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The Office of the Secretary Securities and Exchange Commission
100 F Street, NE Room 10915
Washington, D.C. 20549-1090

Re: **Notice of Appeal** of FINRA National Adjudicatory Council Decision, dated December 15, 2021, regarding Respondent Devin Lamarr Wicker, Complaint No. 2016052104101

Dear Secretary of the U.S. Securities and Exchange Commission:

I represent Respondent Devin Lamarr Wicker ("Respondent"), who is filing this Notice of Appeal of FINRA National Adjudicatory Council ("NAC") Decision, FINRA Matter 201605214101, to the U.S. Securities and Exchange Commission ("SEC").

While it is the Respondent filing this appeal, Respondent was significantly disadvantaged by substantial procedural errors and irregularities that call into question whether FINRA is fairly adhering to its own procedural rules under the 9200 and 9300 Series of Rules of Procedure. It would therefore also be appropriate for the SEC to review this matter on its own initiative.

Rarely does a NAC Decision, in describing the procedures employed to get to this point include *all* of the following language as it does here: "unusual set of facts and circumstances," "unique procedural history," "to the extent errors were made, they constituted, at most harmless errors," "unusual circumstances," "the omission [of critical documents in the Record]" was regrettable," "the Remand Request was unusual," and "in the future we encourage that in similar circumstances the parties be notified of such matters." Indeed, in the last quote, the NAC on one hand suggests that a procedural rule regarding notice to parties was not violated while suggesting that the rule be changed.

On or about December 15, 2021, Respondent received a copy of the NAC Decision which affirmed the decision issued by the Office of Hearing Officers ("OHO"). In affirming the OHO decision, the NAC made several significant factual, procedural, and legal errors in its arguments and conclusions.

Specifically, Respondent's bases for appeal of this matter to the SEC include the following:

1. NAC Erred in its Failure to Properly Address Allegations of Enforcement Contemptuous Conduct under FINRA Rule 9280 and the Unclean Hands Doctrine

FINRA erred in failing to properly address the serious ethical violations by both FINRA's Department of Enforcement ("Enforcement") and of Hearing Officer Jennifer Crawford ("Crawford"), who Enforcement negotiated employment with, promoted, and who, inexplicably, continues to serve as a FINRA Vice President and head Enforcement's Litigation Group. The failure to adequately address these serious ethical violations is not only highly prejudicial to Respondent but also puts the reputation of FINRA's entire disciplinary process at grave risk as demonstrating bias in favor of Enforcement and reflects an inability to regulate itself.

The NAC erred in not dismissing the Complaint or taking other appropriate action to address Enforcement's unclean hands and apparent unethical behavior of negotiating employment with Crawford, the hearing officer presiding over Respondent's hearing panel, while simultaneously prosecuting this matter before that same hearing officer. Instead, FINRA has attempted to keep the underlying facts of this unethical behavior under wraps and not squarely address the consequences contemplated under FINRA Rule 9280 for Enforcement's unethical behavior of engaging in such negotiations.

The NAC maintained an erroneous circular logic and set of facts for not addressing Enforcement's unclean hands. On one hand, it says that the Chief Hearing Officer sought a remand of the proceedings based on a determination regarding whether Crawford was subject to disqualification on or before the date the decision was issued in March 21, 2019.¹ The NAC identifies the event resulting in her disqualification to be Crawford's subsequent employment with Enforcement.² On the other hand, the NAC argues not only that the Respondent should have been on notice of Enforcement's negotiations with Crawford that led to her hiring, but that the allegations of Enforcement's misconduct is not supported by the record.³ To put it colloquially, that is too cute by half. It is a disingenuous argument made by FINRA to avoid further disclosure of embarrassing and unethical behavior that found Respondent facing a party opponent with unclean hands and deserving of relief.

Instead, as described below, FINRA erred in refusing to allow discovery of the employment negotiations between Enforcement and Crawford. FINRA's decisions have focused only on the Hearing Officer's failure to disclose her significant ethical breach of non-disclosure (though she still maintains her position as an officer of FINRA), while glossing over Respondent's party opponent, Enforcement's actions in this matter.

2. NAC Erred in Its Consideration of Chief Hearing Officer's Request for Remand in Contravention of FINRA Rule 9346.

The NAC erred in its application of FINRA Rule 9346(a) to allow the NAC to consider the Chief Hearing Officer's letter of November 8, 2019, which was not part of the record.

¹ NAC Decision, pp. 21-22.

² *Id.*

³ NAC Decision, p. 26.

Neither Respondent nor Enforcement either submitted the letter or had ever even seen it. The NAC erred in allowing that letter to be considered “other papers submitted” under FINRA Rule 9346(a). That is clearly an unprecedented interpretation of the rule, which does not contemplate such submissions for consideration. Rule 9346 further sets forth a procedure for the parties to be engaged in arguing for or against the supplementing of documents into the record that was not followed in this matter. The allowance of non-parties to make submissions to the NAC for consideration, particularly without notice to the parties, sets a dangerous and untenable precedent for FINRA’s appellate process.

3. NAC Erred in Remanding the Original Decision in Contravention of FINRA Rule 9349.

The NAC erred in remanding the original hearing panel decision to OHO without complying with FINRA Rules 9349(a) and (b). In addressing this issue, the NAC conceded:

We acknowledge that the Remand Order did not include the items set forth in FINRA Rule 9349(b). 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 Remedial Request...⁴

The fatal flaw in that explanation, is that Respondent could not have considered the NAC Remand Order in conjunction with the Remand Request from the Chief Hearing Officer as suggested above, because he was not provided the Remand Request until January 2021, when the record was supplemented on appeal. NAC’s error in not allowing Respondent to adduce new evidence regarding Enforcement’s unethical communications with Crawford also stems from this critical flaw in the NAC’s Decision.⁵

The NAC decision erroneously claimed that its own procedural “failure to strictly comply with [the requirements under both] Rules 9349(a) and (b) was ‘harmless error.’” Indeed, the errors were not harmless to Respondent and its findings of “harmless error” was a means of self-dealing to cover up serious, failings in FINRA’s application of its own disciplinary procedures.

4. NAC Erred in its Refusal to Allow Respondent to Adduce New Evidence After Record on Appeal was Supplemented

The NAC erred in not allowing Respondent to adduce new evidence within 30 days of supplementing the Record on Appeal. Within days of being retained, Respondent’s counsel, suggested to FINRA’s Office of General Counsel (“OGC”) that the more than 3,400 page Record on Appeal was incomplete, specifically noting lack of documentation to reflect the manner in which the matter was remanded back to the Office of Hearing Officers once it was on appeal. Based on that request, OGC supplemented the record

⁴ NAC Decision, p. 24.

⁵ NAC Decision footnotes 8, 9.

on appeal with approximately 100 additional pages. These additional documents included, among other things, correspondence from the Chief Hearing Officer that articulated the basis for her request for a remand of the initial hearing panel decision, and the NAC's correspondence back to the Chief Officer granting that request.

In her Remand Request of November 8, 2019, the Chief Hearing Officer stated: "The Office of Hearing Officers has received information regarding whether the Hearing Officer ... *was subject to disqualification on or before the date the decision in this proceeding was issued, March 21, 2019.*" (emphasis added.)

The NAC admits that Respondent never saw that Remand Request or the NAC's response dated November 11, 2019, in which it agreed to remand the matter to OHO. Indeed, the NAC stated:

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.⁶

Instead, up until that point, Respondent only saw the language of the Chief Hearing Officer's Remand Order dated November 12, 2019, which stated:

I find that circumstances exist where the fairness of the Hearing Officer ... might reasonably be questioned as a result of the subsequent employment of the Former Hearing Officer by [Enforcement]. (Emphasis added)

In terms of timing, the original hearing panel decision penned by Crawford was issued in March 2019, and this Remand Order was issued in November 2019, some six months after the Crawford left her role as a Hearing Officer in May 2019 to become a Vice President and Head of Enforcement's Litigation Group, and comes eight months after the issuance of the decision.⁷ Respondent would have no way of knowing or wondering whether, as the Chief Hearing Officer found, that Crawford "*was subject to disqualification on or before the date the decision in this proceeding was issued, March 21, 2019.*" Respondent also would not be aware of when Crawford changed positions or whether she negotiated the employment before or after the decision was issued.

The explanation for seeking a remand provided by the Chief Hearing Officer in that newly provided correspondence was materially different than the explanation provided by the Chief Hearing Officer to the parties in her subsequent remand order. Respondent

⁶ NAC Decision at footnote 19.

⁷ The NAC erred in claiming that "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." (NAC Decision, Footnote 15) As noted above, it was six months after Crawford accepted the job with Enforcement before the Chief Hearing Officer sought a remand. No explanation is provided as to why it took so long for the Chief Hearing Officer to make the determination of disqualification.

therefore requested to adduce additional information within 30 days of OGC providing those additional documents in January 2021 to complete the record on appeal.

The NAC admitted:

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.”⁸

In denying Respondent’s request to adduce new evidence upon receiving the supplemented record in January 2021, the NAC opined, “While the omission was regrettable, nothing in the supplement contained materially new information.”⁹

In this matter, the correspondence and facts contained therein between the Chief Hearing Officer and the NAC on November 8 and 11, 2019, were previously unknown to Respondent. The NAC erred in excusing this significant omission as simply “regrettable,” and therefore denying Respondent the opportunity to adduce new evidence within 30 days of OGC supplementing the record on appeal.

5. NAC Erred in Determining Scope of Discoverable Material Under *Brady* and FINRA Rules

The NAC erred in its application of the *Brady* Doctrine and its own FINRA rules for discovery of Enforcement’s initial failure and subsequent refusal to provide documents and information in connection with its employment negotiations with Crawford.¹⁰ The NAC acknowledged that the FINRA Rule 9280 provides for the striking of pleadings including a motion to dismiss a complaint if a party engages in contemptuous conduct during a proceeding.¹¹

The NAC also cited the *Opinionsexpress, Inc.* SEC decision that opined that under the discovery rules, disclosure obligations are triggered based on a “test of materiality” to the [the respondent’s] guilt or punishment, being whether there is a reasonable probability that the evidence’s disclosure would have resulted in a different outcome.”¹² In this case, disclosure of Enforcement’s unethical behavior could have been used as the basis for a Rule 9280 motion and resulted in a very different outcome for Respondent.

By reason of the foregoing, Respondent appeals the FINRA NAC Decision to the SEC for its review.

The notice from FINRA instructing Respondent on the requirements for an appeal to the SEC instructs Respondent to provide in the filing an address where Respondent may be served and a

⁸ NAC Decision, footnote 20.

⁹ NAC Decision, footnote 20.

¹⁰ NAC Decision, p. 20.

¹¹ NAC Decision, p. 14.

¹² NAC Decision, p. 20, citing *Opinionsexpress, Inc.* Exchange Act Release No. 70698, 2013 SEC LEXIS 3235 at *11 (Oct 16, 2013)

phone number where his counsel can be reached during business hours. Gary Carleton is accepting service on behalf of Respondent. In addition, please note:

Devin L. Wicker can be served at the following address:

[REDACTED]
[REDACTED]

Gary's Carleton's business telephone number is: 202.744.6297

Respectfully Submitted,



Gary A. Carleton
Counsel for Respondent Wicker

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