddenly, the amount of money Butler had withdrawn from Williamson's accounts in the form of checks he had written to "cash" or himself and had cashed ballooned from $20,000 to more than $100,000. (*Id.*) In addition, FINRA learned of an additional check for $18,846 that Butler had written from Williamson's account to pay his personal federal taxes. (RP 1281.)

As a result of this newly discovered evidence, in November 2013, FINRA served Butler with another Rule 8210 request asking about these checks. (RP 1283-85.) Butler responded through counsel that while he could not recall the specific purpose of any check, they were all written with Williamson's consent. (RP 1287-88.)

d. Butler's Hearing Testimony

Butler's response to FINRA's November 2013 Rule 8210 request would be the first hint of what would become a very different story he would tell at the hearing—a story that directly contradicted the contents of the earlier Butler Statement and his sworn, on-the-record testimony in two examinations by FINRA. At the hearing (and in his papers in support of this application), Butler suddenly denied that Williamson was suffering a decline in her [redacted] health and claimed that Williamson was competent to manage her finances and able to balance her checkbook. (RP 710, 720, 724-27, 737-39, 751-52, 782.) Moreover, Butler claimed, also for the first time, that in addition to reimbursement for expenses he incurred on her behalf, many of the withdrawals from Williamson's accounts were indeed gifts she made to him. (RP 674-80, 684-85) Butler claimed that Williamson would often tell him to "treat" himself to some cash to thank him for caring for her. (*Id.*) Butler has never explained his changed story.

III. PROCEDURAL HISTORY

On August 2, 2013, FINRA's Department of Enforcement ("Enforcement") filed a five-cause complaint against Butler. (RP 1-40.) The complaint alleged that Butler converted customer funds in violation of FINRA Rule 2010. (RP 12-13.) Specifically, the complaint alleged that after becoming a joint account holder on Williamson's banks accounts, Butler used the accounts to pay his state taxes and withdrew an additional $26,000 from the accounts through checks made payable to "cash" and an electronic transfer to his own account. (*Id.*) The complaint also alleged that Butler violated FINRA Rule 2010 by violating various Woodbury policies, and submitting a false annuity beneficiary change request form making himself the primary beneficiary on his customer's annuity. (RP 14-17.)

Butler denied the alleged violations and argued that all the withdrawals from his customer's account were made with her authorization and were used for her benefit. (RP 43-54.) With respect to the false beneficiary change form, Butler admitted that he falsely stated on the form that he was his customer's "son," but said this was done at his customer's direction because she considered him like a son. (RP 52.)

After learning of numerous additional withdrawals by Butler from his customer's bank accounts, as discussed above, Enforcement filed an amended complaint on December 20, 2013. (RP 310-23.) The amended complaint alleged that Butler: (1) drew two checks on his customer's account totaling $29,108.18 to pay his state and federal tax liabilities; (2) drew 15 other checks on his customer's account from September 1, 2009 to January 20, 2012 made payable to "cash" or to himself totaling $114,250,[6] (3) withdrew $5,000 from the account through electronic funds transfers to his personal bank account; and (4) violated FINRA Rule 2010 by violating Woodbury policies and submitting a false beneficiary change form making himself the primary beneficiary of his customer's annuity. (*Id.*)

After a two-day hearing, the Hearing Panel found that Butler had converted customer funds and submitted a false annuity beneficiary change form in violation of FINRA Rule 2010. (RP 1569-1606.) The hearing panel barred Butler and ordered him to pay restitution and hearing costs. (RP 1602-03.) Butler appealed the hearing panel decision to the NAC, which affirmed the hearing panel's finding and sanctions, and assessed appeal costs. (RP 1849-62.) The NAC found that, in light of his prior sworn statements and other evidence, Butler's hearing testimony

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[6] In the amended complaint, Enforcement appears to have inadvertently double counted a check for $3,000. The record reflects that Butler actually drew 14 checks on the account totaling $111,250.

was not credible. (RP 1856-58.) Moreover, the NAC explained that it was reasonable to infer from Butler's "shifting and contradictory explanations" for the purposes of the withdrawals from Williamson's accounts that he converted Williamson's funds in violation of his ethical obligations. (RP 1858-59.)

IV. ARGUMENT

A. Butler's Testimony at the Hearing Was Not Credible

The Hearing Panel unequivocally found that Butler's testimony concerning Williamson's competence to manage her financial affairs and the purpose of his withdrawals from her accounts was not credible. (RP 1583-89.) The NAC affirmed these credibility determinations. (RP 1856-58.) It is well settled that the "credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference, and can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, 56 S.E.C. 76, 89 (2003), *aff'd*, 2011 U.S. App. LEXIS 18428 (2d Cir. 2011); *see also See Eliezer Gurfel*, 54 S.E.C. 56, 62 n.11 (1999), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000). There is no substantial evidence in the record to warrant overturning the Hearing Panel's credibility determinations. To the contrary, the record, including Butler's numerous contradictory statements and his changed story upon FINRA's discovery of additional withdrawals by Butler from Williamson's accounts, overwhelmingly supports those credibility findings.

First, Butler's assertion that Williamson was competent to handle her financial affairs is strongly contradicted by Butler's contemporaneous conduct, his statements during Woodbury's and FINRA's investigations, and the documentary evidence. In the Butler Statement and First and Second OTRs, Butler testified that he saw signs as early as 2009 that Williamson was having

trouble paying her bills and reconciling her accounts. (RP 1215-18, 1312-14, 1366.) This was the reason that he was added as a joint holder on Williamson's accounts. (*Id.*) Butler stated that Williamson was misplacing and failing to pay bills. (*Id.*) Butler also knew that Williamson's granddaughter had taken her credit card and was making unauthorized charges without her knowledge. (RP 1215-18.) Finally, Butler claimed that Williamson nearly lost her home because she failed to pay her taxes. (RP 707-08, 1215-18.) Despite his claims to the contrary at the hearing, Butler's previous statements (including his sworn testimony at the on-the-record interviews) establishes that he knew Williamson was not competent to manage her financial affairs.

In his on-the-record testimony, Butler also testified about various steps he took to deal with Williamson's increasing forgetfulness and declining [redacted] health. He arranged for meals-on-wheels because she was not eating properly, he disabled her gas stove, and he regularly reminded her to take her medications. (RP 1359, 1381, 1444-53.) Butler took Williamson to several doctor's visits during which her [redacted] state was evaluated, and the notes of these visits support that Williamson was suffering from a [redacted] decline. (RP 1361-80, 1452, 1296-97.)

In his pre-hearing sworn statements, Butler repeatedly claimed that he stepped in because Williamson could not manage her finances. His attempt to walk away from these statements at the hearing and on appeal—necessitated by FINRA's discovery of the magnitude of the withdrawals from Williamson's account and Butler's need to argue that she was competent to gift large amounts of money to him—is simply not credible and a shameless attempt to provide cover for his egregious misconduct.[7]

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[7] For all of the reasons, the Commission should reject Butler's claim on appeal that Williamson authorized all of his withdrawals from her accounts. Similarly, Butler's claim that

Second, Butler's claims at the hearing that the purpose of the checks was either to reimburse him for expenses he incurred on Williamson's behalf or gifts she made to him is similarly not credible, and on appeal Butler has not presented any evidence to overturn this credibility finding. With respect to the expenses he supposedly incurred on Williamson's behalf, Butler was unable to provide a single receipt or any other documentary support. (RP 1333-40, 1325-59, 1364-65.) He was also unable to identify a single person or company who provided any of the services for which he claimed to have paid, and made no attempt to do so even though he knew these claims were a significant issue in the case. (RP 675-76, 708.) Moreover, his testimony with respect to these expenses was contradictory. For example, with respect a porch he claimed to have paid for, he later admitted that Williamson paid for this expense directly before he was added as a joint account holder. (RP 1356-57.) There was also testimony at the hearing directly contradicting Butler's claim that he spent approximately $4,800 to replace the carpet in Williamson's house. (RP 704.) An investigator for Williamson's guardian testified that when she visited the home the carpet was old and had not been cleaned in a decade. (RP 866-67.) Butler has not, and cannot, reconcile these two starkly different stories.

Moreover, in his sworn pre-hearing statements, Butler was unequivocal in maintaining that he received no cash gifts from Williamson. (RP 1340-42.) Even after the discovery that his property taxes were paid from Williamson's accounts, he insisted that there no were additional gifts. (RP 1383.) Then at the hearing, Butler suddenly claimed that Williamson "treated" him to large amounts of cash. (RP 674-80, 684-85.) The amount, timing and pattern of the withdrawals is inconsistent with the contention that these were gifts, and defy logic. For example, in May

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Williamson authorized Butler's withdrawals because Enforcement did not introduce any medical evidence that Williamson's [redacted] decline began prior to 2011 is without merit and ignores Butler's own testimony and actions prior to 2011.

2011, Butler withdrew a total of $13,000 from Williamson's account over the course of 10 days—$2,000 on May 2, $7,000 on May 9, and $4,000 on May 12. (RP 1261, 1263-64.) Further, it defies belief that Butler would have forgotten such large cash gifts until FINRA happened to discover the checks, and there can be little doubt that Butler fabricated this claim about "treats." Butler has not presented any evidence, much less substantial evidence, sufficient to overturn the findings regarding his incredible testimony that Williamson was competent to handle her financial affairs and gifted to him large sums of her money.

B. Butler Converted Williamson's Funds in Violation of FINRA Rule 2010

Having concluded above that Butler's hearing testimony concerning William's competence to manage her financial affairs and her alleged gifts to him is not credible, and the overwhelming record evidence supporting the opposite conclusions, it is clear that Butler took funds that did not belong to him and were never intended for him. Accordingly, Butler's misconduct constitutes conversion.

FINRA Rule 2010 requires associated persons to conduct their business in accordance with "high standards of commercial honor and just and equitable principles of trade." FINRA Rule 2010 encompasses all unethical, business-related conduct, even if that conduct is not in connection with a securities transaction. *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *1 (Sept. 3, 2015); *see also Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (affirming the SEC's finding that an associated person violated just and equitable principles of trade by misappropriating funds from a political organization for which he served as the treasurer).

Conversion is defined as "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."

John Edward Mullins, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012). It is well-settled that conversion violates FINRA Rule 2010. *See Olson*, 2015 SEC LEXIS 3629, at *7 (finding that a registered representative's conversion of firm funds violated Rule 2010); *Mullins*, 2012 SEC LEXIS 464, at *56, *73-74 (finding that a registered representative's conversion of the funds of a foundation for which he served as an officer violated NASD Rule 2110, the predecessor to FINRA Rule 2010).

It is undisputed that Butler withdrew $170,408.18 from Williamson's accounts, consisting of checks that he wrote and cashed totaling $111,300, $30,000 in wire transfers from Williamson's accounts to his account (including an unexplained $20,000 transfer from her account on the very day he was added as a joint account holder), and $29,108.18 for payment of his state and federal taxes. As discussed above, Butler's claims that Williamson was competent to manage her finances and that these amounts were for reimbursement of expenses he incurred on her behalf or gifts, are contradicted by Butler's sworn on-the-record statements and additional record evidence, and not credible.

On appeal, Butler argues that because Williamson did not testify, the only evidence is his uncontroverted testimony, and accordingly, the NAC's decision is contrary to, and not supported by, the evidence. To the contrary, Butler's testimony, when taken in light of his sworn pre-hearing testimony and the timing of the discovery of evidence, provides ample evidence of Butler's conversion.[8] It is well established that circumstantial evidence may be probative and

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[8] Butler also argues that FINRA never interviewed Williamson and that the failure to do so is "fatal" to its case against him. Butler's argument is misplaced. *See Thomas E. Warren, III*, 51 S.E.C. 1015, 1020 (1994) (rejecting the argument that FINRA did not conduct an adequate investigation into respondent's misconduct where FINRA did not interview certain individuals). A FINRA examiner did attempt to interview Williamson, but determined that she was unable to answer questions because of her illness. (RP 837-44.) Indeed, Williamson did not even know

reliable and sufficient to prove a violation. *See Dep't of Mkt. Regulation v. Geraci*, Complaint No. CMS020143, 2004 NASD Discip. LEXIS 19, *29-30 (NASD NAC Dec. 9, 2004). In *Geraci*, the respondent argued that the insider trading claims against him should fail because there was no direct evidence introduced that he was tipped. *Id.* at *29. The Hearing Panel found that Geraci's testimony was self-serving and not credible, and based its finding that he was tipped on inferences drawn from other circumstantial evidence. *Id.* at *31-32; *see also Mullins*, 2012 SEC LEXIS 464, at *33-34 (rejecting respondent's claim that he had authorization to use certain gift cards based on circumstantial evidence and his lack of credibility where the person allegedly giving authorization did not testify).

Here, Butler's pre-hearing testimony and his contradiction of that testimony at the hearing, as well as other evidence, establishes that he converted Williamson's funds. Butler was added as a joint account holder for the sole purpose of helping Williamson pay her bills because of her declining [redacted] health. (RP 1334, 1337.) Additional evidence, including medical records and meals-on-wheels forms, further establishes that Butler observed Williamson's decline. (RP 1287-1305, 1441-53.) Butler has provided no credible explanation for the purpose of more than $170,000 in withdrawals from Williamson's accounts. Butler provided shifting and contradictory explanations for the purposes of the withdrawals, and Butler's testimony appears to have been a fabrication to conceal his misconduct. It is more than reasonable to infer from these facts that Butler converted his customer's funds.

Finally, Butler argues that he could not, as a legal matter, convert Williamson's funds because he was a joint owner of the accounts in question. See Butler's Brief, at 16-17. This

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who Butler was. (*Id.*) Moreover, Butler's arguments ignore the evidence that he converted his customer's funds, regardless of who Enforcement did or did not interview.

argument is a non-starter, and ignores that according to his own testimony, he became a joint owner solely to assist Williamson to pay her bills at a time when she could no longer do so (and not to grant him ownership over the accounts such that he was entitled to pay his own expenses and provide himself with "treats" whenever he felt like doing so). Likewise, Butler's other purported justifications for his egregious misconduct—that he was the only person who took care of Williamson (and thus somehow was entitled to the funds that he converted) and that her accounts benefited from his financial stewardship because they increased in value over the years—do not and cannot, even if true, excuse his victimization of Williamson.

C. Butler Falsified an Annuity Beneficiary Change Request Designating Himself the Primary Beneficiary of Williamson's Annuity

As discussed above, FINRA Rule 2010 requires associated persons to "observe high standards of commercial honor and just and equitable principles of trade." The submission of false information on a variable annuity application violates Rule 2010. *See Charles E. Kautz*, 1996 SEC LEXIS 994, at *11-12 (1996) (finding that it is a violation to enter false information on documents); *Dep't of Enforcement v. Skiba*, Complaint No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13 (RP NAC Apr. 23, 2010); *Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *6 (NASD NAC Dec. 18, 2000).

Butler admitted that he filled out the annuity beneficiary change form making him the 90% beneficiary of the annuity and that he falsely claimed to be Williamson's son on that form. (RP 651-53.) Butler's defense is that Williamson considered him a son and that she directed him to write "son" on the form. Even if it were true that Williamson directed him to write "son," it would not excuse his violation. As a person who has been in the industry for more than 40 years, it defies belief that Butler did not understand the importance of submitting accurate paperwork.

The only plausible explanation for Butler's misconduct was a desire to avoid the extra scrutiny the form may have received if he had accurately recorded his relationship with Williamson.

D. The Sanctions the NAC Imposed on Butler are Neither Excessive Nor Oppressive

The Commission should affirm the NAC's sanctions, as they are neither excessive nor oppressive. *See* 15 U.S.C. § 78s(e)(2). Moreover, the sanctions here are consistent with the Sanction Guidelines ("Guidelines")[9] and necessary for the protection of the investing public. The Commission considers the principles articulated in the Guidelines and has regularly affirmed sanctions that are within the recommended ranges. *See Robert Tretiak*, 56 S.E.C. 209, 233 (2003); *Daniel D. Manoff*, 55 S.E.C. 1155, 1166 (2002).

The Guidelines direct that the standard sanction for conversion is a bar, regardless of the amount converted, a position the Commission has endorsed.[10] *See Olson*, 2015 SEC LEXIS 3629, at *7 (finding that a bar is standard for conversion). The conversion of customer funds is one of the most serious violations that can be committed by an associated person. Conversion is antithetical to the ethical principles that underpin the self-regulation of securities professionals, and it is misconduct that "poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy." *Mullins*, 2012 SEC LEXIS 464, at *74.

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9 *FINRA Sanction Guidelines* (2015), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

10 *Id.* at 36.

The NAC correctly found that a bar for Butler's conversion is further supported by the presence of numerous applicable aggravating factors. Butler intentionally took advantage of an elderly woman who trusted him and whose declining [redacted] health caused her to be unable to manage her financial affairs.[11] Butler tried to conceal his misconduct, first by claiming that all the withdrawals were made for Williamson's benefit, and later, when the amount at issue became too high for this explanation to make sense, by falsely claiming she gave him large cash gifts.[12] Moreover, Butler concealed the fact that he had taken control of Williamson's finances by falsely claiming to be her son on a form submitted to the annuity insurer. Butler's conversion of funds occurred over the course of more than three years, involved multiple withdrawals from Williamson's accounts, and resulted in financial gain to Butler of more than $170,000.[13]

Significantly, Butler has neither taken any responsibility for his misconduct, nor attempted to make any restitution to Williamson.[14] To the contrary, Butler has throughout attempted to place blame on others, including on Woodbury for not catching his false representations on the annuity beneficiary change form, Williamson's family for not appropriately caring for her, and FINRA for allegedly not interviewing the right people in connection with Butler's flagrant misconduct. His continuing refusal to acknowledge any wrong-doing demonstrates the danger he poses to the investing public.

Butler's brazen conversion is so antithetical to the conduct required of securities professionals, there can be little question that he is unfit for continued employment in the

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11 *Guidelines*, at 7 (Principal Considerations, Nos. 13, 19).

12 *Id.* at 6 (Principal Considerations, No. 10).

13 *Id.* at 6 (Principal Considerations, Nos. 2, 4).

14 *Id.* at 6 (Principal Considerations, Nos. 2, 4).

securities industry. The Commission should affirm the sanction of a bar in all capacities for Butler's conversion.

The Commission should also affirm the NAC's bar of Butler for his submission of a false annuity beneficiary change form. The NAC properly applied the Guideline for falsification of records for Butler's violation of Rule 2010 by submitting a false annuity beneficiary change form and found that Butler's misconduct was egregious.[15] Butler's misrepresentation on the beneficiary change form was important. By falsely claiming to be Williamson's son, Butler was able to avoid any scrutiny that the insurance company might otherwise have given the document had he been truthful. Moreover, Butler's falsehood on this document was part of a larger pattern of misconduct, which included his conversion of his customer's funds. The falsehood on this document concealed that Butler has taken control of Williamson's finances, was converting large amounts of money, and was making himself the beneficiary of her annuity and estate. Butler's conduct demonstrates that he is unfit for the securities industry and the Commission should affirm the bar imposed by the NAC.

E. An Order of Restitution Is Appropriate to Compensate Williamson for Butler's Conversion

The NAC properly ordered Butler to pay restitution to Williamson in the amount of $170,408.18. Restitution is "used to restore the status quo ante where a victim otherwise would unjustly suffer loss."[16] *Id.* at 4. The Guidelines provide that restitution may be ordered when an identifiable person has suffered a quantifiable loss proximately caused by respondent's

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15 *Id.* at 37.

16 *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

misconduct.[17] *See also Alfred P Reeves, III*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, *20 (Nov. 5, 2015) (affirming an order of restitution in a conversion case where an identifiable person suffered a quantifiable loss due to the respondent's misconduct).

Restitution is appropriate to remediate Butler's misconduct. Williamson suffered a significant loss as a direct result of Butler's conversion of her funds. The record clearly identifies the amount of this loss—the $170,408.18 Butler withdrew from Williamson's accounts in the form of checks he wrote and wire transfers to his accounts. Accordingly, the Commission should affirm the NAC's restitution order.

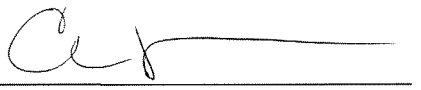
V. CONCLUSION

There is overwhelming support in the record that Butler took control of the finances of and converted more than $170,000 from an elderly woman who trusted him and was suffering a rapid [redacted] decline. This evidence comes from Butler himself. As Butler said, "[t]his lady worshipped me . . . the lady trusted me, this lady believed in me." (RP 1314.) And Butler took full advantage of Williamson's trust and her [redacted] to line his pockets. Moreover, there is no question that Butler filled out paperwork making himself the beneficiary of his customer's annuity which falsely represented that he was her son. Butler's grotesque misconduct is a

17 *Id.*

violation of the most fundamental ethical standards for securities professionals. Consequently, the Commission should affirm the NAC's findings and the sanctions imposed.

Respectfully submitted,



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January 27, 2016

CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 27th day of January 2015, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, In the Matter of Joseph R. Butler, Administrative Proceeding File No. 3-16912 to be served by messenger and facsimile on:

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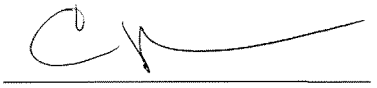
Service was made on the Commission by messenger and on Applicant's counsel by overnight delivery service due to the distance between FINRA's offices and Applicant's counsel.



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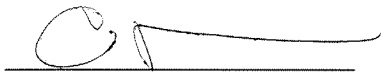
CERTIFICATE OF COMPLIANCE

I, **Celia Passaro**, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains **8,450** words.



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