BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Devin Lamarr Wicker New York, NY, Respondent.	DECISION Complaint No. 2016052104101 December 15, 2021

Registered representative converted customer funds. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Kay Lackey, Esq., Jessica Brach, Esq., Kerry J. Land, Esq., David C. Pollack, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Gary Carleton, Esq.

Decision

I. Introduction

Devin Lamarr Wicker appeals a June 5, 2020 Hearing Panel decision pursuant to FINRA Rule 9311. The Hearing Panel found that Wicker converted customer funds, in violation of FINRA Rules 2150 and 2010. For his misconduct, the Hearing Panel barred Wicker from associating with any FINRA member in any capacity, and it ordered him to pay $50,000 in restitution to the customer whose funds he converted.

We affirm the Hearing Panel's findings that Wicker converted customer funds. The facts underlying our findings are not disputed and are amply supported by the record. We also affirm the bar imposed by the Hearing Panel and its order that he pay $50,000 in restitution. Conversion is among the most serious misconduct for which a bar is the recommended sanction, regardless of the amount converted. Moreover, numerous aggravating factors support barring Wicker and ordering that he repay the victimized customer.

Finally, we reject Wicker's argument that the entire proceeding should be dismissed based upon alleged contemptuous misconduct by FINRA's Department of Enforcement ("Enforcement"). This argument stems from an unusual set of facts and circumstances. Prior to the June 2020 Hearing Panel decision that is the subject of this appeal, a different FINRA Hearing Panel conducted a hearing in February 2019 regarding the same alleged misconduct and issued a decision in March 2019. The March 2019 decision found that Wicker converted customer funds, barred him, and ordered that he pay the customer $50,000 in restitution.

FINRA's Chief Hearing Officer, however, vacated the March 2019 decision because after it was issued, she learned that circumstances existed where the fairness of the presiding Hearing Officer who authored the March 2019 decision (the "Former Hearing Officer") might reasonably be questioned. The Chief Hearing Officer based her decision to vacate the March 2019 decision on the fact that several months after the decision was issued, the Former Hearing Officer left the Office of Hearing Officers and joined Enforcement in a senior role. To address this situation, the Chief Hearing Officer vacated the March 2019 decision in its entirety, directed that no weight or presumption of correctness be given to any prior decisions, orders, or rulings previously issued in the matter, and appointed a new Hearing Officer and hearing panel to conduct a new proceeding. Further, procedures were put into place to ensure that the Former Hearing Officer did not have any role in the new proceeding. The new Hearing Panel conducted a new proceeding and issued the decision in June 2020 that is the subject of this appeal.

Notwithstanding this unique procedural history, and in light of the above-referenced measures, we find that Wicker ultimately received a full and fair opportunity to defend himself before an impartial adjudicator. The Hearing Panel that rendered the June 2020 decision did not abuse its discretion by denying Wicker's post-hearing request to dismiss the proceeding against him. We also reject Wicker's remaining arguments related to the process that led to vacating the March 2019 decision, finding that, to the extent any errors were made, they constituted, at most, harmless error, and were not sufficient to warrant the extreme remedy of dismissing this case.

II. Facts

A. Wicker

Wicker entered the securities industry in 2000 as a general securities representative. Wicker spent most of the next 10 years trading mortgage-backed securities. In 2010, Wicker co-founded a broker-dealer, Bonwick Capital Partners, LLC ("Bonwick" or "the Firm"). During the relevant period, Wicker served as Bonwick's chief executive officer, chief financial officer, and chief compliance officer, and he held an approximately 60% ownership interest in the Firm. Wicker was registered in various capacities at Bonwick, including as a general securities principal.

Wicker terminated his registrations with Bonwick in December 2016. He is not currently associated with a FINRA member firm.

B. Bonwick

Bonwick and Wicker were based in New York City. In early 2016, the Firm had approximately 30 registered representatives in five offices throughout the country.

Around this time, Bonwick was experiencing financial and regulatory difficulties. Among other things, the Firm was involved in on-going litigation and owed a substantial sum to its attorneys. Wicker and the Firm's administrative officer, AD, deferred their compensation at various points in 2016, and the Firm's owners made numerous capital contributions during the first half of 2016. Moreover, in early 2016 Bonwick, which had a minimum net capital requirement of $100,000, reported a negative net capital of $314,096.[1] Bonwick ceased operations around June 2016. Later in 2016, FINRA suspended the Firm for failing to pay its annual assessment. FINRA canceled Bonwick's membership in February 2017.

C. Customer Retains Bonwick to Serve as Underwriter for its IPO

In February 2016, a customer (hereinafter, "the Company") retained Bonwick to serve as the underwriter for its planned initial public offering ("IPO").[2] The Company and Bonwick

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[1] In mid-March 2016, FINRA issued Bonwick a suspension notice in connection with its 2015 annual audit report and the Firm's calculation of its net capital. The Firm's suspension became effective in mid-July 2016. Further, in June 2017, the SEC accepted from Bonwick and Wicker an offer of settlement to resolve allegations that, from January through May 2015, Bonwick failed to properly accrue certain payables and calculate and report its net capital, and, as a result, the Firm at times operated with a net capital deficiency during this period.

[2] Pursuant to the agreement between Bonwick and the Company, Bonwick received $50,000 as an advisory fee. The agreement also provided that Bonwick would receive a success fee in connection with the IPO.

agreed that, among other things, the Company would reimburse Bonwick "promptly when invoiced" for Bonwick's reasonable out-of-pocket expenses, including reasonable legal fees and expenses, in connection with the IPO. DM, an investment banker who joined Bonwick in January 2016, and RW, a minority owner of Bonwick, signed the underwriting agreement on behalf of Bonwick.

D. The Company Wires Bonwick $50,000 to Pay Underwriter's Counsel

In March 2016, DM received from a law firm ("Underwriter's Counsel") a proposed engagement agreement to provide Bonwick with legal services in connection with the Company's IPO. DM sent the proposal to Wicker for his review, and informed him that the Company would pay legal fees to Bonwick upon Bonwick invoicing the Company. DM stated that "we expect an initial $50k payment to [Underwriter's Counsel] following execution of the [agreement]." DM provided Wicker with further details concerning the mechanics of this initial $50,000 payment, specifying that after Bonwick signed the agreement with Underwriter's Counsel, the following steps would occur: (1) Underwriter's Counsel would invoice Bonwick for the $50,000 payment; (2) Bonwick would invoice the Company for the $50,000; (3) the Company would wire the funds to Bonwick; and (4) Bonwick would then pay the $50,000 to Underwriter's Counsel.

Wicker expressed concern that Bonwick would be liable for paying the $50,000 to Underwriter's Counsel while relying upon the Company, a customer with "limited revenue," to reimburse Bonwick. Consequently, Wicker insisted that Bonwick first receive the $50,000 from the Company before Bonwick would sign the engagement agreement. Wicker thus directed DM to immediately invoice the Company for the $50,000 payment. On March 16, 2016, DM sent the Company an invoice for $50,000 for "Underwritier's [sic] Counsel Retainer." The invoice was payable upon receipt and included instructions to wire the funds due to a Bonwick operating account. On March 17, 2016, the Company wired Bonwick $50,000. The money was commingled with funds in Bonwick's operating account, which Bonwick used to pay the Firm's expenses (including making payments to Wicker).[3]

Pursuant to the parties' stipulations and Wicker's testimony, Wicker knew that the Company had wired Bonwick $50,000. He also knew that the sole purpose of the $50,000 wire was to pay these funds as a retainer to Underwriter's Counsel, and he admits that the Company never authorized him or Bonwick to use the funds for any other purpose.

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[3] From April until the end of November 2016, Wicker, who controlled Bonwick's operating account and had complete authority over the account, withdrew or transferred more than $440,000 from Bonwick's operating account and deposited these funds into his personal account. During this period, Wicker also used the funds in Bonwick's operating account to pay the Firm's ongoing expenses, such as payroll and legal fees for an arbitration matter involving the Firm.

On March 18, 2016, Wicker sent DM a redlined copy of the proposed engagement agreement with Underwriter's Counsel. Wicker amended the document to make himself the signatory on behalf of Bonwick and added a provision that Underwriter's Counsel's work would be billed in $50,000 increments. Wicker rejected DM's proposal that the $50,000 increments be paid in advance. Underwriter's Counsel accepted Wicker's changes, and Wicker executed a final copy of the agreement on behalf of Bonwick.

E. Wicker Fails to Pay the Retainer to Underwriter's Counsel Despite Numerous Requests

Several weeks later, DM emailed Underwriter's Counsel and instructed it to send Bonwick an invoice and then Bonwick would wire it the $50,000 retainer. DM copied Wicker on his email. As instructed, Underwriter's Counsel sent DM an invoice on April 4, 2016.[4] DM emailed Bonwick's administrative officer, AD, with a copy to Wicker, and instructed AD to wire Underwriter's Counsel the $50,000 once Wicker approved the payment. DM reminded AD and Wicker that the Company had previously wired Bonwick the $50,000 to engage Underwriter's Counsel. Wicker never responded to these emails, and Bonwick did not send Underwriter's Counsel any funds, although Bonwick had sufficient funds in its bank account at the time to pay the retainer.[5]

In early May 2016, Underwriter's Counsel asked DM when it would receive its retainer. DM emailed AD and stated that he "thought the $50k was wired to [Underwriter's Counsel] in March?" AD responded that he would check with Wicker to see if he ever wired the funds.[6] In mid-July 2016, DM again asked Underwriter's Counsel whether it had received the retainer. After Underwriter's Counsel responded that it had not, DM forwarded its response to Wicker and

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[4] The invoice from Underwriter's Counsel contained in the record is dated August 25, 2015. Wicker, however, testified that this was an error and that Bonwick received an invoice from Underwriter's Counsel in April 2016.

[5] Shortly thereafter, however, Bonwick no longer had sufficient funds to pay the $50,000 retainer. Indeed, as of April 15, 2016, the balance in Bonwick's bank account was $6,000. Although the balance in Bonwick's operating account fluctuated during the ensuing several months, and there were times when Bonwick had insufficient funds to pay Underwriter's Counsel its retainer, at various points Bonwick had sufficient funds to pay the retainer. Bonwick, however, never paid Underwriter's Counsel the retainer. And by mid-October 2016, Bonwick's operating account was nearly completely depleted, with only $60 remaining.

[6] Wicker testified that on April 19, 2016, he instructed AD to wire the funds to Underwriter's Counsel. AD testified that he did not recall Wicker instructing him to do so. Regardless, it is undisputed that the funds were not wired to Underwriter's Counsel pursuant to Wicker's purported instructions to do so and, as described below, Wicker knew that the funds were not wired.

AD to remind them that the payment was past due. Neither Wicker nor AD responded to DM's email.

On July 22, 2016, DM met Wicker in person. DM had learned that FINRA had suspended Bonwick, and DM told Wicker that he intended to leave the Firm. DM also raised with Wicker the unpaid retainer and asked Wicker to ensure that Underwriter's Counsel would be paid. DM testified that Wicker could not tell him definitively whether the retainer had been paid to Underwriter's Counsel and that Wicker would look into it. The next day, DM resigned from Bonwick in an email to Wicker. DM attached to his resignation an email string related to DM's requests during the prior several months to get Bonwick to pay the retainer to Underwriter's Counsel.

DM began working for another broker-dealer at the end of July 2016. At this time, DM's new broker-dealer became the underwriter for the Company's IPO. On July 28, 2016, DM emailed Wicker and AD and attached some of the earlier emails concerning the retainer owed to Underwriter's Counsel. DM stated that Wicker had suggested that Underwriter's Counsel might have already been paid but it could not locate the incoming wire. DM requested that AD send confirmation that Bonwick wired the funds so that Underwriter's Counsel could locate the wired funds. Neither Wicker nor AD responded to this email.

On August 10, 2016, an executive at DM's new broker-dealer asked Underwriter's Counsel if it had received from Bonwick an initial $50,000 payment in connection with the Company's IPO. Underwriter's Counsel responded that it had not, and DM again emailed Wicker and AD requesting that they wire the funds to Underwriter's Counsel or confirm that the funds were sent. Neither Wicker nor AD responded to DM's email. Consequently, on August 24, 2016, a partner at Underwriter's Counsel emailed Wicker directly and asked that the $50,000 that the Company had wired to Bonwick for its retainer, and "held in trust" by Bonwick for the Company, be sent to it or returned to the Company so it could pay Underwriter's Counsel. Wicker did not respond to this email.

On October 7, 2016, the Company's chief financial officer sent a letter to Wicker demanding the immediate return of the $50,000 retainer.[7] The chief financial officer threatened to report Bonwick and Wicker to FINRA and other regulators if they failed to return the funds. Wicker responded on October 12, 2016. He informed the chief financial officer that he would "address the issue with the banker today on your funds." Later in the day, Wicker told the chief financial officer that he was unable to get a response because of the holiday. The next day, Wicker emailed the chief financial officer and informed him that he was able to talk with the banker "and have a path towards resolution." The chief financial officer responded that Wicker

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[7] The chief financial officer learned the day before that Bonwick never forwarded the retainer when Underwriter's Counsel told the Company that it was stopping work on the Company's IPO until it received its retainer. At the time, the Company was trying to file with the SEC initial drafts of its IPO documents.

was "trying [his] patience" and again threatened to report Wicker and Bonwick unless they returned the funds.

Wicker responded on October 14, 2016. Wicker informed the chief financial officer that he did not "appreciate the threatening approach" and stated that he only recently learned that DM did not pay the retainer. The chief financial officer, and later an attorney on behalf of the Company, continued to seek return of the retainer from Bonwick and Wicker. Wicker, however, did not respond. Consequently, the Company paid Underwriter's Counsel for the work it had done, despite having sent $50,000 to Bonwick for this purpose, and complained to FINRA. To date, the Company has not received any funds from Bonwick or Wicker.

III. Procedural History

Wicker's appeal centers around his arguments concerning alleged procedural infirmities and the fairness of this proceeding. Consequently, we discuss in detail the procedural history of this matter.

A. Complaint

In August 2018, Enforcement filed a complaint against Wicker. The complaint alleged that Wicker misused and converted customer funds when he failed to pay the Company's retainer to Underwriter's Counsel and instead used the Company's funds to pay Bonwick's expenses, in violation of FINRA Rules 2150(a) and 2010. The complaint further alleged that Wicker, separately and distinctly, violated FINRA Rule 2010 based upon this misconduct. Wicker filed an answer, in which he generally denied any misconduct.

B. The First Hearing and March 2019 Decision

A hearing panel composed of the Former Hearing Officer and two hearing panelists (collectively, the "First Hearing Panel") conducted a multi-day evidentiary hearing in early February 2019. Wicker represented himself throughout the hearing. In March 2019, the First Hearing Panel issued a decision finding that Wicker converted customer funds. The First Hearing Panel barred Wicker for this misconduct and ordered that he pay the Company $50,000 in restitution.

C. The Chief Hearing Officer Requests that the NAC Remand the Proceeding

Wicker appealed the First Hearing Panel's decision, and the parties filed appellate briefs. Before the NAC reviewed the merits of Wicker's appeal, on November 8, 2019, FINRA's Chief Hearing Officer requested that the NAC remand the proceeding (the "Remand Request") to the

Office of Hearing Officers ("OHO").[8] The Chief Hearing Officer made the Remand Request because she had received information "regarding whether the [Former Hearing Officer] was subject to disqualification on or before" the date of the First Hearing Panel decision.

D. The NAC Remands the Proceeding and the Chief Hearing Officer Vacates the First Hearing Panel's Decision

In response to the Remand Request, the NAC remanded the entire proceeding to OHO.[9] On November 12, 2019, the Chief Hearing Officer issued to the parties an order vacating the First Hearing Panel's decision (the "November 2019 Order"). In the November 2019 Order, the Chief Hearing Officer found that, based upon information she had received after the First Hearing Panel's decision, "circumstances exist where the fairness of the [Former Hearing Officer] might reasonably be questioned as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement." The Chief Hearing Officer cited FINRA Rule 9233, which governs the disqualification or recusal of a Hearing Officer and provides that "[i]f at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter." *See* FINRA Rule 9233(a). Accordingly, the Chief Hearing Officer ordered a new hearing, under a new Hearing Officer with new hearing panelists, and directed that no weight or presumption of correctness be given to any prior decisions, orders, or rulings previously issued in the matter.

E. The Second Proceeding and Hearing

Shortly after the November 2019 Order, a new Hearing Officer conducted several pre-hearing conferences with Enforcement and Wicker's attorney to discuss the proceeding.[10] During the first conference, the Hearing Officer explained that she would conduct the proceeding "as a new case. It's a fresh start. It's a clean slate." The Hearing Officer explained that it was her understanding that the Chief Hearing Officer vacated the First Hearing Panel's decision because she learned that, after issuance of the First Hearing Panel's decision, the Former Hearing Officer was hired by Enforcement. The Hearing Officer further explained that the Chief Hearing

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[8] The Chief Hearing Officer made the Remand Request in a letter addressed to the chairperson of the NAC and delivered to FINRA's Office of General Counsel. The Chief Hearing Officer did not copy the parties on the Remand Request.

[9] The NAC's ruling on the Remand Request was conveyed in a letter dated November 11, 2019, from FINRA's Office of General Counsel to the Chief Hearing Officer (the "Remand Order"). The parties were not copied on the Remand Order.

[10] Unlike during the first proceeding, Wicker was represented by counsel during the entire second proceeding. Different counsel represented Wicker in connection with this appeal.

Officer had determined that these circumstances "created a situation where the fairness of the earlier proceeding might reasonably be questioned." Wicker, through his counsel, did not object to or oppose rehearing the case before a new Hearing Officer and Hearing Panel. Nor did Wicker raise any issues concerning the Former Hearing Officer or the circumstances of her hiring by Enforcement.

The new Hearing Officer instituted procedures to help ensure that Enforcement staff handling the matter were independent in fact and appearance from the Former Hearing Officer (now an Enforcement employee). The Hearing Officer also informed the parties that she would try to streamline the proceeding and gave the parties an opportunity to conduct additional discovery and for Wicker to file an amended answer. Wicker, through his attorney, filed an amended answer. Wicker, however, did not request or seek to obtain any additional discovery.

A Hearing Panel conducted an evidentiary hearing in March 2020. Five witnesses, including Wicker and DM, testified. In a post-hearing brief, Wicker requested, for the first time, that the Hearing Panel dismiss the entire proceeding against him pursuant to FINRA Rule 9280. Wicker asserted that Enforcement and the Former Hearing Officer engaged in contemptuous conduct by allegedly negotiating with one another during the first proceeding. Wicker asserted that Enforcement "brib[ed] a hearing officer, and then [did] not disclos[e] the significant conflict issue" because Enforcement "dangled the carrot" of a high-profile job in front of the Former Hearing Officer during the proceeding. Wicker urged dismissal of the proceeding in its entirety to remedy this purported misconduct.

F. The Second Hearing Panel Finds that Wicker Converted Customer Funds

On June 5, 2020, the Hearing Panel issued its decision. It found that Wicker converted the Company's funds, in violation of FINRA Rules 2150 and 2010. It rejected Wicker's attempt to blame DM for converting the Company's funds because, according to Wicker, DM purportedly convinced Wicker to pay him the $50,000 retainer and DM promised that he would pay the retainer to Underwriter's Counsel from other funds. The Hearing Panel also rejected Wicker's claim that, at worst, he misused the Company's funds based upon his misunderstanding of how he should have handled the retainer. The Hearing Panel based its determinations, in part, upon extensive credibility findings. It found that Wicker's testimony on numerous points was not credible (including his purported remorse), and that his testimony "lacked overall credibility because it was often speculative and vague." In contrast, the Hearing Panel found that DM credibly testified and that his testimony was corroborated by documentary evidence.

The Hearing Panel also rejected Wicker's argument that the entire proceeding should be dismissed pursuant to FINRA Rule 9280. It found that the appropriate remedy to rectify any failure by the Former Hearing Officer to recuse herself was applied here—the First Hearing Panel's decision was vacated, Wicker received a new proceeding before impartial adjudicators "free from any appearance problem," the Chief Hearing Officer directed that no weight or presumption of correctness be given to the First Hearing Panel's decision or any orders or rulings in the first proceeding, and additional measures were employed to ensure that Enforcement staff were independent in fact and appearance from the Former Hearing Officer.

Wicker appealed the June 2020 decision.

IV. Wicker Converted Customer Funds

The Hearing Panel found that Wicker converted customer funds. We affirm the Hearing Panel's findings.

FINRA Rule 2150(a) provides that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." Misuse of a customer's securities or funds rises to the level of conversion where an associated person, without authority, intentionally takes property that does not belong to him. *See John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *33 (Feb. 10, 2012); *Dep't of Enf't v. Tucker*, Complaint No. 2009016764901, 2013 FINRA Discip. LEXIS 45, at *16 (FINRA NAC Dec. 31, 2013) (holding that respondent violated the predecessor to Rule 2150 and Rule 2010 by converting customer's cash for his own benefit), *aff'd*, Exchange Act Release No. 71972, 2014 SEC LEXIS 1370 (Apr. 18, 2014). FINRA Rule 2010 states that a broker-dealer, "in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[11] The rule is "'designed to enable [FINRA] to regulate the ethical standards of its members' and 'encompass[es] business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.'" *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *10 (Mar. 29, 2016) (quoting Vail v. SEC, 101 F.3d 37, 39 (5th Cir. 1996)). Conversion is conduct that violates FINRA Rule 2010 because it "indicates a troubling disregard for basic principles of ethics and honesty." *See Dep't of Enf't v. Olson*, Complaint No. 2010023349601, 2014 FINRA Discip. LEXIS 7, at *24 (FINRA Bd. of Governors May 9, 2014), *aff'd*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629 (Sept. 3, 2015).

We find that Wicker converted customer funds, in violation of FINRA Rules 2150 and 2010. Wicker admittedly knew, as evidenced by his testimony and stipulations, that the Company wired Bonwick $50,000 and that the sole purpose of the wire was to pay, on behalf of the Company, a retainer to Underwriter's Counsel. As further evidenced by Wicker's testimony and stipulations, he also knew that the Company never authorized him to use the funds for any other purpose, and he concedes that Bonwick neither paid the retainer to Underwriter's Counsel nor returned the funds to the Company. Wicker controlled Bonwick's bank account into which the retainer was wired, and he authorized withdrawals and payments from the account for other purposes (including substantial payments to himself).[12] The record shows numerous attempts,

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[11] FINRA Rule 2010 applies to persons associated with a member pursuant to FINRA Rule 0140(a), which provides that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."

[12] We agree with the Hearing Panel that a precise tracing of the Company's funds in Bonwick's operating account is not necessary, as Wicker intentionally used the Company's

[Footnote continued on next page]

during a more than six-month period, to get Wicker to pay Underwriter's Counsel with the Company's funds or return the funds to the Company. Wicker did not do so, and instead ignored the requests and obfuscated his knowledge that the Company's funds had not been used as intended. To date, Wicker has not repaid the Company.

Wicker argues that FINRA Rule 2150 does not apply here because the $50,000 at issue did not constitute customer funds and Wicker's misconduct did not involve a customer's securities account. In support of this argument, Wicker points to Rule 15c3-3 of the Securities Exchange Act of 1934 (Customer Protection—Reserves and Custody of Securities). That rule defines "customer" as "any person from whom or on whose behalf a broker or dealer has received or acquired or holds funds or securities for the account of that person." *See* 17 C.F.R. § 240.15c3-3(a)(1).

We do not read FINRA Rule 2150(a) so narrowly. FINRA's rules broadly define the term "customer," providing that unless the context of a specific rule requires otherwise, "[t]he term 'customer' shall not include a broker or dealer." *See* FINRA Rule 0160(b)(4); *see also John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001) (finding that investors were customers as "the NASD Code defines 'customer' broadly, excluding only 'a broker or dealer'"); *First Montauk Secs. Corp. v. Four Mile Ranch Dev. Co.*, 65 F. Supp. 2d 1371, 1381 (S.D. Fla. 1999) ("Rule 0120(g) [the predecessor to FINRA Rule 0160(b)(4)] contains no limitations other than exclusion of brokers and dealers from invoking rules relating to customers."); *cf. Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir. 2001) (finding that a party was not a customer where it only received "banking services," distinguishing the party from an issuer who retains a broker-dealer to underwrite securities, and explaining that FINRA's rules "support a general definition of 'customer' as one who receives investment and brokerage services or otherwise deals more directly with securities"); *Dep't of Enf't v. Am. First Assoc. Corp.*, Complaint No. E1020040926, 2008 FINRA Discip. LEXIS 27, at *21 (FINRA NAC Aug.

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funds for his and Bonwick's benefit and refused to pay the funds to Underwriter's Counsel as the Company intended. *See Dep't of Enf't v. Braeger*, Complaint No. 2015045456401, 2019 FINRA Discip. LEXIS 55, at *32-33 (FINRA NAC Dec. 16, 2019) (finding that respondent converted customer funds where he did not use funds received from customer for the intended investment purpose); *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *23 (Sept. 30, 2016) (finding that respondent converted money willingly given to him for investment purposes by using it to pay personal expenses); *Dep't of Enf't v. Casas*, Complaint No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *19-24 (FINRA NAC Jan. 13, 2017) (finding conversion where respondent solicited and obtained money claiming it would be used as seed capital for his outside business but instead used the funds for personal expenses and to repay a loan). Regardless, the record shows that Bonwick's expenses, including substantial payments to Wicker, were paid from the operating account (which held the commingled funds of the Company) and that the operating account was nearly depleted by October 2016.

15, 2008) (stating that "[c]ases interpreting the term 'customer' in the securities context have viewed the term broadly to encompass individuals [who] have some brokerage or investment relationship with the broker-dealer").

Here, the Company was not a broker or dealer, and it engaged Bonwick to underwrite its IPO and act as its financial advisor. The Company had an investment banking relationship with Bonwick and was a customer for purposes of FINRA Rule 2150, even if the Company did not have a securities account at Bonwick and the funds at issue were not intended to be used to purchase securities. *See Citigroup Global Markets, Inc. v. Abbar*, 761 F.3d 268, 275 (2d Cir. 2014) (holding that a customer under FINRA's rules is "one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member"); *UBS Fin. Servs. v. Carilion Clinic*, 706 F.3d 319, 325 (4th Cir. 2013) (holding that a customer is "one, not a broker or a dealer, who purchases commodities or services from a FINRA member in the course of the member's business activities insofar as those activities are covered by FINRA's regulation, namely investment banking and securities business activities"); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 741 (9th Cir. 2013) (holding that party was a customer where it engaged a broker-dealer as an underwriter for bonds and stating that a "customer is a non-broker and non-dealer who purchases commodities or services from a FINRA member in the course of the member's FINRA-regulated business activities, i.e., the member's investment banking and securities business activities"); *Dep't of Enf't v. Zayed*, Complaint No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *17-19 (FINRA NAC Aug. 19, 2010) (rejecting argument that investors were not customers because they did not have an account at the firm).[13]

Wicker characterizes this matter as a mere contract dispute between two businesses. We flatly reject Wicker's characterization of his conversion of customer funds in this manner. Wicker knew that the $50,000 the Company wired to Bonwick in connection with investment banking services to be provided by Bonwick was solely to be used to pay a retainer to Underwriter's Counsel on the Company's behalf. Yet, Wicker kept the Company's funds, used them for Bonwick's operating expenses and made more than $440,000 in payments to himself from April through November 2016, and refused to pay $50,000 to Underwriter's Counsel or repay the Company. *See Braeger*, 2019 FINRA Discip. LEXIS 55, at *32-33 (finding that respondent converted customer funds where he did not use funds received from customer for the intended investment purpose); *Akindemowo*, 2016 SEC LEXIS 3769, at *23 (finding that respondent converted money given to him for investment purposes by using it to pay personal

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[13] Consistent with these facts, Wicker testified that the Company was a Bonwick customer. For this reason, and the reasons stated above, Wicker's conversion falls under Rule 2150's prohibition on improper use of a customer's funds. Regardless, and as alleged by Enforcement, Wicker's conversion of the Company's funds separately and independently violated FINRA Rule 2010 as conduct inconsistent with just and equitable principles of trade. *See Casas,* 2017 FINRA Discip. LEXIS 1, at *20 (holding that conversion violates FINRA Rule 2010 even if the victimized individual is not a customer).

expenses); *Casas*, 2017 FINRA Discip. LEXIS 1, at *19-24 (finding conversion where respondent used the funds intended for investment for personal expenses). Further, we reject Wicker's attempt to avoid liability for his misconduct by asserting that the Company no longer owned the funds once it wired them to Bonwick. *See Dep't of Enf't v. Taboada*, Complaint No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *37-38 (FINRA NAC July 24, 2017) (rejecting as "as a technical distinction without a difference in the context of this case" respondent's argument that the funds that he allegedly misused did not belong to the customers but rather were the property of a limited liability company once the investors had purchased their membership interests), *aff'd*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018). The Company wired $50,000 to Bonwick after receiving an invoice from Bonwick—sent at Wicker's direction—stating that it owed $50,000 to retain Underwriter's Counsel. As Wicker acknowledged, the Company expected Bonwick to pay those funds to Underwriter's Counsel and to not use the funds for any other purpose.

Wicker also argues that Bonwick was a poorly managed, but honestly run, broker-dealer, and he asserts that he was an inexperienced manager but did not have a "corrupt intent" in connection with the Company's funds. We reject Wicker's arguments. Scienter is not required to demonstrate that a respondent has converted funds. *See Dep't of Enf't v. Reeves*, Complaint No. 2011030192201, 2014 FINRA Discip. LEXIS 41, at *12 n.5 (FINRA NAC Oct. 8, 2014), *aff'd*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568 (Nov. 5, 2015). Regardless, we find that Wicker intended to exercise ownership of the Company's funds, which did not belong to him. Further, one does not need be an "experienced manager" to understand that using a customer's funds in an unauthorized manner, and then refusing to return them or use the funds for their intended purpose, is a serious violation of FINRA's rules. And, the record shows that Wicker was registered in numerous capacities, including as a general securities principal, and had 16 years of industry experience during the relevant period. The Hearing Panel found not credible Wicker's testimony that he did not understand how to handle the Company's funds, and on appeal Wicker has presented no evidence to disturb that finding.[14] *See Daniel D. Manoff*, 55 S.E.C. 1155, 1161-62 & n.6 (2002) (explaining that a Hearing Panel's credibility determination is entitled to deference absent substantial evidence to the contrary).

Finally, on appeal Wicker argues that neither the agreement between the Company and Bonwick, nor the agreement between Bonwick and Underwriter's Counsel, mentions a retainer, and Underwriter's Counsel never sent Bonwick a bill for services. Wicker posits that Bonwick was therefore not obligated to pay Underwriter's Counsel so he could not have converted the Company's funds. We disagree. Wicker stipulated that the Company transferred $50,000 to Bonwick for the sole purpose of paying a retainer to Underwriter's Counsel. He also stipulated that he was notified that Bonwick received the funds and understood that the sole purpose of the funds was to pay Underwriter's Counsel. Wicker's testimony reinforced these stipulations, and

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[14] Wicker also argues that he was not obliged to place the Company's funds in an escrow account. Enforcement, however, did not allege in the complaint that Wicker violated FINRA's rules because he failed to place the Company's funds in a segregated account. Rather, it charged Wicker with converting the Company's funds.

we will not disturb the parties' stipulations here. *See Joseph Abbondante*, 58 S.E.C. 1082, 1088 n.12 (2006) ("Stipulated facts serve important policy interests in the adjudicatory process, including playing a key role in promoting timely and efficient litigation; we will honor stipulations in the absence of compelling circumstances."), *petition denied*, 209 F. App'x 6 (2d Cir. 2006). Moreover, regardless of the agreements' failure to reference a retainer, all parties—including Wicker—operated with the understanding that the Company would wire Bonwick $50,000, which Bonwick would then pay to Underwriter's Counsel. Importantly, Wicker understood that the Company intended that these funds be used solely to pay Underwriter's Counsel and not for any other purpose. *See Braeger*, 2019 FINRA Discip. LEXIS 55, at *43 (finding that respondent violated FINRA Rules 2150 and 2010 by misusing and converting customer funds instead of using them as intended). Wicker failed to remit the funds to Underwriter's Counsel, return them to the Company, or otherwise reimburse the Company. Wicker converted the Company's funds in violation of FINRA's rules.

V. The Hearing Panel Did Not Abuse its Discretion by Refusing to Dismiss the Proceeding

Wicker argues, as he did to the Hearing Panel in a post-hearing brief, that the proceeding against him should be dismissed pursuant to FINRA Rule 9280. He argues that, absent dismissal of this entire proceeding, the integrity of FINRA's adjudicatory process is at risk. Wicker bases his argument upon what he characterizes as the "blatant, ongoing conflict" resulting from Enforcement's negotiations with the Former Hearing Officer, which he asserts occurred during the proceeding before the First Hearing Panel. Based upon these allegations, Wicker claims that Enforcement had unclean hands, which prevents it from bringing a disciplinary proceeding against him. As set forth below, and based upon this record, we find that the Hearing Panel did not abuse its discretion in denying Wicker's request to dismiss the proceeding. Wicker received a fair proceeding before an impartial adjudicator where his ability to defend himself was not hindered or impaired.

A. The Standard for Dismissal Under Rule 9280

FINRA Rule 9280 provides that a Hearing Panel may sanction a party who engages in contemptuous conduct during a proceeding. The sanctions available to a Hearing Panel include striking pleadings. *See* FINRA Rule 9280(b)(1)(C). The NAC has held that there is no "meaningful distinction" between a motion to dismiss a complaint filed by Enforcement and a motion to strike a complaint in its entirety for purposes of considering sanctions under Rule 9280. *See Dep't of Enf't v. Larson*, Complaint No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *20 n.18 (FINRA NAC Sept. 21, 2020). We review the Hearing Panel's denial of Wicker's request to dismiss this case for abuse of discretion. *See id.* at *12 (finding that the Hearing Officer did not abuse his discretion by refusing to dismiss a case against respondent based upon Enforcement's failure to comply with its discovery obligations). Wicker bears a "heavy burden" to demonstrate that the Hearing Panel either applied the wrong legal standard or made a clear error in judgment by refusing to dismiss the case. *See Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *16 (Sept. 29, 2015).

Dismissal is "a severe and extreme sanction" and should be imposed only "to the extent necessary to induce future compliance and preserve the integrity of the system." *Larson*, 2020 FINRA Discip. LEXIS 44, at *20 (citing *Weisberg v. Webster*, 749 F.2d 864, 869 (D.C. Cir. 1984)); *cf. also Trautman Wasserman & Co.*, Exchange Act Release No. 55989, 2007 SEC LEXIS 1408, at *25 (June 29, 2007) (denying respondent's motion to dismiss proceeding based upon alleged misconduct by SEC enforcement staff and finding that respondent "has not demonstrated any prejudice to himself, much less that such prejudice is sufficient to justify the extreme remedy of dismissal of all proceedings"). In considering whether to dismiss a complaint, adjudicators should weigh, among other things, the risk of prejudice to a respondent against the investing public's interest in resolving allegations of misconduct against registered individuals on the merits.[15] *See Larson*, 2020 FINRA Discip. LEXIS 44, at *23.

B. The Hearing Panel Did Not Abuse its Discretion

We have carefully considered the parties' arguments concerning dismissal. Under the circumstances, we find that Wicker has not met his heavy burden to show that the Hearing Panel abused its discretion when it denied his motion to dismiss the proceeding. As an initial matter, we note that this case presents us with unusual circumstances. We further acknowledge the fundamental importance that FINRA disciplinary proceedings be decided by impartial adjudicators who are free from both real and apparent conflicts of interest or bias. Moreover, we acknowledge that vacating a decision after a full proceeding and multi-day hearing, and ordering a new hearing, is never a desirable outcome for myriad reasons.

We find, however, that under the circumstances currently before us, the proper course of action to address the Former Hearing Officer's employment by Enforcement subsequent to the First Hearing Panel's decision was taken here. The Chief Hearing Officer vacated the First Hearing Panel's decision in its entirety, and Wicker received a new proceeding and new hearing before different adjudicators, free from any circumstances where the Hearing Officer's and Hearing Panel's fairness could reasonably be questioned. Indeed, the new Hearing Officer instituted procedures to help ensure that Enforcement staff handling the matter were independent in fact and in appearance from the Former Hearing Officer, and no weight or deference was given to the First Hearing Panel's decision or any of its rulings. *Cf. Larson*, 2020 FINRA Discip. LEXIS 44, at *12 (reviewing the circumstances surrounding Enforcement's discovery failure in their entirety and the steps taken by the Hearing Officer to mitigate any prejudice resulting from Enforcement's failure and concluding that the Hearing Officer did not commit clear error by denying the respondent's motion to dismiss).

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[15] In *Larson*, we also examined, in connection with Enforcement's failure to comply with its discovery obligations, whether the record showed that Enforcement's misconduct was willful or in bad faith and the length of time that Enforcement failed to fully comply with its discovery obligations. *See* 2020 FINRA Discip. LEXIS 44, at *21-23. As discussed below, the record here does not show that Enforcement acted willfully or in bad faith and, to the extent relevant to our analysis here, the Chief Hearing Officer vacated the First Hearing Panel Decision within several months of learning that the Former Hearing Officer had accepted a job with Enforcement.

Further, the remedy applied here to address any appearance of a conflict of interest by the Former Hearing Officer is consistent with how other adjudicators have handled similar situations. *See, e.g.*, *DeNike v. Cupo*, 958 A.2d 446 (S. Ct. N.J. 2008) (reversing judgment and remanding case for a new trial to address judge's "exploration of future employment opportunities" with defendant's attorney, which created an appearance of impropriety where a party could question the judge's impartiality); *Scott v. U.S.*, 559 A.2d 745 (D.C. Ct. App. 1989) (reversing and remanding judgment in criminal matter and ordering a new trial because a party could reasonably question the trial judge's impartiality where he was negotiating for employment with the Department of Justice during the trial); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988) (holding that judge should have recused himself where he was a board member of an entity seeking to purchase the land at the center of the parties' dispute because his impartiality might have reasonably been questioned, affirming appeal court's decision to vacate the decision and order a new trial, and holding that deference to the lower court in fashioning a remedy was appropriate because "it is a better position to evaluate the significance of a violation than is this Court"); *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (directing judge to recuse himself and reassigning case for trial where the judge was in "preliminary, tentative, indirect, unintentional, and ultimately unsuccessful" employment discussions with a law firm representing a party in the case).

Wicker argues that he was "significantly prejudiced" because he went through two hearings. In support, he points to the time and costs involved, the impact on his career, and the fact that Enforcement had the benefit of seeing his defense and arguments on appeal before the second hearing. While we acknowledge the costs and time attendant to a new proceeding, we disagree with Wicker's claims that this constitutes the type of prejudice that warrants dismissal of the complaint and find that Wicker was able to fully defend himself against allegations of misconduct in the second proceeding. *Cf. Richard L. Goble*, 2011 SEC LEXIS 2505, at *3 (July 21, 2011) (Order Denying Stay) (denying request to stay administrative proceeding pending appeal of underlying injunction, rejecting respondent's argument that denying the stay would substantially prejudice his case, and stating that respondent "confuses price and prejudice"); *cf. also Mark H. Love*, 57 S.E.C. 315, 324-25 (2004) (rejecting applicant's argument that proceeding was unfair based upon alleged undue delay and finding that applicant's ability to defend himself was not harmed by any delay); *Robert D. Potts*, 53 S.E.C. 187, 209 (1997) (rejecting respondent's argument that law judge prejudged the outcome and finding that respondent received a fair hearing because he was able to put on the evidence he wished and defend himself fully), *aff'd*, 151 F.3d 810 (8th Cir. 1998), *cert. denied*, 526 U.S. 1097 (1999); *First Cap. Funding, Inc.*, 50 S.E.C. 1026, 1028 (1992) (finding that applicants were not prejudiced by FINRA purportedly changing the theory of the charge against them during the hearing where applicants were able to defend themselves against the charge).

Further, it is unclear what impact conducting a second hearing had on Wicker's career, separate and apart from the fact that Enforcement filed a complaint against him that alleged serious misconduct, and we find that any such impact did not hinder Wicker's ability to defend himself. Moreover, while Enforcement may have seen Wicker's defense and arguments on appeal before the second hearing, Wicker also saw Enforcement's presentation of its case and

appellate arguments. And, these circumstances exist in every situation where a matter is retried and do not normally rise to the level of prejudice that would preclude a second hearing. In sum, Wicker has not demonstrated that his ability to defend himself was negatively impacted in this proceeding. Rather, the record shows that he was able to defend himself, through counsel, by presenting witnesses and evidence to an impartial adjudicator during the second proceeding.[16] These facts, coupled with the investing public's strong interest in having claims of serious misconduct such as conversion resolved on the merits, support the Hearing Panel's denial of Wicker's request to dismiss the proceeding against him.

Finally, Wicker argues that Enforcement's complaint should be dismissed because Enforcement allegedly has unclean hands as a result of its negotiations with the Former Hearing Officer. We have previously held that a respondent "may not maintain, as a matter of law, any defense that rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct." *Dep't of Enf't v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *88 (FINRA NAC Dec. 20, 2007), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *cf. also Dep't of Enf't v. Bullock*, Complaint No. 2005003437102, 2011 FINRA Discip. LEXIS 14, at *56-57 (May 6, 2011) (holding that even if respondent had shown Enforcement acted with unclean hands, this would not excuse or negate his underlying misconduct and rejecting respondent's affirmative defense). And, even if the equitable doctrine of unclean hands could be used by a respondent to negate his own misconduct, Wicker's argument here is indistinguishable from his claim that the Hearing Panel should have dismissed the proceeding pursuant to FINRA Rule 9280 based upon Enforcement's purported contemptuous conduct.[17] For the reasons discussed above, we reject this argument.

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[16] We also note that the Hearing Officer, with the parties' cooperation, worked to minimize the costs and delays of the second hearing. In fact, the Hearing Panel conducted a hearing in March 2020, just four months after the Chief Hearing Officer vacated the First Hearing Panel decision, and the Hearing Panel issued its decision several months later.

[17] Wicker asserts that "[t]here is nothing unique or new about the concept of dismissing a Complaint against a Respondent in a FINRA proceeding regardless of the charges, in order to ensure the fairness of FINRA's disciplinary process." The cases he cites to support this claim, however, are distinguishable from the facts and circumstances of this case. In *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000), the Commission dismissed a self-regulatory organization's disciplinary proceeding against a respondent because the lengthy delay in bringing the proceeding was "inherently unfair." *Id.* at 654. In *Dep't of Enf't v. Morgan Stanley DW, Inc.*, Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11 (NASD NAC July 29, 2002), we affirmed the Hearing Panel's dismissal of a disciplinary proceeding against the respondents because of undue delay. We based our affirmance, in part, upon the undisputed fact that "elapsed time has severely limited the respondents' ability to defend themselves against this action because of faded memories and lost documents." *Id.* at *37-38. Here, Wicker does not argue that there was an undue delay in any aspect of the proceeding, and the record shows no such delay. Moreover, any unfairness caused by the Former Hearing Officer's subsequent

[Footnote continued on next page]

C. Wicker's Arguments Concerning the Record

Wicker makes several arguments that revolve around his alleged inability to obtain documents to support his request to dismiss this proceeding based upon the Former Hearing Officer's subsequent employment with Enforcement. For instance, he urges that on appeal, the NAC require a full disclosure of the events surrounding Enforcement's negotiations and hiring of the Former Hearing Officer because these facts remain "locked behind FINRA's doors," and he was disadvantaged by being unable to obtain this information. Wicker also asserts that Enforcement was required to produce documents concerning its negotiations with the Former Hearing Officer pursuant to *Brady v. Maryland*.

We reject Wicker's arguments. The Subcommittee empaneled to hear this matter denied Wicker's February 2021 motion to adduce additional evidence related to any negotiations that occurred prior to the First Hearing Panel decision between the Former Hearing Officer and Enforcement—evidence not in Wicker's possession but that he had unsuccessfully requested from Enforcement shortly before filing his motion to adduce.[18] Wicker argued that the Subcommittee should permit Wicker to adduce this evidence (and presumably order Enforcement to produce any such evidence) because he had only recently learned of the circumstances surrounding the Remand Request and the Remand Order as he was not copied on these documents.[19] To justify his belated attempt to adduce this evidence after the 30-day

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[cont'd]

employment by Enforcement was remedied by vacating the First Hearing Panel decision and ordering a completely new proceeding and hearing before a new Hearing Panel. Consequently, and as is relevant to our analysis here, Wicker was able to fully contest the charges and defend himself before an impartial adjudicator.

[18] FINRA Rule 9346 provides that on appeal, a party may seek leave to introduce additional evidence if he shows that extraordinary circumstances exist for doing so. *See* FINRA Rule 9346(a). Pursuant to Rule 9346(b), the moving party must describe the new evidence he seeks to introduce on appeal, show why the evidence is material to the proceeding, and demonstrate that there was good cause for failing to introduce it below. A party must also file his motion within 30 days after transmission of the record to the NAC and service of the index on all parties. If a party files his motion outside of this 30-day period, he must show that there is good cause for doing so.

[19] These documents, and other documents related to Wicker's appeal of the First Hearing Panel Decision, were inadvertently omitted from the record, for which an index was served on the parties in October 2020. The record was supplemented in January 2021 after Wicker's counsel raised the issue.

deadline set forth in FINRA Rule 9346, Wicker argued that the language used by the Chief Hearing Officer in the Remand Request was materially different than the language set forth in her November 2019 Order vacating the First Hearing Panel Decision, which the parties received.

The Subcommittee held that Wicker did not show good cause for failing to seek or introduce this evidence during the proceeding below. It found that beginning with the November 2019 Order, Wicker was on notice concerning the Former Hearing Officer's subsequent employment with Enforcement and the potential conflict created by this hire. The Subcommittee further found that this issue was subsequently raised on several other occasions during the pre-trial conferences of the second proceeding with Wicker and his attorney. Moreover, it found that the Remand Request and Remand Order did not contain materially different information from what Wicker already knew.

We find that the Subcommittee properly denied Wicker's request and reject Wicker's arguments concerning the record. We agree that during the entirety of the second proceeding, Wicker and his counsel were on notice that, because of the Former Hearing Officer's employment by Enforcement shortly after the First Hearing Panel decision, circumstances existed where the fairness of the Former Hearing Officer might reasonably be questioned and that disqualification of the Former Hearing Officer was therefore appropriate pursuant to FINRA Rule 9233.[20] Wicker, through his attorney, had the opportunity to seek information concerning the Former Hearing Officer during the second proceeding. Wicker did not do so. Instead, he first raised the issue in a post-hearing brief, after the Hearing Panel conducted a multi-day

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[20] Wicker argues that the Chief Hearing Officer would not have made the Remand Request if the Former Hearing Officer did not have an actual conflict causing her to be disqualified. Wicker's argument is speculative and not supported by the record. Moreover, Wicker ignores that FINRA's rule governing disqualifications of Hearing Officers covers two scenarios: where a Hearing Officer has an actual conflict of interest or bias, or where—in the absence of an actual conflict—circumstances exist such that the fairness of the Hearing Officer might reasonably be questioned. *See* FINRA Rule 9233(a).

The Subcommittee also found that Wicker's request to adduce additional evidence was untimely because he did not file it within 30 days after transmission of the record in October 2020 and failed to show good cause for his late motion. The Subcommittee rejected Wicker's argument that the 30-day period was reset when FINRA's Office of General Counsel supplemented the record in January 2021. There may be situations where a record supplementation will reset the 30-day deadline for seeking additional evidence because the supplemental information was previously unknown to a party. That is not, however, the case here. While the omission was regrettable, nothing in the supplement contained materially new information. We therefore agree with the Subcommittee that Wicker's request was untimely and that he failed to show good cause to excuse his lateness.

hearing, where he argued that the Hearing Panel should dismiss the proceeding based upon Enforcement's alleged contemptuous conduct in hiring the Former Hearing Officer.[21]

We further reject Wicker's argument that Enforcement was required to produce documents related to its negotiations with the Former Hearing Officer pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), which generally requires that prosecutors turn over any exculpatory evidence that is material to a defendant's guilt or punishment. The *Brady* doctrine is inapplicable to FINRA disciplinary proceedings. *See Dep't of Enf't v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *44 (FINRA NAC Dec. 29, 2014), *aff'd*, 2016 SEC LEXIS 1209, *petition denied*, 712 F. App'x 46 (2017). "Instead, FINRA rules set forth the scope of Enforcement's responsibilities concerning exculpatory evidence." *Id.* Pursuant to FINRA Rule 9251, Enforcement had to produce documents prepared or obtained in connection with the investigation that led to the filing of the complaint against Wicker. *See* FINRA Rule 9251(a)(1). Enforcement was permitted to withhold certain documents from this production (e.g., documents that are privileged or constitute attorney work product) but could not withhold any document that contained material exculpatory evidence. *See* FINRA Rule 9251(b)(3). Wicker does not explain how documents related to negotiations with the Former Hearing Officer would have been prepared in connection with Enforcement's investigation into Wicker's misconduct. Further, any such documents would not be material to whether Wicker converted the Company's funds or the appropriate sanctions for his conversion. *Cf. Banks v. Dretke*, 540 U.S. 668, 691 (2004) (holding that under *Brady* the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching); *Optionsxpress, Inc.*, Exchange Act Release No. 70698, 2013 SEC LEXIS 3235, at *11 (Oct. 16, 2013) (holding that "[t]o trigger the disclosure obligation under Rule 230(b)(2) [requiring the production of material exculpatory evidence], the evidence must be material either to [the respondent's] guilt or punishment, with the test of materiality being whether there is a reasonable probability that the evidence's disclosure would have resulted in a different outcome").

Finally, even assuming that the record had demonstrated that Enforcement engaged in negotiations with the Former Hearing Officer while the case was under consideration by the First Hearing Panel (which it does not) such that the Former Hearing Officer had an actual conflict of

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[21] Wicker's argument set forth in his post-hearing brief filed in March 2020—that the Former Hearing Officer and Enforcement were engaged in negotiations during the first proceeding and Enforcement obtained a favorable ruling in that proceeding because it "dangled the carrot" of a job to the Former Hearing Officer—undercuts his argument that he lacked sufficient information to seek discovery during the second proceeding and only learned of information sufficient to seek such discovery in January 2021 upon receiving the supplement to the record. Further, we reject Wicker's claim that the Hearing Panel failed to address Enforcement's role in hiring the Former Hearing Officer and only looked at the Former Hearing Officer's failure to recuse herself or provide notice to the parties. The Hearing Panel decided Wicker's request to dismiss the case under FINRA Rule 9280 based upon the record before it, and as set forth above, the appropriate remedy was applied here.

interest and not merely an appearance of a conflict, we find that the appropriate remedy would have been to vacate the First Hearing Panel's decision in its entirety and order a new hearing, as was done here. *Cf., e.g.*, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (vacating and remanding case so that appellant could present his claims where judge who sat on appellate panel that vacated lower court's penalty-phase relief and reinstated death sentence had been the district attorney who participated in the case below and finding that his failure to recuse himself presented an unconstitutional risk of actual bias); *Shell Oil Co. v. U.S.*, 672 F. 3d 1283 (Fed. Cir. 2012) (vacating summary judgment orders in favor of plaintiffs and remanding case with instructions to reassign it to a different judge where trial judge should have recused himself based upon a conflict of interest because he and his wife held financial interests in several of the plaintiffs' parent companies); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527-28 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (stating that in fashioning relief to address an adjudicator's appearance of partiality or an actual conflict under federal statute addressing disqualification of adjudicators, the same balancing approach applies).

Wicker's characterization of this remedy as "a mere redo" for Enforcement ignores that the Chief Hearing Officer set aside a decision finding that he engaged in serious misconduct. As a result, Enforcement was required to prove the complaint's allegations by presenting its evidence to a new Hearing Panel and convincing that body, by a preponderance of the evidence, that Wicker converted the Company's funds. *Cf. Larson*, 2020 FINRA Discip. LEXIS 44 (affirming Hearing Panel decision and declining to dismiss proceeding or order new hearing notwithstanding substantial lapses by Enforcement in producing obligatory discovery). This remedy was drastic but appropriate to ensure that Wicker received a hearing before an impartial adjudicator free from any conflict or bias or even the appearance of a conflict or bias. *See Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 717 (M.D. Pa. 1996) (characterizing vacatur of a decision as a "draconian" remedy to address disqualification of judge).

VI. Wicker's Procedural Arguments Are Without Merit

Wicker also argues that this case should be dismissed based upon several purported procedural irregularities surrounding our remand of the proceeding to OHO in November 2019 and the Chief Hearing Officer's November 2019 Order vacating the First Hearing Panel's decision. We address Wicker's specific arguments below.

A. The Chief Hearing Officer's Remand Request

Wicker argues that the Remand Request from the Chief Hearing Officer was "extra-judicial and unprecedented," beyond her authority, and failed to provide a sufficient basis for the request. He asserts that when the Chief Hearing Officer sent the Remand Request, jurisdiction of this proceeding was with the NAC.

We agree that the Remand Request was unusual. We find, however, that the Chief Hearing Officer properly made the Remand Request and did not exceed her authority in doing so. First, Wicker does not point to any FINRA rule that prohibited the Chief Hearing Officer from making the Remand Request. Indeed, once she learned that the Former Hearing Officer

may have been subject to disqualification pursuant to FINRA Rule 9233 by virtue of accepting a job with Enforcement subsequent to the First Hearing Panel decision, the Chief Hearing Officer would have been derelict in her duties if she ignored this information and took no action. The Chief Hearing Officer was an appropriate person to make the Remand Request under the circumstances. *Cf.* FINRA Rule 9235(b) (providing that in the absence of a Hearing Officer the Chief Hearing Officer in her discretion "may exercise the necessary authority in the same manner as if . . . she had been appointed Hearing Officer in the particular proceeding").[22]

Second, we find that the Remand Request contained sufficient information to alert the NAC of the issue concerning the Former Hearing Officer. The Chief Hearing Officer informed the NAC that she had "received information regarding whether the [Former Hearing Officer] was subject to disqualification on or before" issuance of the First Hearing Panel Decision. The Chief Hearing Officer further requested that the NAC remand the case to OHO "for consideration and further proceedings." The Remand Request, while brief, alerted the NAC to the pertinent issue and requested specific relief from the NAC.[23]

B. The NAC's Remand Order

Wicker next argues that the NAC improperly remanded the proceeding back to OHO. He asserts that he was denied an opportunity to argue against the Remand Request before the NAC, the chance to adduce additional evidence concerning Enforcement's purported misconduct, and generally to pursue his appeal. Wicker further argues that the NAC could not consider the Remand Request because the Chief Hearing Officer was not a party to the proceeding and failed to issue a written decision articulating its findings or issuing instructions as required under FINRA rules.

Wicker's arguments are without merit. As an initial matter, we reject Wicker's argument that the NAC could not consider the Remand Request because the Chief Hearing Officer was not a party to the proceeding. FINRA Rule 9346(a) prescribes the scope of what the NAC may

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[22] Although the Chief Hearing Officer properly made the Remand Request, as Wicker correctly points out she could not take any action in connection with the proceeding while the First Hearing Panel Decision was on appeal. Rather, as she did here, she brought the issue to the NAC's attention so that the NAC could take an appropriate course of action. *Cf.* Fed. Rules of Appellate Procedure 12.1 Advisory Notes (stating that "[a]fter an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand" and remand is in the appellate court's discretion).

[23] Wicker complains that the parties were not copied on the Remand Request and the Remand Order. FINRA's rules do not require that the parties be copied on these documents, and we find that the failure to do so here had no impact on the outcome of this proceeding or our resolution of Wicker's procedural arguments. However, in the future we encourage that in similar circumstances the parties be notified of such matters.

consider on appeal. It generally limits the NAC's review on appeal to the record, "supplemented by briefs and other papers submitted" to the NAC and any oral argument. The Remand Request, although not submitted by Enforcement or Wicker, falls under "other papers submitted" to the NAC for its consideration.

Further, FINRA's rules grant the NAC authority to remand a proceeding to OHO. *See* FINRA Rule 9348 ("In any appeal or review proceeding pursuant to the Rule 9300 Series, the [NAC] may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions."); FINRA Rule 9349(a) (providing that in an appeal the NAC may, among other things, remand a proceeding with instructions). FINRA's rules, however, do not require the NAC to hear arguments from the parties concerning a request such as the Remand Request before deciding it. *Cf.* FINRA Rule 9312 (permitting the NAC to call a decision for review without any prior notice or input from the parties). We have previously remanded certain matters to OHO without hearing arguments from the parties. *See, e.g.*, *Dep't of Enf't v. Justin F. Ficken*, Complaint No. C11040006, 2007 FINRA Discip. LEXIS 11 (FINRA OHO Oct. 15, 2007) (noting that after the SEC remanded matter to FINRA, the NAC remanded to OHO for further proceedings); *Clinger & Co., Inc.*, Complaint No. C06950004, 1998 NASD Discip. LEXIS 31 (NASD NBCC Jan. 20, 1998) (remanding matter to trial level adjudicator to conduct further evidentiary proceedings on remand to FINRA from SEC). Importantly, Wicker does not adequately explain how he was prejudiced by his inability to contest the Remand Request before the NAC or to "pursue his appeal." While his stated preference was to pursue his arguments concerning these issues before the NAC, Wicker was able to make arguments concerning these matters to the Hearing Panel during the second proceeding, and immediately after the NAC remanded the matter, the Chief Hearing Officer vacated the First Hearing Panel decision (which benefited Wicker by nullifying a decision barring him for converting customer funds).[24]

Finally, Wicker criticizes the way in which the NAC granted the Remand Request. He argues that the NAC failed to issue a written order articulating any findings or instructions, as required by FINRA Rule 9349(a). That rule provides that:

> In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the [NAC], after considering all matters presented in the appeal . . . may affirm, dismiss, modify or reverse the decision of the Hearing Panel . . . . Alternatively, the [NAC] or the Review Subcommittee may remand the disciplinary proceeding with instructions. The [NAC] shall prepare a proposed written decision pursuant to paragraph (b).

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[24] Wicker argues that the NAC's remand without any argument prevented him from adducing additional evidence on appeal based upon the Remand Request and concerning Enforcement's alleged unethical conduct. This argument ignores that Wicker could, but did not, seek such evidence during the second proceeding. *See supra*, Part V.C.

FINRA Rule 9349(b) states that a proposed decision shall include: a statement describing the origin of the proceeding; the specific rules alleged to have been violated; a statement setting forth the findings of fact concerning the respondent's alleged misconduct; whether the respondent engaged in the misconduct; a statement in support of the disposition of the principal issues raised in the proceeding; and a statement and rationale for any sanction imposed.

The NAC granted the Remand Request and remanded the entire proceeding to OHO for its further consideration. Read in conjunction with the Remand Request (which sought a remand so that OHO could consider whether the Former Hearing Officer was subject to disqualification and conduct further proceedings), the Remand Order contained sufficient detail concerning why the NAC granted the Remand Request, and the Remand Order afforded the Chief Hearing Officer wide latitude on how to proceed on remand. We acknowledge that the Remand Order did not include the items set forth in FINRA Rule 9349(b). We find, however, that under the circumstances a discussion of these factors was unnecessary because it was clear to all parties why the remand was ordered. Consequently, the failure to strictly comply with Rules 9349(a) and (b) was harmless error. *See U.S. Assocs., Inc.*, 51 S.E.C. 805, 812 & n.24 (1993) (noting that finding of harmless error may overcome procedural objections); *see also Daniel Richard Howard*, 55 S.E.C. 1096, 1104 (2002) (rejecting applicant's arguments of procedural irregularities and stating that "even assuming some minor procedural irregularity occurred, it would fall into the category of harmless error"); *Curtis I. Wilson*, 49 S.E.C. 1020, 1024 (1989) (rejecting applicant's argument that he did not receive a proper hearing before a duly constituted hearing panel because the panel consisted of two members and not three as specified by FINRA's rules in place at the time and concluding that applicant did not suffer any prejudice), *aff'd*, 902 F.2d 1580 (9th Cir. 1990).[25]

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[25] The SEC's decision in *Datek Securities Corp.*, 51 S.E.C. 542 (1993), also supports the NAC granting the Remand Request. In *Datek*, the SEC reversed a FINRA decision because two of the three hearing panelists that issued the initial decision were associated with firms that served as market makers for the transactions at issue in the disciplinary proceeding. The respondent had unsuccessfully argued that these panelists were conflicted, both before the hearing panel and the FINRA appellate body that heard respondent's appeal. On appeal, the SEC agreed with the respondent that the panelists had a conflict of interest and held that it could not, at that stage, cure this defect. *Id.* at 545. Here, the NAC had an opportunity to cure any defect caused by the Former Hearing Officer accepting a job with Enforcement subsequent to the First Hearing Panel decision, and did so by granting the Remand Request to permit the Chief Hearing Officer to conduct further proceedings and take an appropriate course of action.

C. The November 2019 Order Vacating the First Hearing Panel Decision

Finally, Wicker argues that the Chief Hearing Officer did not have the authority to vacate the First Hearing Panel decision. He asserts that FINRA Rule 9233 does not govern here because the First Hearing Panel had already issued its decision, Wicker appealed the First Hearing Panel decision, and the matter was pending before the NAC.

We disagree. Although the First Hearing Panel issued its decision and Wicker had appealed the decision, after the NAC remanded the entire proceeding to OHO based upon the concerns raised in the Remand Request, OHO once again had jurisdiction over the proceeding and the Chief Hearing Officer had the authority to find that the Former Hearing Officer was disqualified and appoint a replacement. FINRA Rule 9233(a) provides that

> If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter.

The rule further grants the Chief Hearing Officer the authority to appoint a replacement Hearing Officer. *See* FINRA Rule 9233(a); *cf. also* FINRA Rule 9233(c) (providing that the Chief Hearing Officer shall decide any motion to disqualify and investigate whether disqualification is required and if so, appoint a replacement Hearing Officer). We note that nothing in the rule limits its application to only those cases where a decision has not yet been issued. Moreover, FINRA Rule 9235(b) grants the Chief Hearing Officer, where the Hearing Officer assigned to a case is unable to discharge her duties "under conditions not requiring the appointment of a replacement Hearing Officer," the authority to act in the Hearing Officer's place. FINRA Rule 9235(a) grants the Hearing Officer broad authority "to do all things necessary and appropriate to discharge his or her duties." Here, after the NAC remanded the proceeding back to OHO, the Former Hearing Officer was no longer an OHO employee and thus was unable to discharge any duties related to the case. And although the Former Hearing Officer's subsequent employment by Enforcement required the appointment of a replacement Hearing Officer, under the circumstances we find that the Chief Hearing Officer was an appropriate adjudicator to issue the November 2019 Order vacating the First Hearing Panel decision and ordering a new proceeding with a new Hearing Officer and Hearing Panel.[26] The relief ordered by the Chief Hearing Officer was permissible under 9235(a). *See Dep't of Enf't v. Kirlin Secs.*, Complaint No. EAF0400300001, 2009 FINRA Discip. LEXIS 2, at *71 (FINRA NAC Feb. 25, 2009) (stating that Rule 9235(a) grants a Hearing Officer broad authority to discharge her duties), *aff'd*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168 (Dec. 10, 2009).

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[26] In any event, we find that under the facts and circumstances of this case there would have been no material difference if the new Hearing Officer appointed by the Chief Hearing Officer, instead of the Chief Hearing Officer, vacated the First Hearing Panel decision.

Wicker next argues that the NAC—not the Chief Hearing Officer—was the appropriate body to vacate the First Hearing Panel decision. He points to *DeNike* and *Scott* to support his claim. In those cases, appellate courts ordered that new trials be conducted because the judge's impartiality could be questioned due to employment negotiations with a party to the proceeding. *See DeNike*, 958 A.2d 446; *Scott*, 559 A.2d 745. While these cases provide helpful guidance concerning the appropriate remedy to address the Former Hearing Officer's subsequent employment with Enforcement, and the NAC could have issued an order vacating the First Hearing Panel decision, these authorities do not foreclose the Chief Hearing Officer from doing so. This is especially true where the NAC decided to remand the entire proceeding to OHO for the Chief Hearing Officer to address the issues raised in the Remand Request. And, Wicker does not explain how he was prejudiced or otherwise impacted because the Chief Hearing Officer, rather than the NAC, issued the order to vacate.

Wicker also argues that the November 2019 Order lacked sufficient detail and did not adequately explain the bases for its findings. If Wicker did not understand the order or wanted more details concerning its basis, he could have raised these issues at numerous points during the second proceeding (e.g., at any of the several pre-trial conferences with the Hearing Officer that occurred shortly after the Chief Hearing Officer vacated the First Hearing Panel decision). He did not do so. Nonetheless, as discussed in detail above, the Chief Hearing Officer's November 2019 Order notified the parties that she was vacating the First Hearing Panel's decision and ordering a new hearing because "circumstances exist where the fairness of the [Former Hearing Officer] might reasonably be questioned as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement." We find that the Chief Hearing Officer's order was sufficient to notify Wicker of the reasons why she entered the order.

Finally, Wicker argues that he should have had the opportunity to present arguments to the Chief Hearing Officer before she issued the November 2019 Order, presumably to argue that the case against him should have been dismissed in its entirety. Wicker, however, made this argument to the Hearing Panel after the second hearing concluded, and the Hearing Panel rejected it. Wicker does not explain how the end result here, in which the Chief Hearing Officer set aside the First Hearing Panel decision barring Wicker for converting the Company's funds, would have been any different if he had the opportunity to make an argument that the entire case should be dismissed to the Chief Hearing Officer in November 2019. We find that the Chief Hearing Officer acted properly, despite the parties not having the chance to make arguments to her concerning the appropriate course of action.

In sum, FINRA's procedures do not, and cannot, cover every conceivable fact pattern. The remedy applied in this case to address the issues created by the Former Hearing Officer's subsequent employment with Enforcement was appropriate and ensured that Wicker had the opportunity to defend himself before an impartial adjudicator in a fair proceeding. We reject Wicker's characterization of the actions taken to reach that result as FINRA's attempts to "cover up" Enforcement's alleged egregious misconduct, which is not supported by the record.

VII. Sanctions

The Hearing Panel barred Wicker from associating with any FINRA member in any capacity. It also ordered that he pay the customer $50,000 in restitution, plus interest. We affirm these sanctions.

A. A Bar Is Appropriately Remedial for Wicker's Conversion of Funds

The FINRA Sanction Guidelines ("Guidelines") for conversion provide that a bar is the standard sanction regardless of the amount converted.[27] This recommendation reflects the judgment that individuals who convert funds pose such a serious risk to investors that they should be barred from the securities industry. *See Grivas*, 2016 SEC LEXIS 1173, at *25.

We find that a bar is appropriate for Wicker's conversion. As a starting point, we find that Wicker "exhibited flagrant dishonesty that, without mitigation, renders him ostensibly unfit for employment in the securities industry." *Dep't of Enf't v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *25 (FINRA NAC July 16, 2015), *aff'd*, 2016 SEC LEXIS 1173. Numerous aggravating factors further support barring Wicker for converting the Company's funds. Wicker knew that the Company's funds were to be used to pay Underwriter's Counsel and for no other purpose. Despite this knowledge, and despite numerous requests by DM and the Company to pay the funds to Underwriter's Counsel or return them to the Company, Wicker did not do so.[28] Instead, they were placed in Bonwick's operating account, which was under Wicker's control and authority, and fully depleted without the Company or Underwriter's Counsel receiving the funds. Wicker and Bonwick benefited financially from Wicker's conversion, and his misconduct harmed the Company (which was never repaid and, in fact, had to pay additional funds to Underwriter's Counsel so that it would continue working on its IPO).[29] The fact that Bonwick was experiencing financial difficulties around the time that Wicker converted the Company's funds is not mitigating. Nor is Wicker's purported general reliance on other parties for compliance and operational matters. Wicker should have known that using the Company's funds for any purpose other than paying Underwriter's Counsel, and then refusing to pay those funds to Underwriter's Counsel or return them to the Company, was wrong and a serious violation of FINRA's rules.

Moreover, during the course of more than six months, Wicker concealed his conversion from DM, and later the Company, by offering various excuses and misrepresentations about the

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27 *See FINRA Sanction Guidelines* 36 (2020), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

28 *See Guidelines*, at 8 (Principal Considerations In Determining Sanctions, No. 13).

29 *See id.* at 7-8 (Principal Considerations In Determining Sanctions, Nos. 11, 16).

status of the Company's funds.[30] We reject Wicker's argument that he never tried to hide his misconduct because Bonwick's financial records showed what happened to the Company's funds. Wicker has not exhibited any remorse for his actions; nor has he accepted responsibility.[31] Indeed, the Hearing Panel found that Wicker's expressions of remorse were not credible. On appeal, Wicker has not presented evidence to overturn this finding. *See Manoff*, 55 S.E.C. at 1161-62 & n.6 (explaining that a Hearing Panel's credibility determination is entitled to deference absent substantial evidence to the contrary).

In sum, conversion is extremely serious misconduct and is one of the gravest violations that a securities industry professional can commit. *Mullins*, 2012 SEC LEXIS 464, at *73. Wicker's misconduct demonstrates a troubling disregard for his fundamental obligations owed to customers as a securities professional and shows that he cannot be trusted with customer funds. Based on this record and taking into consideration the aggravating factors discussed above and lack of mitigating factors, we conclude that permitting Wicker to continue to work in the securities industry handling customer funds puts the investing public at risk. We find that barring Wicker, which will prevent him from again converting customer funds, serves a remedial interest, protects the investing public, and will deter others from engaging in similar misconduct. *See John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *7 (Aug. 3, 2019) ("A FINRA bar may be imposed, not as punishment, but as a means of protecting investors."), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020).

B. Restitution

We also order that Wicker pay restitution to the Company in the amount of $50,000, plus interest from April 4, 2016 (i.e., the date Underwriter's Counsel sent an invoice for payment of the funds). The Guidelines provide for restitution "to restore the status quo ante where a victim otherwise would unjustly suffer loss," and they state that it is appropriate to order restitution when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct.[32] "An order requiring restitution . . . seeks primarily to return customers to their prior positions by restoring the funds of which they were wrongfully deprived." *See Newport Coast*, 2020 SEC LEXIS 917, at *37 (quoting *Kenneth C. Krull*, 53 S.E.C. 1101, 1109-10 (1998)).

We find all conditions for ordering restitution are satisfied here. The Company lost $50,000 as a direct, foreseeable, and proximate result of Wicker's conversion of its funds and refusal to pay them as intended or return them to the Company. *See Dep't of Enf't v. Brookstone Secs., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *150 (FINRA

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30 *See id.* at 7 (Principal Considerations In Determining Sanctions, Nos. 8, 9, 10).

31 *See id.* at 7 (Principal Considerations In Determining Sanctions, Nos. 2, 4).

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

NAC Apr. 16, 2015) (stating that courts have used several different tests to determine whether an individual is the proximate cause of a particular loss and concluding that "using any one of the tests articulated above, the losses suffered by the highlighted customers were the foreseeable, direct, and proximate result of the responsible respondent's misconduct."); *see also Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *37 (June 2, 2016) (finding that respondent's conversion of customer funds was a proximate cause of the customer's loss). Consequently, we order that Wicker pay this amount to the Company, plus prejudgment interest.

VIII. Conclusion

Wicker converted customer funds, in violation of FINRA Rules 2150 and 2010. We bar Wicker from associating with any FINRA member in any capacity for this misconduct and order that he pay the Company $50,000 in restitution, plus interest.[33] We also affirm the Hearing Panel's order that Wicker pay $4,370.72[34] in hearing costs and impose $1,619.72 in appellate costs.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

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[33] Interest shall accrue from April 4, 2016, until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 11 (Technical Matters). The bar is effective as of the date of this decision.

[34] These costs are solely in connection with the March 2020 Hearing Panel hearing.