BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Devin L. Wicker

For Review of Disciplinary Action Taken by

FINRA

File No. 3-20705

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Devin L. Wicker converted a customer's funds and used them for his benefit and the benefit of the firm that he owned and ran. The customer hired Wicker's firm to underwrite its initial public offering, and the firm engaged counsel to assist with the offering. With Wicker's knowledge, the customer wired $50,000 to the firm's operating account to be used to pay counsel's retainer. Wicker knew that the funds were not to be used for any other purpose.

Wicker, however, never paid the customer's retainer to counsel and never returned the funds to the customer. Instead, he spent the entirety of the firm's operating account and paid himself hundreds of thousands of dollars from that account. Thereafter, Wicker's firm shut down, and the customer was forced to pay counsel the retainer when it had already sent money to Wicker's firm for that purpose. Making matters worse, over a more than six-month period, Wicker concealed his conversion and made misrepresentations and numerous excuses when repeatedly asked to pay the retainer to counsel or return the customer's funds. Based upon these

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undisputed facts, FINRA's National Adjudicatory Council ("NAC") found that Wicker converted customer funds and barred him for this serious misconduct. The NAC also ordered Wicker to repay the victimized customer.

Wicker does not seriously contest that he engaged in this misconduct and the sanctions imposed for converting customer funds. Nor could he. Instead, Wicker seeks to evade repercussions for his failure to comply with fundamental FINRA rules based upon purported misconduct by FINRA's Department of Enforcement ("Enforcement") and Office of Hearing Officers ("OHO"). The genesis of Wicker's unsupported claims stems from an appearance of a conflict of interest involving a FINRA Hearing Officer who did not draft, or make any decisions involving, the FINRA decision that is currently before the Commission. In March 2019, a FINRA Hearing Panel (which included the Hearing Officer at issue) issued a decision in connection with the same complaint underlying the current appeal. The March 2019 Hearing Panel decision barred Wicker for converting the customer's funds and ordered him to repay the customer. Wicker appealed the March 2019 decision to the NAC.

Two months after the March 2019 decision, the Hearing Officer joined Enforcement in a senior role. Faced with a situation where the fairness of that Hearing Officer could reasonably be questioned because of her employment by Enforcement shortly after issuing an adverse decision against Wicker, FINRA's Chief Hearing Officer requested that the NAC remand the case to OHO for further proceedings. The NAC granted this request, and the Chief Hearing Officer then vacated the March 2019 decision in its entirety. The Chief Hearing Officer explained to the parties why she was vacating the March 2019 decision, ordered a new hearing under a new Hearing Officer with new hearing panelists, and directed that no weight or

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presumption of correctness be given to any prior decisions, orders, or rulings previously issued in the matter.

Wicker, through counsel, did not question or contest the actions of the Chief Hearing Officer. And why would he—the Chief Hearing Officer vacated a decision finding that Wicker converted customer funds and barring him from the securities industry, and required Enforcement to prove its case anew before a new hearing panel. Nor did Wicker or his attorney question or seek any additional information about the circumstances surrounding the former Hearing Officer during the second proceeding. Instead, Wicker filed an amended answer, opted not to seek any additional discovery, and participated in a second hearing during which he was able to fully defend himself against Enforcement's allegations. Only *after* the second hearing, in a post-hearing brief, did Wicker complain that the proceeding should have been dismissed based upon groundless suggestions that Enforcement had bribed the former Hearing Officer by inducing her to issue the March 2019 decision against Wicker in exchange for a job.

The second Hearing Panel, like the first, found that Wicker converted the customer's funds and rejected Wicker's argument that the case against him should have been dismissed based upon alleged contemptuous conduct by FINRA staff. The NAC affirmed the Hearing Panel's decision and found that the Hearing Panel did not abuse its discretion when it declined to dismiss the case against Wicker. The NAC wholly rejected Wicker's arguments that he was prejudiced by having to undergo a second proceeding and found a strong public interest in resolving the allegations against Wicker on the merits. It also rejected Wicker's unfounded claim that he was somehow prevented from developing the record to support his argument that Enforcement and OHO colluded against him. Moreover, the NAC rejected Wicker's numerous

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arguments concerning the mechanics of how the March 2019 decision was vacated and a new proceeding ordered.

The Commission should dismiss Wicker's appeal and reject his arguments surrounding the former Hearing Officer, and the actions of the Chief Hearing Officer and the NAC to ensure that Wicker had a second hearing free from even the appearance of a conflicted or biased adjudicator. The NAC properly concluded that the Hearing Panel did not abuse its discretion when it declined to dismiss the case. Courts have typically ordered remedies identical to the remedy applied here to address the appearance of a conflict: by vacating the decision involving the adjudicator with the appearance of a conflict and ordering a new proceeding. Indeed, even in cases involving actual adjudicator conflicts—which the record here simply does not show—federal courts have declined to impose the drastic remedy of dismissing a case. Instead, courts have vacated decisions and ordered new proceedings, which is exactly what happened here.

Notwithstanding Wicker's second-guessing of the way the NAC and Chief Hearing Officer granted him another opportunity to show that he did not convert customer funds, FINRA acted to ensure that Wicker received a full and fair opportunity to defend himself before adjudicators free from actual conflicts of interest or the appearance of conflicts of interest. Wicker's efforts to concoct conspiracy theories and paint FINRA staff as covering up something nefarious are unsupported allegations meant to distract from his unquestionable conversion of customer funds.

For all these reasons, FINRA requests that the Commission dismiss Wicker's appeal and affirm the NAC's decision in its entirety.

II. FACTUAL BACKGROUND

A. Wicker and Bonwick Capital Partners, LLC

Wicker first registered as a general securities representative in 2000. (RP 3204.)[1] In 2010, Wicker co-founded a broker-dealer, Bonwick Capital Partners, LLC ("Bonwick" or "the Firm"). (RP 2261.) In early 2016, Bonwick had approximately 30 registered representatives in five offices throughout the country. (*Id.*) Wicker served as Bonwick's chief executive officer, chief financial officer, and chief compliance officer. (*Id.*) He also held an approximately 60% ownership interest in Bonwick. (*Id.*) Wicker controlled Bonwick's operating account and had complete authority over the account. (RP 2431, 2491-95.) Wicker was registered in various capacities at Bonwick, including as a general securities principal. (RP 3202.)

Wicker terminated his registrations with Bonwick in December 2016. (RP 3202.) He is not currently associated with a FINRA member firm.

B. Bonwick's Dire Financial and Regulatory Problems

Around the time that Wicker converted customer funds, Bonwick was experiencing extreme financial and regulatory difficulties. Among other things, the Firm was involved in on-going litigation and owed a substantial sum to its attorneys (who recognized that Bonwick had "been dealing with a number of financial issues"). (RP 3038.) Unrelated to the Firm's legal fees, Wicker personally owed more than $260,000 in legal fees and unpaid taxes. (RP 3037.) Wicker and the Firm's administrative officer, Alfred Dedona ("Dedona"), deferred their compensation at various points in 2016. (RP 2434-35.) Wicker and Bonwick's other owners also made numerous capital contributions during the first half of 2016. (RP 2431-32, 2932-33,

[1] "RP ___" refers to the page numbers in the certified record filed by FINRA on January 27, 2022.

2940, 2952.) Wicker testified that the Firm's financial difficulties were "building up" during this time. (RP 2834-35.)

Moreover, in early 2016 Bonwick reported a negative net capital of $314,096. (RP 3032.) In mid-March 2016, FINRA issued Bonwick a suspension notice in connection with its 2015 annual audit report and its calculation of net capital. (RP 3187-88.) Bonwick ceased operations around June 2016, and the Firm's suspension became effective in mid-July 2016. (RP 2264, 3187-88.) Later in 2016, FINRA suspended the Firm for failing to pay its annual assessment. (RP 3191.) FINRA ultimately canceled Bonwick's membership in February 2017. (RP 3193.)

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

While Bonwick was experiencing financial strain, in February 2016 a customer ("the Company") retained Bonwick to serve as the underwriter for its planned initial public offering ("IPO").[2] (RP 2262, 3043.) The Company and Bonwick 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. (RP 3046.) Daniel McClory ("McClory"), an investment banker who joined Bonwick in January 2016 and brought the Company to Bonwick as a customer, and a minority owner of Bonwick, signed the underwriting agreement on behalf of Bonwick. (RP 2512, 3048.)

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

McClory sought to hire an attorney to assist with the Company's IPO. In connection therewith, in March 2016 McClory received from a law firm ("Underwriter's Counsel") a proposed engagement agreement to provide Bonwick with legal services in connection with the

[2] The Company's identity may be found at RP 0020.

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Company's IPO. (RP 3066.) McClory sent the proposal to Wicker for his review and informed Wicker that the Company would pay legal fees to Bonwick upon Bonwick invoicing the Company. (RP 3052.) McClory further informed Wicker that "we expect an initial $50k payment to [Underwriter's Counsel] following execution of the [agreement]." (*Id.*)

Wicker expressed concern that Bonwick would be liable for paying the $50,000 to Underwriter's Counsel and would not be reimbursed by the Company because the Company had "limited revenue." (RP 3051.) Wicker therefore insisted that Bonwick first receive the $50,000 from the Company before Bonwick would engage Underwriter's Counsel, and directed McClory to immediately invoice the Company for the $50,000 payment. (*Id.*)

McClory sent the Company an invoice from Bonwick for $50,000 for "Underwritier's [sic] Counsel Retainer" on March 16, 2016. (RP 3055.) The invoice was payable upon receipt and included instructions to wire the funds to Bonwick's operating account. On March 17, 2016, the Company wired Bonwick $50,000. (RP 2263, 2940.) These funds were to be used solely to pay the retainer to Underwriter's Counsel. (RP 2262, 2455-56, 2459.) The Company's $50,000 was commingled with funds in Bonwick's operating account. (RP 2262, 2460.)

With the Company's $50,000 in hand, Wicker sent McClory a redlined copy of the proposed engagement agreement between Bonwick and Underwriter's Counsel. (RP 3061.) Wicker amended the document to make himself the signatory and added a provision that the work of Underwriter's Counsel would be billed in $50,000 increments. (RP 3067.) Wicker rejected McClory's proposal that the $50,000 increments be paid in advance. (RP 3076-77.) Underwriter's Counsel accepted Wicker's changes, and Wicker executed a final copy of the agreement on behalf of Bonwick. (RP 3099.)

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E. Wicker Fails to Pay the Retainer to Underwriter's Counsel or Return the Company's Funds Despite Numerous Requests

Several weeks later, McClory emailed Underwriter's Counsel, copying Wicker, and instructed it to send Bonwick an invoice and then Bonwick would wire it the $50,000 retainer. (RP 3095-96.) As instructed, Underwriter's Counsel sent McClory an invoice on April 4, 2016. (RP 3107.) McClory emailed Dedona and Wicker, and asked Dedona to wire Underwriter's Counsel the $50,000 once Wicker approved the payment. (RP 3095.) McClory reminded Dedona and Wicker that the Company had previously wired Bonwick the $50,000 to engage Underwriter's Counsel. (*Id.*) In what would become an intentional and prolonged pattern, Wicker never responded to these emails and Bonwick did not send Underwriter's Counsel any funds (despite having sufficient funds at the time to make this payment). (RP 2516.)

Indeed, from early April 2016 until November 2016, Wicker received at least eight inquiries and requests from McClory, Underwriter's Counsel, and eventually the Company's chief financial officer and its attorney to either pay the Company's funds to Underwriter's Counsel or return the funds to the Company. Wicker ignored these requests, pretended not to know the status of the Company's funds, or misrepresented his knowledge of the status of the Company's funds. (RP 2519-22, 2480, 2578, 3109-11, 3117, 3125, 3135, 3141, 3153, 3157-64.) Ultimately, 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. (RP 2569-70.) To date, the Company has not received any funds from Bonwick or Wicker. (RP 2264.)

F. Wicker Pays Himself and Funds Bonwick's Operations from Its Operating Account

Despite knowing that the Company's funds were to be used solely to pay the retainer to Underwriter's Counsel and admitting that the Company never authorized Wicker to use its

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$50,000 for any other purpose, Wicker used those funds for himself and Bonwick. (RP 2263, 2473, 2655.) Specifically, from April 2016 until the end of November 2016, while Wicker dodged repeated requests to either pay Underwriter's Counsel or return the Company's $50,000, he withdrew or transferred more than $440,000 from Bonwick's operating account and deposited these funds into his personal account. (RP 2264.) 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. (*See, e.g.*, RP 2465-66, 2676, 2971.)

III. PROCEDURAL HISTORY

A. FINRA's Complaint

In August 2018, Enforcement filed a complaint against Wicker. (RP 0001.) 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. Wicker filed an answer, in which he generally denied any misconduct. (RP 0023.)

B. The First Hearing and March 2019 Decision

A hearing panel composed of a FINRA Hearing Officer (the "Former Hearing Officer") and two hearing panelists (together, the "First Hearing Panel") conducted a multi-day evidentiary hearing in early February 2019. (RP 0617-1298.) Wicker represented himself throughout the hearing. On March 21, 2019, the First Hearing Panel issued a decision finding that Wicker converted customer funds. (RP 2001.) The First Hearing Panel barred Wicker for this misconduct and ordered that he pay the Company $50,000 in restitution. (RP 2018-20.)

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

Wicker appealed the First Hearing Panel's decision to the NAC. (RP 2021.) OHO sent a certified record to the NAC, and the parties filed appellate briefs. (RP 2075-84, 3467, 3481.) 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 OHO. (RP 3501.) 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. (*Id.*)

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 (the "Remand Order"). (RP 3503.) 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"). (RP 2085.) 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); (RP 2085). 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. (RP 2085.)

E. The Second Proceeding and Hearing

1. Pre-Hearing Conferences Where Former Hearing Officer and New Hearing Discussed

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.[3] (RP 2097-2132 (Nov. 20, 2019 pre-hearing conference); RP 2184-2206 (Dec. 4, 2019 pre-hearing conference.))

During the first pre-hearing conference, the Hearing Officer stated that, "I want to address the question that I imagine is on your mind why are we here." (RP 2101.) 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 a couple of months after the First Hearing Panel issued its decision.[4] (RP 2101-02.) The Hearing Officer further explained that the Chief Hearing Officer had determined that these circumstances "created a situation where the fairness of the earlier proceeding might reasonably be questioned." (*Id.*) The Hearing Officer informed the parties that she would conduct the proceeding "as a new case. It's a fresh

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[3] Unlike the first proceeding, Wicker was represented by counsel during the entire second proceeding. Different counsel represented Wicker in connection with his appeal to the NAC and the Commission.

[4] Wicker incorrectly states that he "had no way of knowing" when the Former Hearing Officer left OHO and joined Enforcement and that it was reasonable for him to assume that she joined Enforcement in November 2019. *See* Wicker's Br., at 36, 37. In addition to the Hearing Officer's disclosure to the parties during the November 20, 2019 pre-hearing conference that the Former Hearing Officer joined Enforcement approximately two months after the First Hearing Panel decision, this fact was repeated to the parties, in writing, in a November 20, 2019 order setting forth procedures governing the second proceeding. (RP 2093.)

start. It's a clean slate. . . . So the prior determinations in the case are of no effect going forward." (RP 2100.)

Wicker and his counsel did not ask any questions, object to, or oppose rehearing the case before a new Hearing Officer and Hearing Panel during this first pre-hearing conference. (RP 2107, 2130.) Nor did they raise any issues concerning the Former Hearing Officer or the circumstances of Enforcement hiring her. Similarly, Wicker and his counsel did not ask any questions, raise any issues concerning the Former Hearing Officer, object to, or oppose rehearing the case during the second pre-hearing conference. (RP 2184-2206.)

2. The Hearing Officer Institutes Procedures to Ensure Fairness and Sets Case Deadlines

Immediately after the first pre-hearing conference, the Hearing Officer instituted procedures (the "Procedures Order") to help ensure that Enforcement staff handling the matter was independent in fact and appearance from the Former Hearing Officer (now an Enforcement employee). (RP 2093-95.) In the Procedures Order, the Hearing Officer reiterated that the First Hearing Panel decision was vacated because approximately two months after its issuance, the Former Hearing Officer joined Enforcement and that the Hearing Officer was assigned to the case "to conduct the proceeding afresh and hold another hearing." (RP 2093.) The Procedures Order excluded from participating in the proceeding any Enforcement staff who spoke with the Former Hearing Officer about the case without Wicker or his counsel being present and any staff involved with the decision to hire the Former Hearing Officer. (*Id.*) The Hearing Officer also ordered that Enforcement staff participating in the proceeding have no communications with the Former Hearing Officer about the case and that the Former Hearing Officer have no role in the case. (RP 2094.) Finally, the Hearing Officer ordered that any Enforcement staff participating

in the proceeding file declarations representing that they had complied and would comply with the Procedures Order. (*Id.*)

Enforcement staff subsequently submitted declarations in compliance with the Procedures Order. (RP 2145-58.) Wicker, through his counsel, never objected to or raised questions about the Procedures Order.

The Hearing Officer also informed the parties that she would try to streamline the proceeding, gave the parties an opportunity to conduct additional discovery, and permitted Wicker to file an amended answer. (RP 2106, 2169-82.) Indeed, the deadlines set forth in the Hearing Officer's case management order were based primarily on the parties' joint proposed schedule. (RP 2169.) Wicker, through his attorney, filed an amended answer. (RP 2213-16.) Wicker, however, did not request or seek to obtain any additional discovery.

3. Hearing Panel Conducts a Hearing and Wicker Argues for Dismissal in a Post-Hearing Brief

A Hearing Panel, consisting of the new Hearing Officer and two new Hearing Panelists,[5] conducted an evidentiary hearing in March 2020. (RP 2363-2909.) Five witnesses, including Wicker, McClory, and the Company's chief financial officer, testified. In a post-hearing brief dated March 31, 2020, Wicker requested—for the first time and despite actively participating in the proceeding from mid-November 2019 with knowledge of the cause for the November 2019 Order and the second hearing—that the Hearing Panel dismiss the entire proceeding against him

[5] Several weeks prior to the March 2020 hearing, Enforcement disclosed during a pre-hearing conference that one of the Hearing Panelists worked for a firm undergoing an Enforcement examination and had been assisting the firm with responding to requests for information. (RP 2354-55.) Although Enforcement stated that it did not believe this was a conflict, it nonetheless disclosed this information "in an abundance of caution." (RP 2355.) Wicker's counsel, noting the unusual procedural history of the case, objected to the Hearing Panelist and requested the appointment of a replacement panelist. (RP 2355-56.) Consequently, the Chief Hearing Officer appointed a new Hearing Panelist. (RP 2349.)

pursuant to FINRA Rule 9280. (RP 3275-90.) Wicker asserted, without any evidence, that Enforcement and the Former Hearing Officer engaged in contemptuous conduct by allegedly negotiating with one another during the first proceeding. (RP 3276-77, 3279-82.) Wicker claimed 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. (*Id.*) Wicker urged dismissal of the proceeding in its entirety to remedy this purported misconduct. (*Id*.)

F. The Second Hearing Panel Finds that Wicker Converted Customer Funds and Declines to Dismiss the Case

On June 5, 2020, the Hearing Panel issued its decision. (RP 3295-3336.) It found that Wicker converted the Company's funds, in violation of FINRA Rules 2150 and 2010. The Hearing Panel barred Wicker for his misconduct and ordered him to pay $50,000 in restitution to the Company.

The Hearing Panel thoroughly rejected Wicker's attempt to blame McClory for converting the Company's funds because, according to Wicker, McClory purportedly convinced Wicker to pay him the $50,000 retainer and McClory promised that he would pay the retainer to Underwriter's Counsel from other funds. (RP 3297-98, 3318-22, 3329.) 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. (RP 3329-30.) The Hearing Panel based its determinations, in part, upon extensive credibility findings. (RP 3322-25.) 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." (RP 3322.) In contrast, the Hearing Panel found that McClory credibly testified and that his testimony was corroborated by documentary evidence. (RP 3324-25.)

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The Hearing Panel also rejected Wicker's argument that the entire proceeding should be dismissed pursuant to FINRA Rule 9280 based on alleged contemptuous conduct. (RP 3330-31.) It found that the appropriate remedy to rectify any appearance of a conflict involving the Former Hearing Officer was applied here—the First Hearing Panel's decision was vacated, Wicker had 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 was independent in fact and appearance from the Former Hearing Officer. (RP 3331.)

G. The NAC Finds that Wicker Converted Customer Funds and Bars Wicker

Wicker appealed the June 20, 2020 Hearing Panel decision. (RP 3337-38.) After considering the parties' briefs and arguments, the NAC issued its decision on December 15, 2021. (RP 3741-73.)

1. Wicker Converted the Company's Funds

The NAC found, based upon undisputed facts "amply supported by the record," that Wicker converted the Company's funds, in violation of FINRA Rules 2150 and 2010. (RP 3746, 3754-58.) The NAC found that Wicker knew that the sole purpose of the Company's $50,000 wire to Bonwick was to pay on the Company's behalf a retainer to Underwriter's Counsel and that the Company never authorized Wicker to use its funds for any other purpose. (RP 3754.) The NAC further found that Wicker conceded that he never paid the funds to Underwriter's Counsel or returned the funds, despite multiple requests to do so, and instead used the funds (which were comingled with other funds in Bonwick's operating account) for his and Bonwick's purposes. (RP 3754-55.)

The NAC rejected Wicker's argument that he did not violate FINRA Rule 2150 because the Company, which had engaged Bonwick to serve as its underwriter, was not a customer of the Firm. (RP 3755-56.) The NAC also "flatly reject[ed]" Wicker's attempt to characterize his conversion as a mere contract dispute between Bonwick and the Company. (RP 3756.) Further, the NAC found unconvincing Wicker's argument that he did not convert funds because he did not act with the requisite intent and he simply lacked experience handling customer funds. (*Id.*) Finally, the NAC rejected Wicker's claim that he did not convert the Company's funds because the relevant agreements did not reference a retainer and Underwriter's Counsel never sent a bill for its services. (RP 3758.)

2. Wicker Did Not Demonstrate that the Hearing Panel Abused Its Discretion in Refusing to Dismiss the Entire Proceeding

The NAC also addressed, at length, Wicker's argument that the Hearing Panel should have dismissed the proceeding against him based upon alleged contemptuous conduct that occurred during the first hearing. (RP 3758-64.) The NAC found that Wicker failed to show that the Hearing Panel abused its discretion by declining to dismiss the proceeding under FINRA Rule 9280. It held that under the facts and circumstances, the proper course of action was taken to address any appearance of a conflict with the Former Hearing Officer: (1) the First Hearing Panel decision, authored by the Former Hearing Officer, was vacated in its entirety and all rulings and orders by the First Hearing Panel had no precedent or bearing on the second proceeding; (2) Wicker received a new hearing before a new Hearing Officer and Hearing Panel; and (3) the Hearing Officer instituted procedures pursuant to the Procedures Order to ensure that the new proceeding was fair and free from any conflicts of interest. (RP 3759.) The NAC found these remedies were similar to how other adjudicators have handled analogous situations. (RP 3760.)

The NAC further found that Wicker was not prejudiced by having to undergo a second hearing because he was able to fully defend himself during the second proceeding and present his case to an adjudicator free from both actual conflicts and appearances of conflicts. (*Id.*) The lack of prejudice to Wicker, along with the investing public's strong interest in resolving on the merits the serious allegations underlying the complaint against Wicker, led the NAC to conclude that the Hearing Panel did not abuse its discretion when it declined to dismiss the case. (RP 3761.)

The NAC also thoroughly rejected Wicker's argument that he was somehow prevented from developing the record and obtaining evidence to support his case for dismissal. (RP 3762.) The NAC ruled that the subcommittee empaneled to hear this matter properly denied Wicker's motion to adduce additional evidence surrounding the Former Hearing Officer and any negotiations she and Enforcement may have had prior to the First Hearing Panel decision. The NAC found that, among other things, Wicker did not show good cause for failing to introduce or seek this additional evidence during the proceeding below because Wicker had been on notice, since November 2019, that the First Hearing Panel decision was vacated because of the appearance of a conflict when the Former Hearing Officer accepted a job with Enforcement two months after the First Hearing Panel decision. (RP 3763.) The NAC noted that "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 hearing." (*Id.*) With respect to Wicker's argument that Enforcement was required to produce documents related to its negotiations with the Former Hearing Officer as exculpatory evidence, the NAC disagreed and

found that under FINRA's rules such documents, to the extent they exist, are not exculpatory. (RP 3764.)

Finally, the NAC held that even if the record showed that Enforcement and the Former Hearing Officer engaged in negotiations while the First Hearing Panel considered the case (which the record did not), such documents would not have changed the remedy applied here. (RP 3764-65.) In support, the NAC noted that dismissal was a drastic remedy and cited to federal caselaw applying the same remedy as applied here (i.e., vacating the decision and remanding for a new proceeding with different adjudicators) when the original adjudicator had an actual conflict of interest (versus an appearance of a conflict, as was the case with the Former Hearing Officer). (RP 3765.)

3. The NAC Rejects Wicker's Procedural Arguments

The NAC also rejected Wicker's numerous procedural arguments related to how the case was remanded by the NAC to OHO and then vacated by the Chief Hearing Officer. (RP 3765-70.) The NAC acknowledged the unique procedural history of this case, and as general matter it held that

> 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.

(RP 3770.)

Addressing Wicker's specific arguments, the NAC first found that, although the Remand Request from the Chief Hearing Officer to the NAC was "unusual," the Chief Hearing Officer did not exceed her authority by requesting a remand and the Remand Request contained sufficient information for the NAC to consider. (RP 3765-66.)

Second, the NAC rejected Wicker's argument that it improperly remanded the proceeding to OHO because he was denied an opportunity to argue against the remand and develop the record concerning Enforcement's alleged contemptuous conduct. (RP 3766-68.) The NAC held that remanding the case to OHO was within its authority under FINRA's rules, hearing arguments from the parties' concerning the Remand Request was not required by FINRA's rules, and that Wicker failed to explain how he was prejudiced by his inability to "pursue his appeal." The NAC noted that this was especially true considering that, following the remand, the First Hearing Panel decision, which barred Wicker for engaging in highly serious misconduct, was vacated. (RP 3766.) The NAC also found that the failure to strictly comply with FINRA's rule specifying what must be included in any decision was harmless error and that its Remand Order contained sufficient detail concerning why the NAC was remanding the case. (RP 3768.)

Third, the NAC rejected Wicker's argument that the Chief Hearing Officer lacked authority to vacate the First Hearing Panel decision and that her November 2019 Order lacked sufficient detail. (*Id.*) It held that although the NAC could have vacated the First Hearing Panel decision, this fact did not foreclose the Chief Hearing Officer from vacating the decision after the NAC returned jurisdiction of the matter to OHO. (RP 3770.) The NAC further found that the November 2019 Order contained sufficient detail and, if Wicker did not understand it or needed more details, he could have—but did not—raise these issues at numerous points during the second proceeding. (*Id.*) It also rejected Wicker's claim that his inability to make arguments prior to the Chief Hearing Officer vacating the First Hearing Panel decision warranted dismissing the case against him.

4. The NAC Bars Wicker for His Egregious Misconduct and Orders Restitution

Following the recommendation of FINRA's Sanction Guidelines for converting customer funds, which provide that a bar is "standard," the NAC barred Wicker in all capacities. (RP 3771-72.) The NAC concluded that barring Wicker for converting customer funds was the appropriate remedial sanction for several reasons. It found that Wicker exhibited "flagrant dishonesty," which rendered him "unfit" to work in the securities industry. (RP 3771.) The NAC further found that Wicker acted intentionally and knew that the Company's funds were to be used solely to pay Underwriter's Counsel. Despite this knowledge, Wicker refused to return the funds and instead used them for his and Bonwick's benefit. Further, the NAC found that Wicker ignored numerous requests to return the funds or to pay Underwriter's Counsel, and instead concealed his conversion and made excuses or misrepresentations concerning the Company's funds. (*Id.*) Finally, the NAC found that Wicker's misconduct directly harmed the Company and that Wicker did not take any responsibility, or show any remorse, for his extremely serious misconduct. (RP 3771-72.)

The NAC also ordered that Wicker pay $50,000 in restitution to the Company for converting its funds. It found that the Company lost $50,000 as a direct and foreseeable result of Wicker's conversion. (RP 3772-73.)

IV. ARGUMENT

The Commission must dismiss this application for review if it finds that Wicker engaged in conduct that violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Securities Exchange Act of 1934 ("Exchange Act"), and FINRA imposed

sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition.[6] 15 U.S.C. § 78s(e).

The record conclusively supports the NAC's findings that Wicker converted customer funds, in violation of FINRA rules. Moreover, barring Wicker and ordering him to repay the victimized customer are appropriately remedial sanctions and are neither excessive nor oppressive sanctions for Wicker's highly serious breach of rules fundamental to the securities industry. Wicker's arguments on appeal concerning the alleged unfairness of FINRA's proceeding, which repeat arguments that he made to the NAC and Hearing Panel, do not serve as a basis for disturbing the NAC's findings or sanctions. Wicker ultimately had an opportunity to fully defend himself against Enforcement's allegations, before adjudicators free from any actual conflicts or appearances of a conflict. The Commission should therefore reject Wicker's belated attempt to second-guess the Hearing Panel's refusal to employ the drastic remedy of dismissing the case against him, and reject his remaining procedural arguments.

A. Wicker Converted Customer Funds in Violation of FINRA's Rules

The undisputed facts demonstrate that Wicker converted customer funds, in violation of FINRA Rules 2150 and 2010.

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 when 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*,

[6] Wicker does not contend that FINRA's sanctions impose an undue burden on competition.

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."[7] 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). 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).

The record conclusively demonstrates that Wicker converted customer funds. Wicker admittedly knew that the Company, Bonwick's investment banking customer, 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 to assist with the Company's IPO. Wicker admitted 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. (RP 2263-64.) Wicker controlled Bonwick's operating account into which the retainer was wired, and he authorized withdrawals and payments from the account for other purposes (including

[7] 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."

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payments to himself totaling more than $440,000). (RP 2264, 2431, 2491-95.) For more than six months, McClory, Underwriter's Counsel, and ultimately the Company and its attorney tried to get Wicker to pay Underwriter's Counsel the retainer or to return the funds to the Company. Wicker never did so. (RP 2264, 2519-22, 2480, 2578, 3109-11, 3117, 3125, 3135, 3141, 3153, 3157-64.) Instead, he ignored these requests and made excuses and misrepresentations while he spent all of the money—including the Company's funds—in Bonwick's operating account.

On appeal, Wicker's arguments that he did not convert the Company's funds lack support. He states that while he "maintains his innocence" and acknowledges "shortcomings" in how the Company's funds were handled, he did not violate FINRA Rules 2150 and 2010. *See* Wicker's Br., at 1, 3, 5, 6. He further asserts, as he did before the NAC, that he is an "honest broker who simply got involved in an underwriting deal that went awry" and that he did not convert the Company's funds because they did not involve a security account. Wicker's Br., at 3.

The NAC rejected these arguments, and so should the Commission. (RP 3755-57.) The record demonstrates that Wicker was not an "honest broker," but rather he intentionally used funds that did not belong to him for an unintended purpose (and then concealed his conversion). Regardless, scienter is not required to demonstrate that Wicker converted the Company's 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). And, the fact that the Company did not have a securities account at Bonwick and the Company's funds were not placed in a securities account do not somehow negate Wicker's conversion of an investment banking customer's funds. *See* FINRA Rule 2150; *Citigroup Glob. Mkts., 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"); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 741 (9th Cir. 2013) (holding that party was a customer when 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").

In sum, the record strongly supports the NAC's findings that Wicker converted the Company's funds. The Commission should therefore sustain the NAC's findings.

B. The Proceeding Against Wicker Was Fair

Wicker spends most of his brief arguing that the proceeding against him must be dismissed as a matter of fairness. Specifically, Wicker argues that the complaint should have been dismissed based upon his unsupported allegations—thoroughly rejected by the Hearing Panel and the NAC and not evidenced in the record—that the Former Hearing Officer and Enforcement engaged in contemptuous conduct during the first hearing. He further argues that he was deprived an opportunity to obtain evidence in support of his argument concerning this purported contemptuous conduct, and that in vacating the First Hearing Panel decision and affording Wicker a second hearing, the Chief Hearing Officer and the NAC violated numerous FINRA procedural rules.

The Commission should reject Wicker's baseless arguments. The second Hearing Panel was correct in ruling that Wicker failed to prove contemptuous conduct. Wicker also fails to show that he experienced any undue prejudice, particularly in light of the remedy he was given—the First Hearing Panel decision was vacated and he received a new hearing before new

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adjudicators. Moreover, the Chief Hearing Officer and the NAC acted consistent with FINRA's rules in remanding the case and vacating the First Hearing Panel decision.

1. Wicker Failed to Show that the Hearing Panel Abused Its Discretion

The NAC correctly found that Wicker failed to demonstrate that the Hearing Panel abused its discretion when it declined to dismiss the proceeding against him as a sanction for alleged contemptuous conduct by FINRA staff. The Commission should reject Wicker's arguments to the contrary.

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, and the NAC has interpreted this sanction to include dismissing a proceeding. *See* FINRA Rule 9280(b)(1)(C); *Dep't of Enf't v. Larson*, Complaint No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *20 n.18 (FINRA NAC Sept. 21, 2020). A decision by a FINRA Hearing Panel to decline to sanction a party pursuant to FINRA Rule 9280 is reviewed under an abuse of discretion standard. *Cf. Sorenson v. Wolfson*, 683 F. App'x 33, 35 (2d Cir. 2017) (stating that the court reviews a district court's denial of a motion for sanctions under Fed. R. Civ. P. 11 for abuse of discretion); *Allen v. Exxon Corp.*, 102 F.3d 429, 432 (9th Cir. 1996) ("We review sanctions imposed by a district court [under Fed. R. Civ. P. 37] for abuse of discretion and will not reverse absent a definite and firm conviction that the district court made a clear error of judgment."). 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).

Moreover, the sanction Wicker seeks here—dismissal of the proceeding against him with prejudice—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." *Weisberg v. Webster*, 749 F.2d 864, 869 (D.C. Cir. 1984); *see 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 Commission 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 public's interest in resolving allegations of misconduct on the merits. *Cf. Allen*, 102 F.3d at 433 (stating that when determining whether dismissal is warranted, a district court must consider the public's interest in the expeditious resolution of litigation, the risk of prejudice to the defendant, and the public policy favoring disposition of cases on their merits); *Tujibikila v. Allyn*, No. 19-C-193, 2020 U.S. Dist. LEXIS 75058, at *4-5 (E.D. Wis. Apr. 29, 2020) ("Factors suggested by the Seventh Circuit for district courts to consider when dismissing a case . . . include . . . whether the misconduct prejudiced the other party . . . [and] the likely merits of the wrongdoer's case.").

The NAC properly examined these factors when it determined that Wicker had not met his heavy burden to show that the Hearing Panel abused its discretion. (RP 3758-61.) First, the NAC found that when Wicker made his belated argument that the case should be dismissed, he had already received the appropriate remedy for the Former Hearing Officer's appearance of a conflict of interest—the Chief Hearing Officer vacated the First Hearing Panel decision against him, ordered a new hearing before new adjudicators, and ordered that any and all decisions and

orders by the First Hearing Panel would have no bearing on the second proceeding. The NAC observed that the remedy afforded to Wicker is similar to the remedies afforded by other adjudicators in similar circumstances. (RP 3760.) Contrary to Wicker's claim that this was a "mere redo" and insignificant, vacating the First Hearing Panel decision required Enforcement to demonstrate before another hearing panel that Wicker had converted customer funds and eliminated a bar and restitution order against him. *See* Wicker's Br., at 12.

Second, the NAC correctly concluded that Wicker did not suffer the kind of prejudice necessary to support dismissal.[8] Although it is undisputed that Wicker had to undergo a second proceeding (which took additional time and for which Wicker incurred costs by hiring an attorney to represent him), it is also undisputed that Wicker was able to fully defend himself in the second proceeding before an adjudicator free from actual conflicts or the appearance of conflicts. *See, e.g.*, *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 impacted 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); *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 when applicants were able to defend

[8] Contrary to the case law cited by the NAC in which prejudice to a moving party is central to any decision to dismiss a case to sanction a party who has engaged in misconduct, Wicker argues that he did not need to show actual prejudice and, regardless, he has suffered "significant prejudice" here because of the time and costs involved and the purported impact of the second proceeding on his career. *See* Wicker's Br., at 31. For the reasons stated herein, Wicker is wrong on both counts.

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themselves against the charge); *see also* 15 U.S.C. §§ 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding fairness requirements of the Exchange Act met when FINRA brought specific charges, respondent had notice of charges and an opportunity to defend himself, and FINRA kept a record of proceedings).

Third, the NAC found that the public interest weighed strongly in favor of denying Wicker's request to dismiss the case and resolving Enforcement's complaint against Wicker on the merits. (RP 3761.) Enforcement alleged that Wicker converted customer funds, and the undisputed evidence showed that Wicker committed this serious securities industry violation when he used the Company's funds for his own benefit and then concealed his misconduct for many months thereafter. Declining to dismiss the case against Wicker was entirely appropriate, considering that the Chief Hearing Officer had already granted Wicker appropriate relief by vacating the First Hearing Panel decision and ordering a new hearing.

Wicker repeatedly argues that the Hearing Panel and NAC erroneously declined to dismiss the proceeding against him because they never addressed Enforcement's role in negotiating with, and ultimately hiring, the Former Hearing Officer. *See* Wicker's Br., at 1-3, 8, 12-13, 19. The Hearing Panel and the NAC, however, decided Wicker's belated request to dismiss the proceeding against him on the record before them. That record showed that: (1) the First Hearing Panel barred Wicker for converting customer funds; (2) the Former Hearing Officer joined Enforcement approximately two months after that decision was issued; (3) the Chief Hearing Officer later vacated the decision because she determined that the Former Hearing Officer joining Enforcement shortly after issuance of the First Hearing Panel decision created a situation in which her fairness might reasonably be questioned; and (4) Wicker was able to

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defend himself fully during the second hearing. Other than innuendo and speculation, Wicker points to nothing in the record supporting his claims of contemptuous conduct (and certainly nothing to support the drastic remedy of dismissing the entire case against him).[9] Simply put, the NAC reached its conclusion in the context of the record before it—not the unsupported facts that Wicker now wishes he had attempted to develop during the second proceeding.

2. Wicker Failed to Seek Discovery or Information Concerning Alleged Contemptuous Conduct During the Second Proceeding

Wicker had an opportunity during the second proceeding to seek additional information concerning the Former Hearing Officer and the issues surrounding her employment by Enforcement two months after the First Hearing Panel decision. Wicker, however, chose not to seek any such information. When he amended his answer to the complaint, Wicker did not raise any issues related to the Former Hearing Officer and Enforcement. (RP 2213-16.) When participating in pre-hearing conferences, neither Wicker nor his attorney raised any such issues. The same is true after Enforcement staff filed declarations pursuant to the Procedures Order, which underscored the issue of disqualifications and conflicts. And despite entering a case management order that permitted Wicker to seek additional discovery, Wicker did not do so. Only after participating fully in the second proceeding for nearly five months, and after a two-day evidentiary hearing, did Wicker first argue that the Former Hearing Officer and Enforcement had engaged in contemptuous conduct by purportedly conducting negotiations while the case was pending.

[9] In his opening brief, Wicker points to two FINRA job postings—one from mid-January 2019 and another from March 25, 2019 (after the First Hearing Panel decision was issued), for the job he asserts that the Former Hearing Officer eventually secured with Enforcement. *See* Wicker's Br., at 6. Wicker, however, does not explain his failures to reference these postings or to seek to introduce them as evidence during the second FINRA proceeding.

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To get around his failure to pursue this information despite a clear ability to do so, Wicker makes the factual assertion in his brief that he did not have sufficient knowledge during the second proceeding that would have caused him to seek information related to his claims that the Former Hearing Officer and Enforcement engaged in contemptuous conduct. Wicker alleges that the "real basis for remand" was revealed only after he saw the November 2019 Remand Request in January 2021 and only then did he fully understand the issues related to the Former Hearing Officer and Enforcement.[10] *See* Wicker's Br., at 34. Wicker characterizes his failures to seek any information during the second proceeding as "refusals" by Enforcement, OHO, and the NAC to allow him "to get a full picture of the abusive behavior by Enforcement, and the communications between Enforcement, OHO, [the Former Hearing Officer], [FINRA's Office of General Counsel,] and the NAC, that further establish that abusive behavior." *See* Wicker's Br., at 2.

The NAC rejected Wicker's claims as having no factual basis, and the Commission should do the same. The record unequivocally shows that starting with the November 2019 Order, Wicker had the information he needed to decide whether to raise issues concerning, or pursue documentary support for, any claims that the Former Hearing Officer and Enforcement engaged in contemptuous conduct during the first proceeding. This information was stated in the November 2019 Order and repeated to him during several pre-hearing conferences in November and December 2019 (and again in the Procedures Order), prior to the discovery deadlines set

[10] As explained in the NAC decision, documents related to Wicker's appeal of the First Hearing Panel decision, including the Remand Request (which was not sent to Wicker or Enforcement by the Chief Hearing Officer in November 2019), were inadvertently excluded from the certified record sent by OHO to FINRA's Office of General Counsel in connection with Wicker's appeal of the June 2020 Hearing Panel decision. (RP 3367, 3762.) FINRA's Office of General Counsel corrected this oversight after Wicker's counsel raised the issue in January 2021. (RP 3419.)

forth in the case management order issued by the Hearing Officer and at all times when counsel represented Wicker. (RP 2085, 2101-02, 2093-95, 2187-88.)

Wicker was not precluded from pursuing such information; rather, Wicker and his counsel appear to have chosen not to pursue any information.[11] Wicker's belated regret of his strategic choice cannot serve as a basis for dismissing the proceeding against him. *See Russo Sec., Inc.*, Exchange Act Release No. 44186, 2001 SEC LEXIS 2771, at *20 (Apr. 17, 2001) (stating "public policy considerations favor the expeditious disposition of litigation, and a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action"); *cf. Hardy v. Walsh Manning Sec. LLC*, No. 02 Civ. 1522, 2002 U.S. Dist. LEXIS 16589, at *8-9 (S.D.N.Y. Sept. 5, 2002) (holding that respondents, who actively participated in an arbitration proceeding by participating in discovery and a hearing, waived any objection to jurisdiction), *remanded on other grounds*, 2003 U.S. App. LEXIS 16922 (2d Cir. Aug. 19, 2003). Wicker's claims that he was "denied critical evidence" are undercut by his inaction and silence during the second proceeding. *See* Wicker's Br., at 7

Moreover, the record shows that Wicker did not learn anything materially different in January 2021, when he first saw the Remand Request and made a belated attempt to adduce information on appeal concerning the Former Hearing Officer and her subsequent employment

[11] Two additional facts underscore that Wicker possessed sufficient knowledge to raise these issues during the second proceeding. First, as described above, Wicker's counsel objected to a Hearing Panelist several weeks before the March 2020 hearing when Enforcement disclosed that the panelist was assisting another member firm with responses to FINRA examination staff. At that time, and in making his objection to a panelist with a potential appearance of a conflict, Wicker's counsel raised the unique procedural history of this matter. (RP 2355-56.) Second, Wicker's counsel made the very same argument he makes today concerning alleged contemptuous conduct in his March 2020 post-hearing brief, after he had heard all the evidence and witness testimony demonstrating that Wicker converted the Company's funds. Importantly, no new facts unknown to Wicker concerning the Former Hearing Officer were revealed during the hearing.

by Enforcement. In the Remand Request, the Chief Hearing Officer stated that 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. (RP 3501.) Contrary to Wicker's repeated assertions, the Chief Hearing Officer *did not* determine that the Former Hearing Officer was disqualified in the Remand Request. *See, e.g.*, Wicker's Br., at 3, 10-11. Nor did the Chief Hearing Officer state whether the Former Hearing Officer may have been disqualified because of an actual conflict or bias under FINRA Rule 9233 because she took a job with Enforcement shortly after issuing the First Hearing Panel decision. *See, e.g.*, Wicker's Br., at 14 (incorrectly stating that the only way to interpret the basis for the Remand Request is that the Former Hearing Officer was negotiating with Enforcement during the proceeding, such that she had an actual conflict of interest).

In the November 2019 Order, which Wicker received when the Chief Hearing Officer issued it, the Chief Hearing Officer determined that the Former Hearing Officer was disqualified because the circumstances of her taking a job with Enforcement shortly after issuing the First Hearing Panel decision created a situation in which her fairness could reasonably be questioned. (RP 2085.) There is nothing inconsistent between the language used in the Remand Request and the November 2019 Order, and Wicker did not question the fact that the Former Hearing Officer was subject to disqualification based upon the appearance of a conflict under FINRA Rule 9233 during discovery or the hearing in the second proceeding and did so only when he raised the matter in his motion to adduce additional evidence. The NAC correctly found that the subcommittee empaneled to hear the case properly denied Wicker's motion to adduce additional evidence on appeal because he failed to demonstrate good cause for not doing so during the

second proceeding. Wicker has presented no legitimate arguments on appeal to disturb these findings.

3. Enforcement Complied with FINRA's Rules in Producing Documents to Wicker

Finally, the Commission should reject Wicker's arguments that Enforcement was required to produce, as material exculpatory evidence, any communications concerning employment negotiations with the Former Hearing Officer pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Wicker's Br., at 38. As the NAC found, the *Brady* doctrine (which applies to criminal proceedings) is inapplicable to FINRA proceedings. *See Gopi Vungarala*, Exchange Act Release No. 90476, 2020 SEC LEXIS 4938, at *33 n.53 (Nov. 20, 2020). 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); *Dep't of Enf't v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *44 (FINRA NAC Dec. 29, 2014) (holding that FINRA rules, not *Brady*, govern production of documents), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016), *petition denied*, 712 F. App'x 46 (2d Cir. 2017). 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).

Evidence is considered material and exculpatory if it would have had a reasonable probability of resulting in a different outcome regarding Wicker's liability or the sanctions imposed for his misconduct. *Cf. 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 [SEC Rule of Practice] 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").

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, such that these documents should have been produced under FINRA's rules. *See* FINRA Rule 9251(a)(1). Further, he concedes that any such documents would not be material to whether Wicker converted the Company's funds or the appropriate sanctions for his conversion. *See* Wicker's Br., at 38. Instead, he argues that any such documents would have been material to determine whether he received a fair proceeding. *Id.*

Any communications between the Former Hearing Officer and Enforcement, if they exist, are not material exculpatory evidence. First, Wicker fails to explain why any such documents have any relevance to the second proceeding when the Chief Hearing Officer vacated the First Hearing Panel decision based on the Former Hearing Officer's employment with Enforcement. Moreover, his counsel did not contest the fairness of the first or second proceeding until after the second proceeding had concluded. Wicker acted throughout the second proceeding as if any issue created by the Former Hearing Officer's appearance of a conflict had been remedied once the Chief Hearing Officer vacated the First Hearing Panel decision, and only raised the issue in late March 2020, after the second evidentiary hearing had concluded.

Second, as the NAC found, even if the Former Hearing Officer had an actual conflict of interest because she negotiated with Enforcement before issuing the First Hearing Panel decision, Wicker cannot show that this should have changed the outcome here. Indeed, federal

courts have imposed the same remedy used by the Chief Hearing Officer for actual conflicts of interest involving adjudicators—vacating the decision involving the conflicted adjudicator and ordering a new proceeding.[12] *See Williams v. Pennsylvania*, 579 U.S. 1 (2016) (vacating and remanding case so that appellant could present his claims when 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 when 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) (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). The record shows the proceedings against Wicker were fair.

[12] Similarly, federal courts have established a high bar for dismissing cases with prejudice on due process grounds to remedy prosecutorial misconduct. *See, e.g.*, *U.S. v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993) (stating that a district court may dismiss an indictment with prejudice for prosecutorial misconduct only if there is "(1) flagrant misbehavior and (2) substantial prejudice"); *U.S. v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988) (noting that the court's supervisory authority "includes the power to impose the extreme sanction of dismissal with prejudice only in extraordinary situations and only [when] the government's misconduct has prejudiced the defendant"). As set forth above, the Chief Hearing Officer vacated the First Hearing Panel decision and afforded Wicker a new hearing before new adjudicators, in which he was able to fully defend himself against Enforcement's allegations. Wicker has not and cannot establish prejudice sufficient to warrant dismissing the entire proceeding against him. Nor does the record show any misconduct by Enforcement.

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4. Wicker's Unclean Hands Argument Is Untenable and Indistinguishable from His Argument Concerning Contemptuous Conduct

Wicker also argues that the NAC failed to properly address his argument that the case should be dismissed based upon his allegation that Enforcement had unclean hands. *See* Wicker's Br., at 15-19. Wicker is mistaken. First, and as described above, the record simply does not support any finding that Enforcement acted with unclean hands.

Second, Wicker's unclean hands argument is indistinguishable from his argument that the case should have been dismissed based upon the alleged contemptuous conduct of Enforcement and the Former Hearing Officer. The NAC properly rejected that argument as being the same. (RP 3761.)

Third, a respondent such as Wicker "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). Wicker's claim that the unclean hands doctrine is available only to regulatory agencies ignores FINRA precedent—affirmed by the Commission—that has precluded respondents from asserting the doctrine against FINRA to avoid liability for misconduct. *Id.* Similarly, Wicker's citation to a 2002 NAC decision stating that an adjudicator may withhold equitable relief from a party who engaged in wrongdoing is inapposite—that case involved applying the doctrine to a respondent; not to Enforcement to

permit the respondent to avoid liability for misconduct.[13] *See Morgan Stanley DW Inc.*, 2002 NASD Discip. LEXIS 11, at *35-36.

5. Wicker's Procedural Arguments Surrounding the Mechanics of Providing Him with a Second Hearing Free of the Appearance of Conflicts Are Unavailing

Wicker raises myriad alleged improprieties surrounding the steps taken by the Chief Hearing Officer and the NAC that ultimately resulted in the Chief Hearing Officer vacating the First Hearing Panel decision and ordering a new hearing. As described below, most of Wicker's arguments are baseless, and the few instances when FINRA may not have strictly complied with its procedures constitute at most harmless error and should not serve as a basis to dismiss the entire proceeding. This is especially true given: (1) the unique facts and circumstances of this case, which the NAC acknowledged did not necessarily squarely fall under existing FINRA procedures; (2) the end result of the process of which Wicker now complains was to dismiss the First Hearing Panel decision and grant Wicker a new hearing before new adjudicators; (3) Wicker and his counsel participated fully in the second proceeding without questioning or objecting to the fact that the First Hearing Panel decision was vacated or the process by which

[13] Wicker argues that dismissing the case against him is consistent with *Jeffrey Ainley Hayden*, 54 S.E.C. 651 (2000) and *Dep't of Enf't v. Morgan Stanley DW Inc.*, Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11 (NASD NAC July 29, 2002). These cases, however, are inapposite. In *Hayden*, the Commission dismissed a self-regulatory organization's disciplinary proceeding against a respondent because the lengthy delay in bringing the proceeding was "inherently unfair." 54 S.E.C. at 654. In *Morgan Stanley*, the NAC affirmed the Hearing Panel's dismissal of a disciplinary proceeding against the respondents because of undue delay. The NAC based its 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." 2002 NASD Discip. LEXIS 11, 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, Wicker had an opportunity to fully defend himself against Enforcement's allegations before impartial adjudicators.

that occurred; and (4) Wicker suffered no prejudice and was able to fully defend himself and raise the arguments that he belatedly made during the second proceeding.[14]

a. The Remand Request Was Appropriate

Wicker challenges the Remand Request from the Chief Hearing Officer asking the NAC to remand the case to OHO for further proceedings. *See* Wicker's Br., at 21-25. The Chief Hearing Officer properly made the Remand Request. Contrary to Wicker's assertion, the Remand Request contained sufficient information for the NAC to rule on it (and if it did not, the NAC could have asked for clarification). 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" the date of the First Hearing Panel decision, and thus requested that the NAC return the case to OHO for consideration and further proceedings. Further, while the Chief Hearing Officer was not a "party" to the proceeding, no FINRA rule precluded her from making the Remand Request upon learning that the Former Hearing Officer may have been subject to disqualification pursuant to FINRA Rule 9233.

Wicker's suggestion that permitting the Chief Hearing Officer to make the Remand Request will open the door for any "non-party" to indiscriminately file documents in disciplinary proceedings is baseless and ignores the unique facts and circumstances of this case. Further, notwithstanding Wicker's stated preference for the NAC to decide whether the Former Hearing

[14] *See, e.g.*, *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 that 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).

Officer was disqualified under FINRA Rule 9233, the Chief Hearing Officer did not violate any FINRA rule in making the Remand Request and asking that the NAC return to OHO jurisdiction over the matter so OHO could make that determination. Indeed, Wicker has not explained how he was prejudiced by the Remand Request and jurisdiction returning to OHO to decide the matter—he was able to raise arguments and marshal evidence concerning the Former Hearing Officer before OHO during the second proceeding. The only practical consequence of the Remand Request and the NAC granting the request was to shift the forum for Wicker's arguments—arguments that he only made after the evidentiary hearing in the second proceeding—from the NAC to OHO.[15]

b. The NAC Properly Remanded the Case

Wicker also challenges the propriety of NAC's Remand Order. He asserts that: (1) the NAC was not permitted to review the Remand Request because it was not part of the record pursuant to FINRA Rule 9346; (2) the NAC failed to use a subcommittee to decide the Remand Request; (3) the Remand Order did not comply with all elements of FINRA Rule 9349, which "significantly prejudiced" him because a compliant decision would have provided Wicker with "a significantly clearer understanding of the basis for the remand" and permitted him to seek additional discovery; (4) the NAC should have itself decided the appropriate remedy to resolve the issue concerning the Former Hearing Officer; and (5) the NAC deprived him of an

[15] Wicker emphasizes that he and Enforcement should have been copied on the Remand Request (and later, the Remand Order). He argues that the Remand Request was like a motion to adduce additional evidence (which must be served on all parties). The NAC correctly found that no FINRA rule required that the parties be copied on these documents, and Wicker's comparison of the Remand Request to a motion to adduce is misplaced. And, contrary to Wicker's suggestion, the NAC's statement encouraging that similar documents in the future be served on all parties does not show that the failure to do so here constituted an error (and certainly not an error sufficiently grave to require dismissing the entire proceeding).

opportunity to adduce additional evidence concerning the Former Hearing Officer. *See* Wicker's Br., at 26-31.

The Commission should reject Wicker's arguments, as they are either baseless or do not constitute procedural errors that deprived Wicker of a fair proceeding. For example, FINRA Rule 9346(a) (which prescribes the scope of what the NAC may consider on appeal) 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 and was not outside the scope of its review. Further, Wicker does not explain how the fact that a subcommittee did not issue the Remand Order prejudiced him in any way, and while the NAC could have denied the Remand Request, retained jurisdiction over Wicker's appeal, and decided the appropriate remedy for the Former Hearing Officer's appearance of a conflict of interest, nothing precluded the NAC from returning jurisdiction to OHO to allow it to consider the issue and fashion an appropriate remedy. *See* FINRA Rules 9348 (stating that the NAC's powers include the ability to remand a disciplinary proceeding with instructions) and 9349(a) (providing that the NAC or the Review Subcommittee may remand a disciplinary proceeding with instructions).

Moreover, the NAC's Remand Order, while brief, was clear in that it: (1) granted the Remand Request based upon the reason set forth therein; and (2) sent the entire matter back to OHO for its consideration. Under the circumstances, and given that the Chief Hearing Officer requested that the entire proceeding be remanded to OHO for further consideration of the Former Hearing Officer's potential disqualification, it was unnecessary to include in the Remand Order all of the information set forth in FINRA Rule 9349(b) because including this information in the

Remand Order would not have provided any new information on the narrow issue before the NAC.[16] And, after the NAC issued the Remand Order, the Chief Hearing Officer issued to the parties the November 2019 Order, in which she vacated the First Hearing Panel decision because the Former Hearing Officer's subsequent employment with Enforcement created circumstances in which her fairness might reasonably be questioned. The November 2019 Order, and additional disclosures that occurred during the second proceeding, put Wicker squarely on notice of the issue of which he now complains and provided him with sufficient information and opportunity to make arguments and to seek additional evidence during the second proceeding.[17]

c. The Chief Hearing Officer Properly Vacated the First Hearing Panel Decision

Finally, Wicker argues that the Chief Hearing Officer improperly vacated the First Hearing Panel decision (even though she wiped away a decision against him finding that he engaged in serious misconduct for which he was barred and ordered a new hearing). He argues that FINRA Rule 9233 does not apply after a Hearing Panel has issued its decision and the matter is appealed to the NAC and that the Chief Hearing Officer was "protecting OHO and

[16] *See* FINRA Rule 9349(b) (providing that a NAC decision shall contain 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's final decision contains all the procedural background, findings of fact, conclusions of law, and the statements required by FINRA Rule 9349(b).

[17] Contrary to Wicker's assertion, the NAC did not need to hear arguments from the parties concerning the Remand Request before it issued the Remand Order. And, even if Wicker could point to such a requirement, he had every opportunity to seek information and make arguments concerning the Former Hearing Officer and purported contemptuous conduct by FINRA during the second proceeding. Yet he did not do so until several weeks after the March 2020 evidentiary hearing had concluded.

Enforcement at the expense" of Wicker without getting the parties' input. *See* Wicker's Br., at 24, 33.

The Commission should reject Wicker's baseless arguments. As the NAC explained, after it issued the Remand Order, OHO had jurisdiction over the matter and nothing in FINRA Rule 9233 limits disqualification of an adjudicator to only those instances when a decision has not been issued. Once OHO had jurisdiction, the Chief Hearing Officer had the authority to appoint a replacement Hearing Officer. *Cf.* 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). As the NAC further explained, FINRA's rules permit the Chief Hearing Officer to act on behalf of a Hearing Officer, and a Hearing Officer has broad authority to do "all things necessary and appropriate to discharge his or her duties." *See* FINRA Rule 9235; *see also Dep't of Enf't v. Kirlin Sec., Inc.*, 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). This includes vacating a decision to ensure a respondent such as Wicker has had a hearing before adjudicators free from actual conflicts or the appearance of conflicts.

The NAC acknowledged that FINRA Rule 9235(b) permits the Chief Hearing Officer to act on behalf of a Hearing Officer when the Hearing Officer assigned to a case is unable to discharge her duties "under conditions not requiring the appointment of a replacement Hearing Officer." Here, the Chief Hearing Officer, and not the new Hearing Officer, issued the November 2019 Order. Nonetheless, under the circumstances the NAC properly found that the Chief Hearing Officer was an appropriate adjudicator to vacate the First Hearing Panel decision.

As with Wicker's other arguments on appeal, he does not state how he was prejudiced by the Chief Hearing Officer vacating the First Hearing Panel decision that barred him. *See Wilson*, 49 S.E.C. at 1024. And, although the Chief Hearing Officer vacated the decision without input from the parties, Wicker had every opportunity during the second proceeding to seek dismissal of the case based upon the Former Hearing Officer and Enforcement's alleged contemptuous conduct. That he chose not to do so until the last possible moment in the second proceeding cannot serve as a basis to dismiss the entire proceeding against him.

C. The Sanctions Are Warranted and Are Neither Excessive Nor Oppressive

The record demonstrates that the NAC carefully considered numerous factors, including the highly serious nature of Wicker's conversion, in determining that barring Wicker and ordering that he repay $50,000 in ill-gotten gains to his customer were appropriate sanctions. In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are within the allowable range of sanctions under FINRA's Sanction Guidelines ("Guidelines"). *See* 15 U.S.C. § 78s(e); *Grivas*, 2016 SEC LEXIS 1173, at *25 n.37. The Commission considers the principles articulated in the Guidelines, and has regularly affirmed sanctions that are within the recommended ranges contained in the relevant Guidelines. *See Robert Tretiak*, 56 S.E.C. 209, 233 n.46 (2003). The Guidelines for conversion provide that a bar is the standard sanction regardless of the amount converted.[18] 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.

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

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Wicker does not contest the NAC's bar and order that he pay the Company $50,000 in restitution. These sanctions are appropriately remedial, supported by the record, and the Commission should sustain them. The NAC considered the Guidelines, including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions, and properly determined that a bar was appropriate for Wicker's breach of a fundamental duty owed to customers. The NAC concluded that Wicker demonstrated "flagrant dishonesty" by converting customer funds and found that several aggravating factors further supported a bar. (RP 3771.) Wicker acted intentionally and used the Company's funds for his and Bonwick's purposes despite knowing that the funds were only to be used to pay Underwriter's Counsel. Wicker ignored numerous requests to pay the funds to Underwriter's Counsel or return them to the Company and concealed his use of the funds from the Company and others. The Company suffered financial harm as a direct result of Wicker's conversion. Moreover, Wicker has never accepted responsibility or shown remorse for his serious misconduct. (RP 3771-72.) Indeed, to this day Wicker continues to "maintain his innocence" while shifting blame to McClory for converting customer funds. *See* Wicker's Br., at 1, 3, 5, 6.

The NAC's bar, and order that Wicker repay the Company $50,000 to return it to the position it was in prior to Wicker's misconduct, are appropriately remedial sanctions, neither excessive nor oppressive, and fully supported by the record.[19] The Commission should therefore affirm them.

[19] *Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 5 (discussing restitution)). There is no dispute that Wicker's misconduct was the proximate cause for the Company's loss of its $50,000.

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IV. CONCLUSION

The Commission should sustain FINRA's action in all respects and dismiss Wicker's application for review. The evidence overwhelmingly supports the NAC's findings that Wicker converted customer funds, and he has provided no legitimate reason to overturn these findings. Similarly, Wicker has not, and cannot, demonstrate that the bar and restitution order imposed upon him for his serious betrayal of a customer's trust are excessive or oppressive. These sanctions are encouraged by the Guidelines in a case such as this, and appropriately serve to remediate Wicker's misconduct and protect investors.

Finally, Wicker has not demonstrated that the Hearing Panel abused its discretion when it declined to dismiss the proceeding against him in its entirety for alleged contemptuous conduct. The record is devoid of such evidence, and Wicker was afforded an opportunity to fully defend himself before an adjudicator free from actual conflicts and appearances of conflicts. Wicker's arguments of procedural irregularities are baseless, and do not provide a reason to take the drastic remedy of dismissing the case against Wicker in light of his conversion of customer funds. For all these reasons, FINRA urges the Commission to dismiss Wicker's application for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew Love, certify that on this 20th day of April 2022, I caused a copy of the foregoing Brief in Opposition, Administrative Proceeding File No. 3-20705, to be filed through the SEC's eFAP system and served by electronic mail on:

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CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Andrew Love, further certify that this Brief of FINRA in Opposition to Application for Review complies with the limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,726 words.

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