FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DEVIN LAMARR WICKER (CRD No. 4228250), Respondent.	Disciplinary Proceeding No. 2016052104101 Hearing Officer–JLC **EXTENDED HEARING PANEL DECISION** March 21, 2019

Respondent is barred from association with any FINRA member in any capacity for converting and misusing customer funds in violation of FINRA Rules 2150(a) and 2010. Respondent is also ordered to pay restitution and costs.

Appearances

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

For the Respondent: Pro Se

DECISION

I. Introduction

The Department of Enforcement filed a single-cause Complaint charging Respondent Devin Lamarr Wicker, the majority owner, chief executive officer, chief financial officer and chief compliance officer of former FINRA member firm Bonwick Capital Partners, LLC ("Bonwick"), with misusing and converting $50,000 of an investment banking customer's funds.

There is no dispute that someone converted and misused the customer's funds. Wicker admits that the customer hired Bonwick as the underwriter for its initial public offering ("IPO"); admits that the customer sent Bonwick $50,000 for the sole purpose of paying a retainer to Bonwick's underwriting counsel for the customer's IPO; and admits that Bonwick neither paid the retainer to underwriter's counsel nor returned those funds to the customer. But Wicker denies that he converted or misused the funds. He contends that a former Bonwick investment banker stole the customer's $50,000.

The Extended Hearing Panel, therefore, is left to resolve two material issues of fact: Who took the customer's $50,000? And what did that person do with the $50,000?

After a three-day hearing, the Panel finds that Wicker converted and misused the customer's $50,000 to pay for Bonwick's expenses, in violation of FINRA Rules 2150(a) and 2010.[1] For this misconduct, the Panel bars him from association with any FINRA member in any capacity and orders him to pay the customer restitution of $50,000 plus interest and hearing costs.

II. Findings of Fact

A. Wicker's Background

Wicker first became registered with FINRA as a General Securities Representative ("GSR") in October 2000 through his association with a FINRA member.[2]

In or around 2010, Wicker formed Bonwick.[3] In June 2012, Wicker became registered through Bonwick as a GSR, Equity Trader, General Securities Principal, Investment Banking Representative, and Municipal Securities Principal.[4] In October 2013, he became registered through Bonwick as a Research Principal.[5]

At all relevant times, Wicker owned approximately 60 percent of Bonwick and served as the firm's chief executive officer, chief compliance officer, and chief financial officer.[6] Bonwick had approximately 30 registered representatives in five offices.[7]

Bonwick ceased operations in June 2016 and FINRA canceled its registration in February 2017.[8] After Bonwick ceased operations, Wicker registered with FINRA through his association with two other FINRA members.[9] His last registration with FINRA terminated on September 20, 2018.[10]

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[1] The hearing was held between February 4 and 6, 2019, in New York, New York, before an Extended Hearing Panel. Citations to the Hearing Transcript are referred to as "Tr." followed by the page number.

[2] Joint Stipulations ("Stip.") ¶ 1; Answer ("Ans.") ¶ 2; Complainant's Exhibit ("CX-") 2, at 6-7.

[3] Stip. ¶ 2.

[4] Stip. ¶ 3.

[5] Stip. ¶ 3.

[6] Stip. ¶ 2; Ans. ¶ 3.

[7] Stip. ¶ 2; Ans. ¶ 3.

[8] Stip. ¶ 14; Ans. ¶¶ 5, 27.

[9] Stip. ¶¶ 5-6; CX-2, at 3-4.

[10] CX-2, at 3.

FINRA maintains jurisdiction over Wicker because Enforcement filed the Complaint within two years after the effective date of termination of Wicker's FINRA registration, and the Complaint charges Wicker with conduct that occurred while he was associated with a FINRA member.[11]

B. Customer ADM Retains Bonwick as Underwriter for Its IPO

In February 2016, investment banking customer ADM engaged Bonwick to serve as the managing underwriter for its IPO.[12] DM, who was associated with Bonwick at the time, was the lead investment banker on the deal.[13] ADM and Bonwick executed an engagement agreement whereby ADM agreed to reimburse Bonwick for all reasonable fees and expenses associated with, among other things, retaining Bonwick's underwriter counsel for ADM's IPO.[14]

Bonwick anticipated hiring "Law Firm" as underwriter's counsel. So on March 16, 2016, DM sent Wicker an email attaching Law Firm's engagement agreement and informing Wicker that Bonwick should expect to make an initial $50,000 payment to Law Firm following the execution of the engagement agreement.[15] Because Wicker was concerned with the risk of incurring legal expenses for a customer with limited revenue, Wicker emailed DM and instructed him to have ADM advance Bonwick the $50,000 retainer before Bonwick executed Law Firm's engagement agreement:

> [DM] – let's think about the risk for this particular client. By signing this, we are on the hook for at least $50k of expenses for a client [ADM] that has limited revenue. Let's invoice [ADM] and get the first payment before we sign.[16]

DM followed Wicker's instruction.[17] On March 16, DM sent an invoice to ADM for $50,000 requesting that ADM wire those funds to Bonwick to pay Law Firm's retainer.[18] The invoice listed Wicker as contact person for questions about the invoice and included Wicker's email address and phone number.[19] The invoice was payable upon receipt and instructed ADM to wire the $50,000 to a bank account that Bonwick used as its operating account.[20]

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[11] Article V, Section 4(a) of FINRA's By-Laws.

[12] Stip. ¶ 7; Joint Exhibit ("JX-") 7.

[13] JX-7; Tr. 258.

[14] JX-7, at 4.

[15] JX-9.

[16] JX-9; Tr. 90-91.

[17] JX-9; JX-11; Tr. 90-91.

[18] Stip. ¶ 8; JX-10; JX-11; Tr. 92.

[19] JX-10; Tr. 92-93.

[20] JX-10; Tr. 286.

The next day, March 17, ADM wired $50,000 to Bonwick's operating account for the sole purpose of paying Law Firm's retainer.[21] Wicker knew those funds were deposited into Bonwick's operating account and were only to be used to pay Law Firm's $50,000 retainer.[22] Wicker admits that he did not segregate or reserve ADM's funds in a separate account.[23] He commingled them with other funds in Bonwick's operating account.[24]

On March 18, after securing the $50,000 advance from ADM, Wicker sent DM edits to Law Firm's engagement agreement.[25] Wicker changed the names of the addressee and signatory from DM's name to his own name.[26] Wicker also modified the agreement to ensure that Law Firm billed Bonwick in $50,000 increments and did not incur any charges above $50,000 without Bonwick's written approval.[27] After Law Firm accepted these changes, Wicker signed Law Firm's engagement agreement and then emailed Law Firm the executed agreement on March 28.[28]

Shortly thereafter, on April 4, Law Firm invoiced Bonwick for the $50,000 retainer.[29] That same day, DM sent Law Firm's invoice to Wicker and Bonwick's administrative officer,[30]Alfred Dedona, requesting payment: "Hi Al – please see attached and when approved by Devin can you make arrangement for the wire to [Law Firm], our counsel on the [ADM] IPO. They have previously wired us $50K which we are now sending to engage Law Firm."[31] Wicker knew that Bonwick was required to pay Law Firm promptly upon receipt of any legal bills.[32] He also knew at this point that Bonwick had not paid Law Firm.[33] Wicker admits that he was ultimately responsible for ensuring that Bonwick paid Law Firm.[34] Bonwick, however, never

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[21] Stip. ¶ 9.

[22] Stip. ¶ 9; JX-11; JX-12; Tr. 96-100.

[23] Tr. 102.

[24] JX-1, at 10.

[25] JX-12; Tr. 108-10.

[26] JX-12, at 7; Tr. 110.

[27] JX-12, at 7; JX-15, at 1-2; Tr. 109-10.

[28] Stip. ¶ 10; JX-14; JX-16, at 2-3; Tr. 112, 115-16. (The parties stipulated that Wicker executed Law Firm's engagement agreement on March 18 but the documentary evidence shows that Wicker did not send the executed agreement to Law Firm until March 28. *Compare* Stip. ¶ 10 *with* JX-16, at 2-3.)

[29] Stip. ¶ 11; JX-16. (It is unclear from the record why Law Firm's invoice is dated August 25, 2015, but the parties stipulated and other documentary evidence shows that Law Firm sent the invoice to Bonwick on April 4.)

[30] Tr. 282.

[31] JX-16, at 1; Tr. 115-18. Wicker testified that he knew Law Firm invoiced Bonwick for the $50,000 retainer on April 4. Tr. 115.

[32] JX-12, at 9; Tr. 110.

[33] Tr. 118.

[34] Tr. 128.

paid Law Firm the $50,000 retainer or returned those funds to ADM.[35] Consequently, ADM lost $50,000.

Bonwick ceased operations in June 2016. After resigning from Bonwick on July 23, 2016, DM joined FINRA member firm Monarch Bay Securities, Inc. ("Monarch Bay"). ADM then hired Monarch Bay to underwrite its IPO, which also used Law Firm as underwriter counsel.[36] But Law Firm refused to proceed with ADM's IPO unless it was paid $50,000 for services it had already performed for Bonwick in connection with the ADM IPO.[37] ADM, therefore, spent another $50,000 to satisfy Law Firm's bill.[38] ADM completed its IPO in June 2017.[39]

C. Wicker Uses ADM's $50,000 to Pay Bonwick's Expenses

There is no dispute that Bonwick received $50,000 from ADM or that those funds were never used for the intended purpose or returned to ADM. The issues in dispute concern who took the funds and what happened to those funds. The record is clear on both of these questions. Wicker took the funds and used them to pay Bonwick's expenses. Wicker's own admissions lead the Panel to that conclusion.

We first considered who controlled Bonwick's operating account. It was Wicker. He was, among other things, the firm's chief financial officer. In that role, he approved firm expenses, paid firm expenses, and authorized payroll runs.[40] He admits that he was the only person who had the authority to, and in fact did, approve disbursements and transfers from Bonwick's operating account.[41] He also admits that he was ultimately responsible for ensuring that Bonwick paid Law Firm.[42]

Next, we considered what Wicker did with ADM's $50,000 when it was wired into Bonwick's operating account on March 17. Wicker concedes that the funds were not segregated or reserved into a separate account. The funds were commingled with Bonwick's operating capital. The question then becomes what tracing methodology the Panel should apply to determine how Wicker spent those funds given that he commingled customer funds with non-

[35] Stip. ¶ 13; Tr. 118-19, 128.

[36] Tr. 162-63; JX-18.

[37] Tr. 150-52, 162-63; CX-3.

[38] Tr. 150-52, 162-63; CX-2; CX-3.

[39] Tr. 160.

[40] Tr. 81.

[41] Tr. 47, 84-87, 99-100, 284-88. Dedona, the only other person with access to the account, testified that he could not disburse funds from Bonwick's bank account without Wicker's approval. Tr. 284-88.

[42] Tr. 128.

customer funds. [43] We traced the use of ADM's funds on a first-in, first-out basis.[44] This methodology assumes that the first funds deposited into a commingled account are also the first funds withdrawn or paid out of that account. We find this methodology appropriate here because it more closely mirrors the reality of credits and debits than other tracing methodologies.[45] It also gives Wicker the benefit of the doubt that he spent the funds Bonwick already had in its operating account before using the customer's funds.[46]

This analysis shows that immediately before Bonwick received ADM's $50,000, Bonwick's operating account had a balance of $34,486. After Bonwick received the $50,000 from ADM, the balance in Bonwick's operating account increased to $84,486. Between March 17 and March 28, Wicker spent $34,486—the initial balance in Bonwick's operating account—on Bonwick's expenses and transferred some of the money to his personal account.[47] Then, between March 28 and March 31, he spent the next $50,000—ADM's funds—on Bonwick's expenses, including $10,000 on March 29 to pay legal fees associated with a FINRA arbitration (brought by another broker-dealer against Bonwick and Wicker)[48] and $31,285.89 on Bonwick's payroll.[49] Wicker authorized those payments, even though he admits that he never requested or received authorization from ADM to use the $50,000 for any purpose other than to pay Law Firm's retainer. [50]

By April 4, when Law Firm invoiced Bonwick for its $50,000 retainer, Wicker had already spent ADM's funds. Bonwick nonetheless had other funds in its operating account on April 4. In fact, between April 4 and November 30, 2016, Bonwick received approximately

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[43] Equitable tracing principles are means used by courts to identify and segregate property that has been commingled with other property in such a manner that it has lost its identity. *United States v. Henshaw*, 388 F.3d 738, 740 (10th Cir. 2004). Courts have discretion to select the appropriate tracing methodology. *Henshaw*, 388 F.3d at 739-40 ("Adherence to specific equitable principles, including rules concerning tracing analysis, is subject to the equitable discretion of the court.") (quoting *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996)); *see also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 581 B.R. 370, 386 (2017).

[44] The first-in, first-out ("FIFO") tracing methodology has been applied in several contexts. *See, e.g.*, *United States v. Walsh*, 712 F.3d 119, 124 (2d Cir. 2013) (in a forfeiture case, the court affirmed the district court's use of the FIFO methodology to trace illicit proceeds in a commingled account); *In re Lichtenberger*, 337 B.R. 322, 325-26 (2006) (applying a FIFO methodology to trace debtor's exempt funds in a commingled account).

[45] *See In re Marve*, 484 B.R. 735, 740 (2013).

[46] Enforcement argues that Wicker spent the funds by March 30. To support this conclusion, Enforcement offered CX-8 (summary exhibit), JX-1 (bank records for Bonwick's operating account), and JX-2 (bank records for Wicker's personal account). While it appears from CX-8 and the bank records that Enforcement applied a last-in, first-out methodology to trace the use of ADM's funds, Enforcement did not explain the tracing methodology it adopted, the reasons for adopting that methodology, or why that methodology is reasonable or equitable in this case. We, therefore, decline to adopt Enforcement's analysis.

[47] JX-1, at 10-13; Tr. 101-06.

[48] Tr. 105-06, 484-85.

[49] Tr. 106-07.

[50] Ans. ¶ 14; Tr. 102, 105-07.

$2.7 million in deposits into its operating account.[51] During that same period, Wicker transferred or withdrew $440,500 from Bonwick's operating account and deposited it into his personal bank account.[52] Wicker, however, never used a single penny in Bonwick's operating account or any other financial account to pay Law Firm or return ADM's $50,000.[53]

By October 7, 2016, Wicker depleted all of the funds in Bonwick's operating account, except $60, where the account balance remained through February 2017.[54]

D. Wicker Evades Multiple Requests to Pay Law Firm or Return the Funds to ADM

Beginning in April 2016 and continuing through November 2016, Wicker received multiple requests from DM, Law Firm, and ADM asking that Bonwick either pay Law Firm the $50,000 retainer or return those funds to ADM.[55]

DM sent several of those requests. On at least five occasions—April 4, May 5, July 20, July 28, and August 10—DM emailed Wicker and Dedona requesting that Bonwick either pay Law Firm or send Law Firm confirmation that Bonwick paid.[56] There is no evidence in the record that Wicker provided a written response to these emails. Dedona's only response was that he had to check with Wicker about whether Bonwick wired the funds.[57]

Then on August 24, a partner at Law Firm emailed Wicker requesting that Bonwick pay Law Firm or return the funds to ADM because Law Firm had already performed work as Bonwick's counsel on the ADM IPO:

> Hi Devin, I hope you are doing well. I am contacting you regarding a retainer of $50k that should be sent to us for our legal fees in connection with the [ADM] IPO. I understand that [ADM] had wired Bonwick Capital $50k in March 2016 for this retainer and that these are client funds that should be held in trust for [ADM]. From the time we started work as Bonwick's counsel, we have invoiced Bonwick approximately $7,692, for which this retainer would be applied. There is another approximate $25k in legal fees that we are planning to invoice as Bonwick's

[51] JX-1, at 14-36.

[52] Tr. 119; Ans. ¶ 26.

[53] Tr. 118-19, 128.

[54] JX-1, at 33-39. While the Panel applied a FIFO methodology to trace the use of ADM's funds, it is important to note that the application of any recognized tracing methodology would have yielded the same result here because Wicker concedes that Bonwick never paid Law Firm or returned ADM's $50,000.

[55] Tr. 118-19; Stip. ¶ 12; Ans. ¶ 20.

[56] JX-16; JX-17; JX-19; JX-20.

[57] JX-19, at 2-3.

> counsel on this IPO. All of these fees are less than the retainer at this point and would be covered by the retainer.[58]

There is no evidence in the record that Wicker ever responded to this email.

Finally, on October 7, 2016, ADM's chief financial officer, MM, sent Wicker a letter demanding the return of ADM's $50,000 because Bonwick had failed to forward those funds to Law Firm.[59] Wicker responded to ADM's demand letter on October 12.[60] Wicker told MM that he would address the "issue with the banker today on your funds."[61] Later that day, Wicker emailed MM again telling him he was not able to get a response but he expected that "the holiday has everyone out so hoping to resolve this tomorrow."[62] The next day, October 13, Wicker emailed MM and said that he had talked with the banker, had a "path to resolution," and expected the issue "to be resolved in a few days."[63]

MM testified that, by this point, he had lost patience with Wicker and felt that Wicker was giving him excuses.[64] So on October 13, MM emailed Wicker informing him that if Bonwick did not wire the $50,000 into ADM's account by the next day, MM would contact FINRA, the SEC, the California Attorney General, and anyone else he thought could make Wicker's life miserable.[65]

Wicker responded on October 14. He told MM that he did not "appreciate the threatening approach" and if that approach continued he did not see any incentive for continuing communicate with MM without a lawyer.[66] Wicker told MM that he "was only recently made aware of the fact that [DM] did not satisfy this outstanding amount when he left the firm. I don't know what [DM] communicated to you, but your anger escalation directed at me is unwarranted."[67]

That same day, MM responded to Wicker's email: "Devin, you told me the other day you would send the money, then had the excuse that Yom Kippur was a stumbling block. Now you seem to be jerking me around with other delays. That's why I'm unhappy. Just wire the funds

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[58] JX-21, at 1.

[59] Tr. 150-52; JX-22.

[60] JX-23, at 6.

[61] Tr. 155-59; JX-23, at 6.

[62] JX-23, at 5.

[63] JX-23, at 5.

[64] Tr. 157-58.

[65] JX-23, at 4.

[66] JX-23, at 3-4.

[67] JX-23, at 4.

and we never have to have another conversation. Thank you."[68] After that, MM followed up with Wicker at least four times giving him opportunities to wire the funds to ADM before he filed a complaint with the regulators.[69] But after October 14, Wicker stopped responding to MM and he never responded to calls from ADM's lawyers.[70]

Because Wicker failed to respond to MM or ADM's lawyers, MM filed a written complaint with FINRA on November 17, 2016.[71] MM alleged in his complaint that Bonwick and Wicker stole ADM's $50,000 by failing to forward those funds to Bonwick's underwriter counsel for the ADM IPO.[72]

E. Wicker Is Not Credible and His Defenses Have No Merit

1. Wicker's Reallocation Defense

Wicker claims that DM stole ADM's $50,000 when DM took the funds with him to Monarch Bay in July 2016. Wicker's explanation for how DM stole those funds is convoluted but we understand it as follows.[73]

In May 2016, DM instructed Wicker to "reallocate" ADM's funds to an escrow account established for another investment banking customer.[74] Wicker testified that this reallocation was not a physical transfer of funds from Bonwick's operating account to the escrow account.[75] So we interpret Wicker's use of the term "reallocate" to mean earmark.

Wicker claims that DM instructed him to "reallocate" ADM's funds because Bonwick paid, or anticipated paying, legal expenses on DM's behalf. Rather than deducting those legal expenses from DM's existing commissions, Wicker claims DM agreed to reimburse Bonwick for those legal expenses with commissions he anticipated earning from another pending investment banking deal, the funds for which were held in escrow. Bonwick would then use those funds (once released from escrow) to pay Law Firm its $50,000.[76] Wicker claims, however, he could

[68] JX-23, at 3.

[69] JX-23, at 1-3.

[70] Tr. 158-59.

[71] JX-23, at 1.

[72] JX-24.

[73] To summarize Wicker's defense, we pieced together his testimony and statements he made in his opening and closing statements. Tr. 63-65, 357, 473-81, 566-67, 571-72.

[74] Tr. 473, 479-80, 566-67, 571-72.

[75] Tr. 479-80, 566-67.

[76] Tr. 357, 473-78, 566-67.

not pay Law Firm the $50,000 because DM took the escrowed funds to Monarch Bay in July 2016.[77]

DM denied promising Wicker that he would pay Law Firm with his existing or future commissions.[78] He also denied ever promising to personally pay Law Firm $50,000.[79] And despite Wicker's attempt to shift blame to DM, Wicker never asked DM at the hearing whether DM had instructed him to reallocate or earmark ADM's funds to another account, or whether DM had agreed or instructed Wicker to use DM's commissions to pay Law Firm's retainer. DM further testified that he met with Wicker at the end of July 2016 to discuss whether Bonwick had paid Law Firm.[80] DM testified that Wicker led him to believe that Bonwick had already paid Law Firm its $50,000 retainer.[81] DM's testimony is corroborated by the emails he sent to Wicker on July 28 and August 10 asking Bonwick to pay Law Firm or provide confirmation that Bonwick had already been paid.[82] DM also could not recall any legal expenses that Bonwick incurred on DM's behalf and implored Wicker to show him some kind of documentation to refresh his recollection.[83] Wicker never did.

The Panel finds Wicker not credible for several reasons.

First, there is no documentation to corroborate Wicker's self-serving assertion that DM somehow stole ADM's funds, or reallocated or earmarked those funds in a different account. And there is no documentation to show that there were sufficient or available funds in any escrow account to pay Law Firm. All of the evidence, except Wicker's uncorroborated assertions, shows that Wicker exercised control over ADM's $50,000 and determined how to spend those funds. The evidence also shows that DM tried to get Wicker to pay Law Firm. He followed up with Wicker on at least five occasions about the $50,000 retainer, and Wicker never replied to those emails indicating that he had some alternative arrangement with DM to pay Law Firm.

Second, Wicker's explanation for how DM allegedly stole ADM's $50,000 is nonsensical. Wicker never clearly articulated his defense or connected the dots between ADM's $50,000, DM's purported legal fees, and the other customer's escrow account. But even after piecing together Wicker's tortuous defense, his story strains credulity. It is hard to believe that a

[77] Tr. 473, 571-72. Wicker also claims that he spoke with the chief executive officer of Monarch Bay, Keith Moore, who told Wicker that he would return ADM's funds to Bonwick. Tr. 62. Moore testified that he never spoke to Wicker about ADM for any reason before late 2018 and he had no recollection of ever promising to return ADM's funds to Bonwick. Tr. 442-43, 446-47.

[78] Tr. 179-80.

[79] Tr. 179.

[80] Tr. 186-87; JX-19, at 1.

[81] Tr. 182-83, 186-89.

[82] JX-19; JX-20; Tr. 186-89.

[83] Tr. 270-73.

broker-dealer would earmark one customer's funds in another customer's escrow account because the broker-dealer incurred or anticipated incurring unrelated legal expenses for a registered representative.

Third, it is unclear from Wicker's testimony whether DM ever actually instructed him to reallocate the funds to another customer's escrow account. Wicker initially testified that DM instructed him to reallocate ADM's funds to the escrow account for the other investment banking deal,[84] but when Wicker was questioned again about whether DM actually gave this instruction, Wicker's answer was evasive and vague:

> Q. So did he [DM] ask you to redirect the ADM money at that time to [escrow account] or to the legal fees?
>
> A. I think there is like this underlying assumption that there is like, there is ADM money that was like sitting in say [DM's] business let's say. And then he said send this ADM money to [a law firm], right. So there was $50,000 in his business along with other funds, right that were in his business. He directed me to pay things out of that, those funds in the business. Some of those were commissions, some of those were expenses. Some were legal fees. So what that left in his business, if you don't include the escrow is a deficit which would have been a deficit that is ADM's money. But when I checked the escrow, there was enough money in there. So I believe that it was a tangible asset and that it was still part of his business and not really a deficit until he left the firm with it.[85]

Whether DM instructed Wicker to reallocate or earmark ADM's funds in another escrow account is the crux of Wicker's defense. Wicker's evasive and vague answer on this point leads the Panel to believe that Wicker is not credible.

Finally, there is another hole in Wicker's story. Wicker told MM in an October 14 email that he was "only recently made aware of the fact that [DM] did not satisfy this outstanding amount when he left the firm."[86] Wicker echoed this statement in his opening statement, claiming that he did not understand that DM did not pay Law Firm until October 2016 when MM and ADM's lawyers demanded the return of those funds.[87] This cannot be true. After DM left the firm in late July 2016, Wicker received two emails in August 2016 explicitly informing him that Law Firm had not been paid: one from DM on August 10 and the other from a partner at Law Firm on August 24.[88]

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[84] Tr. 473.

[85] Tr. 479-80.

[86] JX-23, at 4.

[87] Tr. 62.

[88] JX-20; JX-21.

2. The April 19 Instant Message

Wicker contends that he did not intend to misuse ADM's funds because he instructed Dedona to wire the Law Firm its retainer.[89] Wicker testified that on April 19, 2016, approximately two weeks after Bonwick received Law Firm's invoice, he sent an instant message ("IM") to Dedona instructing Dedona to send a wire to Law Firm for DM's deal. Wicker claims that Dedona did not comply with that instruction.[90] Wicker could not recall the exact content of the IM but he acknowledged that he never specified to Dedona the amount that should be sent to Law Firm.[91] Wicker did not offer the IM as an exhibit.[92] And Dedona did not recall receiving this IM or any instruction by Wicker to wire ADM's money to Law Firm.[93]

There is insufficient evidence to conclude that Wicker sent this purported IM on April 19 or that the IM contains the message Wicker claims. Wicker does not recall the exact content of the IM and he concedes that the IM did not specify the amount ($50,000) of the wire. Dedona also could not recall the IM. Moreover, Wicker never offered the IM as an exhibit, even when he was granted an extension to file his exhibits four weeks after the pre-hearing deadline.[94]

That said, even crediting Wicker's testimony that there is an April 19 IM instructing Dedona to wire funds to Law Firm, the IM is immaterial and irrelevant to Wicker's liability here. Wicker admitted that he knew by early May 2016 that Dedona never sent the $50,000 to Law Firm (as purportedly instructed),[95] yet Wicker still failed to have Bonwick pay Law Firm or return ADM's funds.

3. Bonwick's Other Financial Accounts

Wicker argues that Bonwick did not spend ADM's money because money is fungible and Bonwick had money in other accounts to pay Law Firm.[96] Wicker testified that, at the end of March 2016, Bonwick had over $900,000 in its clearing account.[97] Wicker offered no documentary evidence of Bonwick's other financial accounts, including its clearing account, to

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[89] Tr. 122-23.

[90] Tr. 122-23, 132-35.

[91] Tr. 134-35, 462.

[92] Tr. 133-34.

[93] Tr. 341-42, 346-50, 367-68.

[94] Wicker was given a second chance to file exhibits in this matter—four weeks after the pre-hearing deadline—and he did not include what he claims to be an important exhibit among the 59 exhibits he filed.

[95] Tr. 135-36, 481-82.

[96] Tr. 121-23, 131-32, 554-57.

[97] Tr. 122-23, 131-32, 557.

corroborate that Bonwick indeed had funds available in another account. We, therefore, do not credit his assertion.

Nonetheless, even if Bonwick had funds available in other accounts to pay Law Firm, Wicker's argument is unpersuasive because he never used any of those other funds to pay Law Firm or reimburse ADM.

Additionally, Wicker's argument that ADM's funds were fungible misses the mark. Customer funds are not fungible. Wicker was not at liberty to commingle ADM's funds with non-customer funds and use them to finance Bonwick's business. He had an obligation to segregate or reserve them in a separate account and he did not. This is the cornerstone principle of the Customer Protection Rule.[98]

III. Conclusions of Law

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."[99] "Because conversion casts doubt on a person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money, it is well established that conversion is contrary to the mandate of Rule 2010."[100]

Improper use or misuse of funds is governed by FINRA Rule 2150(a). This Rule states that "[n]o member or person associated with a member shall make improper use of a customer's securities or funds." Misuse of customer funds occurs when a registered person fails to apply the funds or securities or uses them for a purpose not directed by the customer.[101] Improper use can occur in instances where the associated person does not convert the funds or otherwise benefit from the misuse.[102] Customer funds are also used improperly when they have been commingled with non-customer funds and thereby are subjected to a risk of loss.[103]

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[98] *See* Exchange Act Rule 15c3-3, 17 C.F.R. § 240.15c3-3.

[99] FINRA Sanction Guidelines at 36, n.2 (2019), http://www.finra.org /industry/sanction-guidelines. The Securities and Exchange Commission has used this definition in evaluating FINRA disciplinary actions alleging conversion. *See, e.g.*, *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *22 (Sept. 30, 2016); *Stephen Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *11 (Mar. 29, 2016); *Alfred P. Reeves*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568, at *8-9 (Nov. 5, 2015).

[100] *Akindemowo*, 2016 SEC LEXIS 3769, at *22 (internal quotations and citations omitted).

[101] *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *43 (NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015).

[102] *Dep't of Enforcement v. Highland Fin. Ltd.*, No. 2011025591601, 2013 FINRA Discip. LEXIS 39, at *39-40 (OHO Sept. 27, 2013).

[103] *Highland Fin.*, 2013 FINRA Discip. LEXIS 39, at *40 (citing *Dist. Bus. Conduct Comm. v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, at *15-16 (NBCC Jan. 20, 1998)).

"Misuse of customer funds is patently antithetical to the high standards of commercial honor and just and equitable principles of trade that FINRA seeks to promote."[104]

Wicker converted and misused ADM's $50,000. Each element of conversion is met here. First, Wicker intentionally took ADM's $50,000. He directed DM to invoice ADM for the $50,000 and ADM wired those funds to Bonwick for the sole purpose of paying Law Firm's retainer. Second, Wicker was not authorized to take ADM's funds. Wicker knew that ADM's $50,000 had to be used to pay Law Firm's retainer and he admits they were not. Wicker also admits that he did not segregate or reserve those customer funds but instead commingled them with the firm's operating capital. Wicker controlled Bonwick's operating account and made the decision to use those funds for a purpose other than to pay Law Firm—here, to benefit the broker-dealer he founded and majority owned.[105] Third, the $50,000 did not belong to Wicker or Bonwick; nor were they "entitled to possess it."

For these same reasons, Wicker also improperly used ADM's $50,000. Indeed, Wicker's commingling of ADM's $50,000 with non-customer funds alone constituted an improper use of the funds.[106]

Accordingly, the Panel finds that Wicker converted and misused ADM's $50,000 and therefore violated FINRA Rules 2150(a) and 2010.

IV. Sanctions

FINRA's Sanction Guidelines state that a bar is standard for conversion "regardless of [the] amount converted."[107] "This approach reflects the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry. Indeed, conversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money."[108]

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[104] *Mielke*, 2015 SEC LEXIS 3927, at *53 (internal quotations and citations omitted).

[105] *Grivas*, 2016 SEC LEXIS 1173, at *1, 10-16 (associated person converted funds of an investment fund he managed and transferred those funds to the broker-dealer with which he was associated to cure the broker-dealer's net capital deficiency); *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *1, 19-22 (Dec. 7, 2010) (An associated person, who was the president, chief executive officer, chief financial officer, and compliance officer of a member firm, caused that member firm to convert and misuse customers' securities. The associated person took the customers' securities, liquidated them, and then used a portion of the proceeds to pay the broker-dealer's operating expenses).

[106] *Highland Fin.*, 2013 FINRA Discip. LEXIS 39, at *40.

[107] Guidelines at 36.

[108] *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *29 (June 2, 2016) (internal quotations and citations omitted).

The Panel finds no reason to deviate from the standard sanction of a bar. We find no mitigating factors here, only aggravating. Wicker intentionally took ADM's funds and used them to finance Bonwick's business.[109] This conversion caused direct financial harm to—the tune of $50,000[110]—and resulted in monetary gain for Bonwick and Wicker.[111] Wicker also has taken no responsibility for his misconduct.[112] Nor has he attempted to make restitution to ADM.[113] Instead, with no corroborating or credible evidence to do so, Wicker shifts blame to one of his subordinates.

We now turn to restitution. The Guidelines instruct adjudicators to order restitution where it is appropriate to remediate misconduct and necessary to "restore the status quo ante for victims who would otherwise unjustly suffer loss."[114] A hearing panel may order restitution "when an identifiable person … has suffered a quantifiable loss proximately caused by a respondent's misconduct."[115] ADM gave Bonwick $50,000 based on Wicker's agreement that the firm would use those funds to pay Law Firm's retainer. Wicker converted those funds and used them to finance Bonwick's business. Those funds were never paid to Law Firm or returned to ADM. As a result, ADM lost $50,000. The proximate cause of this loss was Wicker's conversion. Accordingly, Wicker is ordered to pay $50,000 in restitution plus prejudgment interest to ADM. Prejudgment interest shall run from April 4, 2016, which represents the date that Law Firm invoiced Bonwick for the $50,000.

V. Order

Respondent Devin Lamarr Wicker is barred from associating with any FINRA member in any capacity for converting and misusing customer funds. He is also ordered to pay ADM $50,000 in restitution plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), from April 4, 2016, until paid.[116]

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[109] Guidelines at 8 (Principal Consideration No. 13).

[110] Guidelines at 7 (Principal Consideration No. 11).

[111] Guidelines at 8 (Principal Consideration No. 16).

[112] Guidelines at 7 (Principal Consideration No. 2).

[113] Guidelines at 7 (Principal Consideration No. 4).

[114] Guidelines at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[115] Guidelines at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[116] In the event that ADM cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of ADM's last-known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to the staff of FINRA's Department of Enforcement no later than 90 days after the date this decision becomes final.

Wicker is ordered to pay the hearing costs of $5,063.69, consisting of a $750 administrative fee and $4,313.69 for the cost of the transcript.

The bar shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding. The restitution (including interest) and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action in this disciplinary proceeding.[117]

Jennifer L. Crawford
Hearing Officer
For the Extended Hearing Panel

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[117] The Panel considered and rejected without discussion all other arguments the parties.