SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 100148 / May 15, 2024

Admin. Proc. File No. 3-20705

In the Matter of the Application of

DEVIN LAMARR WICKER

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

FINRA found that person associated with member firm converted a customer's funds; barred him for his violations of FINRA rules; and ordered restitution. *Held*, FINRA's findings of violation and sanctions imposed are *sustained*.

APPEARANCES:

Gary A. Carleton of Carleton Law PLLC for Devin Lamarr Wicker.

Alan Lawhead, *Jennifer Brooks*, and *Andrew Love* for FINRA.

Appeal filed: January 13, 2022
Last brief received: April 20, 2022

Devin Lamarr Wicker seeks review of a FINRA disciplinary action.[1] FINRA found that Wicker violated FINRA Rules 2150 and 2010 by converting a customer's funds. For this misconduct, FINRA barred Wicker from association with any FINRA member and ordered that he pay restitution of $50,000, plus interest, to the customer.[2] We sustain FINRA's finding that Wicker violated FINRA Rules 2150 and 2010 by converting a customer's funds. We also sustain FINRA's imposition of a bar and a restitution order.

I. Background[3]

Wicker was registered with FINRA and associated with FINRA member firms from approximately October 2000 to September 2018.[4] As relevant here, he was registered through former FINRA member firm Bonwick Capital Partners, LLC, from June 2012 until December 2016. Wicker founded Bonwick, owned approximately 60 percent of it, and served as its Chief Executive Officer, Chief Compliance Officer, and Chief Financial Officer.

A. A company hired Bonwick to serve as the underwriter for its anticipated public offering and transferred $50,000 to Bonwick for the sole purpose of paying a law firm's retainer, but Wicker used the funds for other purposes.

In February 2016, a company (the "Company") retained Bonwick to serve as underwriter for its anticipated public offering, paying an upfront advisory fee of $50,000. A Bonwick investment banker, DM, was Bonwick's main contact with the Company.

In mid-March 2016, DM emailed Wicker to request that Bonwick engage a law firm (the "Law Firm") to act as its underwriting counsel. DM explained that he anticipated that Bonwick would pay $50,000 to the Law Firm, and the Company would then reimburse Bonwick. Wicker admitted that, during the relevant period, only he could authorize debits, and that he authorized each of Bonwick's debits.

Wicker responded to DM via email that he was concerned about Bonwick being put "on the hook for at least $50k of expense for a client that has limited revenue." Therefore, Wicker instructed DM to obtain $50,000 in legal fees from the Company before engaging the Law Firm. Accordingly, on March 16, 2016, Bonwick invoiced the Company $50,000 for "Underwritier's

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1 *Dep't of Enf't v. Wicker*, Complaint No. 2016052104101, 2021 WL 6050421 (NAC Dec. 15, 2021).

2 FINRA also ordered Wicker to pay costs, and he has not challenged that order.

3 The facts described in this opinion are based on the evidence presented at the second FINRA hearing only because, as explained below, the final FINRA decision that we are reviewing was based only on the second FINRA hearing.

4 *See* BrokerCheck Report for Devin Lamarr Wicker, https://files.brokercheck.finra.org/individual/individual_4228250.pdf. We take official notice of Wicker's BrokerCheck report pursuant to Commission Rule of Practice 323. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records and citing Rule of Practice 323, 17 C.F.R. § 201.323).

[sic] Counsel Retainer." The next day, the Company wired $50,000 to Bonwick's bank account for the sole purpose of paying the Law Firm's retainer. Wicker stipulated that he understood that the purpose of these funds was to pay the Law Firm.

Wicker never used these or any other funds to pay the Law Firm, and he never returned the money to the Company, even though he received at least seven written requests from the Company and the Law Firm to do so. Instead, after the Company wired $50,000 to Bonwick's bank account, essentially all of that account's funds were used to pay Bonwick's other expenses, as well as to transfer approximately $440,500 into Wicker's personal bank account. Bonwick ceased operations in June 2016 and had only $60 in its account by October 7, 2016.

At the FINRA hearing, Wicker attempted to explain his failure to pay the Company or the Law Firm. He testified that he had instructed a subordinate to wire $50,000 to the Law Firm in April 2016. But Wicker's subordinate testified that he did not recall Wicker telling him this. Wicker acknowledged that he became aware that the wire was not actually sent by May 2016.

Wicker testified that in May 2016, DM asked Wicker to transfer the $50,000 intended for the Law Firm's retainer to DM as a commission, and DM promised to pay the Law Firm using funds from another deal once those funds were released from escrow. Wicker testified that he transferred $50,000 from Bonwick's account to DM. But Wicker pointed to no documentary evidence supporting his claim, DM testified that he never promised to personally pay the Law Firm, and Wicker admitted that there was no documentation of this alleged promise. Several emails show that DM sent Wicker, either directly or copied, requests that Bonwick pay or confirm payment of $50,000 to the Law Firm. DM sent these emails on July 20, July 28, and August 10, 2016—after DM allegedly promised to pay the $50,000. The record contains no evidence that Wicker responded to these emails.

An August 24, 2016, email from the Law Firm to Wicker also requested that Wicker pay $50,000 to the Law Firm or return it to the Company. Again, the record contains no evidence that Wicker responded to that email.

The Company's CFO testified that he first became aware that the Law Firm's retainer had not been paid on October 6, 2016, when the Law Firm refused to perform additional work until it received payment. That same day, the Company paid the Law Firm an additional $50,000 so that the offering could go forward.

The Company's CFO wrote a letter dated October 7, 2016, to Wicker, demanding that Bonwick return the $50,000 to the Company immediately. On October 12 and 13, 2016, Wicker sent three emails to the Company's CFO, stating in chronological order that he hoped to address the issue "today," "tomorrow" or "in a few days." The Company's CFO responded on October 13 that, if the money was not in the Company's account by the next day, he would report Wicker to various authorities, including FINRA. The next day, October 14, Wicker responded that he "was only recently made aware of the fact that [DM] did not satisfy this outstanding amount when he left the firm," and Wicker was unsure whether he would communicate with the CFO further without a lawyer. The Company's CFO then followed up with emails on October 18, 21, and 28, and November 11, 2016, demanding that Wicker repay

the $50,000. The record contains no evidence that Wicker responded to these emails. Wicker stipulated that he never repaid the money or sent it to the Law Firm.

B. A first hearing panel issued a decision barring Wicker and ordering restitution, and Wicker appealed the decision.

On August 8, 2018, FINRA's Department of Enforcement ("Enforcement") filed a complaint against Wicker, alleging that he had converted the Company's $50,000 in violation of FINRA Rules 2150(a) and 2010. Enforcement also alleged that Wicker's conversion independently violated Rule 2010.

Starting on February 4, 2019, a hearing panel chaired by a former FINRA hearing officer held a three-day hearing, with Wicker appearing pro se. On March 21, 2019, this hearing panel issued a decision finding that Wicker violated FINRA Rules 2150(a) and 2010, barring Wicker, and ordering restitution of $50,000, plus interest, to the Company and costs. Wicker then filed a pro se notice of appeal to the National Adjudicatory Council ("NAC").

C. After the first hearing officer accepted a position with Enforcement, the NAC remanded the case and FINRA's chief hearing officer vacated the first decision.

On November 8, 2019, after the parties had filed their merits briefs regarding Wicker's first appeal, FINRA's chief hearing officer requested that the NAC "remand the case to the Office of Hearing Officers for consideration and further proceedings" because, after the first hearing panel issued its decision, "[t]he Office of Hearing Officers [had] received information regarding whether [the former hearing officer] was subject to disqualification on or before the date the decision in this proceeding was issued, March 21, 2019." This remand request was not served on Wicker or Enforcement.

On November 11, 2019, the NAC responded by letter stating: "Pursuant to the letter from the Chief Hearing Officer . . . , the NAC hereby remands the above-referenced case to the Office of Hearing Officers. The entire record in this proceeding is being sent to [that Office]." The NAC's remand order was not served on Wicker or Enforcement.

On November 12, 2019, the chief hearing officer issued and served on the parties an order vacating the first hearing panel's decision. This order stated:

> Based upon information received by the Office of Hearing Officers after the decision in this proceeding was issued on March 21, 2019, I find that circumstances exist where the fairness of the Hearing Officer in the proceeding ("Former Hearing Officer") might reasonably be questioned as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement. Accordingly, pursuant to FINRA Code of Procedure Rule 9233(a), I vacate the hearing panel decision dated March 21, 2019. I will assign a new Hearing Officer to preside over a new hearing in this case, with a different hearing panel, and direct that no weight or presumption of correctness be given to any prior decisions, orders, or rulings previously issued in the matter.

Consistent with this order, on November 13, 2019, the chief hearing officer appointed a new hearing officer (the "Hearing Officer").

D. The Hearing Officer presided over a new hearing.

On November 20, 2019, the Hearing Officer held a prehearing conference with Enforcement and Wicker, who was now represented by counsel. The Hearing Officer stated that her "assignment" was to "conduct the case as a new case." She also stated that her understanding of the vacating order was that, after the issuance of the first hearing panel's decision, the chief hearing officer had learned information that involved "the prior hearing officer's change in employment and hiring by the Department of Enforcement a couple months after she issued the decision." The Hearing Officer stated that the chief hearing officer had apparently considered "those circumstances and determined that they created a situation where the fairness of the earlier proceeding might 'reasonably be questioned,'" so the chief hearing officer had vacated the prior decision. The Hearing Officer noted that it might be "burdensome" for Wicker to restart proceedings and provided an opportunity for questions or comments from the parties. Wicker's counsel responded that he had "no questions at this time."

At the same prehearing conference, the Hearing Officer explained that she planned to issue a written order to "make sure that the Enforcement staff handling this case going forward are independent in fact and in appearance from the former hearing officer who previously had this case," as the new proceeding was "a completely fresh start." Accordingly, that same day, the Hearing Officer issued an order requiring any Enforcement staff involved in the matter to file an affidavit or declaration stating that the individual (1) "has had no off-the-record conversations about this case with the former Hearing Officer, either before the former Hearing Officer joined Enforcement or at any time afterward," (2) "was not involved in any way in the decision to hire the former Hearing Officer or the employment process that led to her hiring," and (3) "understands that there is a continuing obligation not to communicate with the former Hearing Officer about this case." This order applied to everyone on the Enforcement "trial team," including "attorneys filing appearances, examiners, investigators, paralegals, and technical personnel," as well as their "reporting structure," including "any person advising the trial team or supervising, directing, or evaluating their work." In addition, the order required the lead counsel's affidavit or declaration to "contain a commitment on Enforcement's behalf" to "promptly notify [the] Case Administrator . . . if Enforcement should discover that any of these directives have been violated, including the ongoing obligation not to talk with the former Hearing Officer about this case." Finally, the written order's introductory paragraph reiterated that the former hearing officer had joined Enforcement about two months after the issuance of the first hearing panel's decision.

On December 4, 2019, the Hearing Officer entered a scheduling order that allowed Wicker to seek additional discovery. The record does not reflect that Wicker sought additional discovery. Wicker subsequently filed an amended answer, and Wicker and Enforcement entered into 24 joint stipulations of fact.

The new hearing panel, chaired by the Hearing Officer, held a hearing on March 9 and 10, 2020. Several witnesses testified, including Wicker, DM, and the Company's CFO. Wicker was represented by counsel throughout the second hearing and during post-hearing briefing.

On March 31, 2020, Wicker filed a post-hearing brief after the second hearing. He argued for the first time that the entire proceeding should be dismissed because Enforcement had allegedly "brib[ed]" the former hearing officer during the first hearing. Specifically, Wicker argued that Enforcement had enticed the former hearing officer with the prospect of her new position during the first hearing. Wicker also stated that, even after the first hearing panel's decision, he was not informed of the situation until, in an order that gave Wicker "minimal information, and seemingly utilized no known Rule or other procedural mechanism," the chief hearing officer "*sua sponte* vacated" the first hearing panel's decision and gave Wicker "a mulligan, only with an entirely new hearing panel." The former hearing officer's new subordinates in Enforcement prosecuted the second hearing, while her former colleagues presided over it. Wicker argued that the entire proceeding should be dismissed as a sanction under FINRA Rule 9280, which provides that a hearing panel may sanction a party that engages in contemptuous conduct during a proceeding, because Enforcement had engaged in contemptuous conduct by "bribing" the former hearing officer.

E. FINRA found that Wicker violated Rules 2150 and 2010 by converting the Company's funds; barred him from associating with any FINRA member; and ordered that he pay restitution.

1. The new hearing panel issued a decision against Wicker.

On June 5, 2020, the new hearing panel issued a decision finding that Wicker had converted the Company's funds, in violation of FINRA Rules 2150(a) and 2010. The hearing panel rejected Wicker's argument that "the circumstances here entitle him to dismissal of the charges against him" and found that "[t]he remedy in a case where an adjudicator should have disqualified him or herself for an appearance of potential impropriety is to vacate that adjudicator's decision and provide another trial free from any appearance problem." The hearing panel found the existence of multiple aggravating factors and no mitigating factors, and imposed a bar on Wicker. The hearing panel also ordered that he pay the Company restitution of $50,000, plus interest.

2. Wicker appealed the new hearing panel's decision and filed a motion to adduce additional evidence with the NAC.

Wicker, again appearing pro se, appealed the new hearing panel's decision to the NAC. Wicker's appeal was untimely filed, but the NAC accepted the late appeal. The NAC imposed procedures similar to those imposed by the Hearing Officer to insulate Enforcement's appellate counsel from the former hearing officer.[5] On October 21, 2020, the Hearing Officer transmitted the certified record to the NAC and served Wicker with the record index.

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[5] In particular, the NAC required Enforcement's "appellate counsel" and their "reporting structure" to file declarations or affidavits stating that they had not had off-the-record conversations with the former hearing officer before or after she joined Enforcement; that they were not involved in the hiring of the former hearing officer; and that they were aware of the continuing obligation not to communicate with the former hearing officer about the case. In

(*continued*…)

Wicker subsequently retained new counsel for his appeal of the second hearing panel's decision. On January 9, 2021, Wicker's new counsel filed a letter with the NAC inquiring about documents related to Wicker's first appeal that seemed to be missing from the record. On January 12, 2021, a FINRA Associate General Counsel responded that these documents had been "inadvertently omitted" from the record, and the record was therefore supplemented with documents concerning Wicker's first appeal, including the chief hearing officer's remand request to the NAC and the NAC's remand order.

On February 1, 2021, Wicker filed a motion with the NAC that he styled as a motion to adduce additional evidence on appeal, in which he sought to obtain and then introduce evidence regarding Enforcement's employment negotiations with the former hearing officer. Wicker indicated that, the day before he filed his motion, he had sent a letter to Enforcement to request its production of this evidence. As the basis for his motion, Wicker argued that the previously-undisclosed remand request and order indicated that Enforcement had acted unethically during the first hearing and that FINRA rules had prohibited the former hearing officer from participating in the first hearing. Wicker also argued that the motion was timely because it occurred within 30 days of supplementation of the record. Enforcement opposed Wicker's motion.

A NAC subcommittee denied Wicker's motion to adduce additional evidence.[6] The subcommittee found that Wicker had not shown good cause for his failure to introduce the evidence earlier because, during the second hearing, he had been on notice that Enforcement had hired the former hearing officer, yet he had not sought evidence concerning the employment negotiations. The subcommittee found that the motion to adduce was also untimely because it was not filed within 30 days of the initial record index, and FINRA's supplement to the record did not reset the deadline because it "did not contain material, new information."

3. The NAC affirmed the new hearing panel's decision.

The NAC affirmed the new hearing panel's decision, finding that Wicker had converted customer funds in violation of FINRA Rules 2150 and 2010 and separately and independently in violation of Rule 2010, barring Wicker, and ordering restitution. The NAC rejected Wicker's argument that the case should be dismissed as a sanction on Enforcement under Rule 9280 or because Enforcement had unclean hands, finding that Wicker had received a full and fair hearing before the new hearing panel and the public has a strong interest "in having claims of serious misconduct such as conversion resolved on the merits." The NAC alternatively rejected Wicker's unclean-hands argument by holding that associated persons could not negate their own misconduct by pointing to FINRA's alleged misconduct. And the NAC found that the procedures used to remand the case and vacate the first decision were generally consistent with

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addition, the lead appellate counsel's affidavit or declaration had to commit to informing FINRA's Appellate Group Director if Enforcement discovered that any of these conditions had been violated.

6 The NAC later upheld the subcommittee's denial of Wicker's motion.

existing FINRA rules and any procedural errors that occurred were harmless. This appeal followed.

II. Analysis

In reviewing FINRA's action, Securities Exchange Act of 1934 Section 19(e)(1) requires us to determine (1) whether the applicant engaged in the conduct FINRA found, (2) whether that conduct violated the rules specified in FINRA's determination, and (3) whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[7] We base our findings on an independent review of the record and apply a preponderance-of-the-evidence standard.[8]

Wicker forfeited any challenge to FINRA's findings by failing to specifically brief them,[9] but, consistent with our standard of review, we explain below our decision to sustain FINRA's finding that Wicker converted—and therefore improperly used—customer funds in violation of FINRA Rules 2150 and 2010.[10] We further find that, although some of FINRA's procedures in remanding Wicker's first appeal were flawed, FINRA still applied Rules 2150 and 2010 in a manner consistent with the purposes of the Exchange Act.[11]

A. Wicker engaged in the conduct FINRA found.

The Company retained and paid Bonwick to serve as the underwriter for its public offering. Wicker controlled Bonwick's finances, and he knew that the Company provided it with $50,000 for the sole purpose of paying the Law Firm's retainer. Wicker nevertheless used the money for other purposes. Specifically, after the money was deposited into Bonwick's operating account, Wicker used all but $60 in that account to pay Bonwick's expenses and himself.

Wicker testified that he told his subordinate to wire $50,000 to the Law Firm in April 2016, but he also acknowledged that he learned by May 2016 that the payment had not been made. We do not credit Wicker's uncorroborated account that he transferred $50,000 to DM in May 2016 based on DM's promise to pay the Law Firm after a separate deal closed. No documentation supports DM's alleged promise. And DM testified that he never promised to personally pay the Law Firm, which *is* corroborated by several emails DM sent to Wicker requesting payment after the alleged agreement. Rather than respond that DM owed the money, Wicker did not reply at all, which is inconsistent with Wicker's claim that DM had agreed to pay

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7 Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1).

8 *E.g.*, *Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 WL 6867617, at *7 (Nov. 20, 2020).

9 *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule 450(b)] may, at the discretion of the Commission, be deemed to have been waived by the applicant.").

10 *See infra* Section II.A-B.

11 *See infra* Section II.C; Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8) (requiring FINRA to provide a "fair procedure" for disciplining associated persons).

the Law Firm. Thus, we credit DM's corroborated account over Wicker's uncorroborated account.[12]

Because Wicker failed to transfer the money to the Law Firm or the Company, despite repeated requests to do so, and because he provided the Company with the false excuse that DM was responsible for paying the debt, we find that Wicker's unauthorized use of the money was intentional.[13]

B. Wicker converted customer funds and thereby violated 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." And we have held that this rule prohibits the improper use of a customer's funds, regardless of whether the funds are contained in a customer's securities account.[14] FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[15] Violating any other FINRA rule also violates Rule 2010.[16]

Converting a customer's funds clearly constitutes an improper use of that customer's funds and therefore violates FINRA Rule 2150.[17] The Company was Bonwick's customer

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[12] We also note that, even assuming *arguendo* that Wicker *had* provided the $50,000 to DM on DM's request, that still would have been an unauthorized use of the money.

[13] *See, e.g.*, *Michael Joseph Clarke*, Exchange Act Release No. 97860, 2023 WL 4422304, at *8 (July 10, 2023) (holding that associated person's "failure to repay [certain] money and attempts to conceal his unauthorized use of the money by offering false excuses for why he could not repay it further supports our conclusion that he intentionally used it for unauthorized purposes"); *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *8 (Jan. 9, 2015) (holding that associated person's "concealment of his actions from his customer and his deceit further demonstrate deliberate intent and bad faith"), *aff'd*, 641 F. App'x 27 (2d Cir. 2016); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *9 (Feb. 10, 2012) (holding that associated person's "failure to repay the funds until forced to do so . . . serves as evidence that his conversion of the property was intentional").

[14] *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *2, *16 (Sept. 24, 2015) (holding that misallocating a portion of funds invested in limited liability company violated FINRA Rule 2150).

[15] The rule also applies to associated persons of FINRA member firms. *See* FINRA Rule 0140(a) (providing that associated persons "shall have the same duties and obligations as a member under the Rules").

[16] *E.g.*, *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *3 n.10 (July 27, 2015).

[17] *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 WL 5092727, at *9 (Dec. 7, 2010) (finding that applicant "misused, and ultimately converted, their customers' securities in violation of" predecessor to Rule 2150).

because it was not a broker or dealer,[18] and it hired (and paid) Bonwick to serve as the underwriter for its planned public offering.[19] The Company gave Bonwick $50,000 for the sole purpose of paying the Law Firm. But Wicker, who controlled Bonwick's finances, instead intentionally used the money to pay Bonwick's expenses and himself. This unauthorized use of the customer's funds for Bonwick's and Wicker's own purposes constitutes conversion.[20] Even assuming that Wicker intended to use the money properly in April 2016, when he allegedly asked his subordinate to wire it to the Law Firm, he still committed conversion because he intentionally failed to return or forward the money after he learned that the wire had not been sent.[21] Thus, Wicker converted customer funds in violation of Rule 2150. Because this conduct violated Rule 2150, it also violated Rule 2010.[22]

C. FINRA Rules 2150 and 2010 are, and were applied, consistent with the purposes of the Exchange Act.

By prohibiting the improper use of customer funds and securities and acts inconsistent with just and equitable principles of trade, FINRA Rules 2150 and 2010 are consistent with the purposes of the Exchange Act, because they reflect the statutory requirement that FINRA enact rules to "promote just and equitable principles of trade" and "protect investors and the public interest."[23] We also find that, substantively, the rules were applied in a manner consistent with the purposes of the Exchange Act. Converting customer funds violates just and equitable principles of trade and constitutes an improper use of customer funds. Prohibiting this act

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18 FINRA Rule 0160(b)(4) ("The term 'customer' shall not include a broker or dealer.").

19 *See West*, 2015 WL 137266, at *1-3, *7-8, *10-11 (applying FINRA Sanction Guideline for improper use of customer funds where associated person misused money entrusted to him by an institutional investment banking customer); *cf. Citigroup Glob. Markets Inc. v. Abbar*, 761 F.3d 268, 275 (2d Cir. 2014) (holding in the FINRA arbitration context that a customer 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").

20 *See Clarke*, 2023 WL 4422304, at *7-8 (holding that associated person committed conversion by using provided funds for unauthorized purposes).

21 *See Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 WL 6777050, at *4 (Nov. 5, 2015) (holding that applicant had committed conversion "when he continued to hold [certain] funds after [their proper recipient] contacted him to demand their return").

22 *See Evansen*, 2015 WL 4518588, at *3 n.10 ("A violation of FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010."). FINRA also found that Wicker independently violated FINRA Rule 2010 by converting the Company's funds, regardless of whether the Company was a customer. We do not reach this separate finding because we find that the Company *was* a customer, and also because Wicker has forfeited any challenge to FINRA's findings of violation on appeal.

23 Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6); *see also Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *3 n.8 (Apr. 3, 2020) (addressing FINRA Rule 2010); *Mielke*, 2015 WL 5608531, at *16 (addressing FINRA Rule 2150).

protects investors and the public interest. FINRA acted consistently with the purposes of the Exchange Act by holding Wicker liable for committing this violation.

In addition, we find that the proceeding against Wicker was fair overall and therefore was consistent with the Exchange Act's purpose that FINRA provide a fair procedure for disciplining its associated persons.[24] We review the "overall fairness" of a FINRA disciplinary action based on the "entirety of the record."[25] And typically we will not set aside a FINRA disciplinary action due to a non-prejudicial procedural error.[26] Here, for the reasons below, we find that although FINRA made various procedural errors in the way it remanded Wicker's first appeal, Wicker was not prejudiced by these errors and ultimately received a fair new hearing and new appeal.

1. FINRA did not err by denying Wicker's request to dismiss the case due to Enforcement's alleged misconduct.

Wicker argues that Enforcement committed misconduct by allegedly engaging in employment negotiations with the former hearing officer during the first hearing. According to Wicker, FINRA should therefore have dismissed the case as a sanction for Enforcement's misconduct under FINRA Rule 9280 and because Enforcement had unclean hands.

Dismissing an entire case is an extreme remedy.[27] Dismissing a FINRA disciplinary action not only sanctions Enforcement, but it can also prevent the remediation of harm to the investing public.[28] That is the case here where dismissing this matter could prevent the remediation of Wicker's conversion of $50,000 from the Company.

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[24] Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8).

[25] *Mark H. Love*, Exchange Act Release No. 49248, 2004 WL 283437, at *4 (Feb. 13, 2004).

[26] *See, e.g.*, *Thomas P. Reynolds Sec., Ltd.*, Exchange Act Release No. 29689, 1991 WL 292140, at *4-5 (Sept. 16, 1991) (sustaining NASD action, despite "the placement of an ineligible person on the Hearing Panel," where applicants failed to "demonstrate any actual prejudice"); *Curtis I. Wilson*, Exchange Act Release No. 26425, 1989 WL 992510, at *4 (Jan. 6, 1989) (sustaining NASD action, despite hearing panel consisting of fewer members than required, where "we are unable to conclude that [the applicant] suffered any prejudice"), *aff'd* 902 F.2d 1580 (9th Cir. 1990) (table op.) (unpublished); *cf.* Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

[27] *Cf. Trautman Wasserman & Co.*, Exchange Act Release No. 55989, 2007 WL 1892138, at *1, *6 (June 29, 2007) (discussing the showing necessary for "the extreme remedy of dismissal of all proceedings" due to alleged misconduct by the Commission's Division of Enforcement).

[28] *Cf.* Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6) (requiring FINRA to enact rules to "protect investors and the public interest").

Adjudicators typically will not dismiss a proceeding due to alleged prosecutorial misconduct unless, at minimum, the misconduct resulted in prejudice. Thus, for example, we have denied a request to enter an interlocutory dismissal of an administrative proceeding based on the Commission's Division of Enforcement's alleged misconduct where the respondent failed to demonstrate prejudice.[29] And even in criminal cases, federal courts generally require a showing of prejudice before using their supervisory powers to dismiss a criminal indictment due to prosecutorial misconduct.[30]

We find that it was fair for FINRA to deny Wicker's request to dismiss the disciplinary proceeding due to Enforcement's alleged misconduct, as he has not shown that he suffered prejudice due to that alleged misconduct. Wicker claims that he suffered prejudice because he had to participate in a second hearing. But, even though he was represented by counsel throughout the second hearing, he failed to object to the second hearing until after it occurred, which undermines his claim that he viewed the rehearing as unduly onerous. Moreover, prejudice generally means "[d]amage or detriment to one's legal rights or claims."[31] Although Wicker has alleged that participating in a new hearing was costly, he has not shown that his *legal* rights or claims were damaged by this participation. In fact, the new hearing provided him with an entirely new opportunity to pursue his legal rights and claims, even though he had failed to prevail in the first hearing. The new hearing thus cured any prejudice caused by Enforcement's alleged misconduct in the first hearing.[32] And the Hearing Officer and the NAC imposed procedures to ensure that no Enforcement staff who were involved in the alleged misconduct (*i.e.*, hiring the former hearing officer) participated in the new hearing or appeal. Accordingly, we find that Wicker was not prejudiced by Enforcement's alleged misconduct in the first hearing.

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[29] *Trautman Wasserman*, 2007 WL 1892138, at *1, *6 (finding that petitioner had "not demonstrated any prejudice to himself, much less that such prejudice is sufficient to justify the extreme remedy of dismissal of all proceedings").

[30] *See, e.g.*, *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 259 (3d Cir. 2005) ("[W]e believe that, to merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a *Brady* violation."); *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993) (permitting dismissal only in cases involving "(1) flagrant misbehavior and (2) substantial prejudice"); *United States v. Welborn*, 849 F.2d 980, 985-86 (5th Cir. 1988) (holding that a federal district court may "impose the extreme sanction of dismissal [of an indictment] with prejudice only in extraordinary situations and only where the government's misconduct has prejudiced the defendant").

[31] *Prejudice*, *Black's Law Dictionary* (11th ed. 2019).

[32] *Cf. Fahie*, 419 F.3d at 255 n.7 (noting that "a new trial cures completely any prejudice to a [criminal] defendant from a *Brady* violation"); *James S. Tagliaferri*, Exchange Act Release No. 75820, 2015 WL 5139389, at *2 (Sept. 2, 2015) (finding that respondent would not be prejudiced by amending order instituting proceedings to add new basis for sanctions, given that respondent would "have an opportunity to contest these allegations and their legal effect").

Wicker also argues that he suffered prejudice and the case should be dismissed because Enforcement engaged in employment negotiations with the former hearing officer during the first hearing, which caused the former hearing officer to have an actual conflict of interest during that hearing. But even assuming *arguendo* that Enforcement and the former hearing officer engaged in employment negotiations during the first hearing, the proper remedy would be to set the case for a new hearing before an untainted hearing panel, which is what happened here.[33] Although Wicker argues that the case should be dismissed instead, he has not identified any case where an appellate tribunal dismissed a case based on the adjudicator's employment negotiations with a party. Instead, in the two most similar cases identified by the parties, the appellate tribunal remanded for a new trial upon learning that an entity related to one of the parties had engaged in employment negotiations with the trial judge.[34]

Wicker further argues that the new hearing panel and the NAC failed to properly address his request for dismissal due to Enforcement's alleged misconduct. We disagree. The new hearing panel specifically mentioned this argument and found that Wicker was not entitled to dismissal of the case. And the NAC spent over three pages discussing and rejecting this argument. Moreover, the new hearing panel and the NAC both responded to Enforcement's alleged misconduct by taking detailed steps to prevent any contact between Enforcement staff prosecuting this case and Enforcement staff involved in the hiring process.

Wicker argues that dismissal is warranted even without a showing of prejudice based on *Jeffrey Ainley Hayden*.[35] In *Hayden*, the Commission held that a proceeding was "inherently unfair" because a self-regulatory organization was severely delayed in its institution of proceedings, and the Commission set aside the action without "find[ing], as a factual matter, that [the applicant's] ability to mount an adequate defense was impaired by the . . . delay."[36] But that case is inapposite, as Wicker does not argue that the institution of this proceeding was unduly delayed. Indeed, this proceeding was brought approximately two years after the charged misconduct, and the new hearing took place less than two years after that. Moreover, in *Hayden*, the Commission found that the procedural defect rendered the proceeding "inherently unfair."[37] Here, by contrast, we have determined through our examination of the entire record that the proceeding overall was fair, despite the procedural defects.

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33 *See U.S. Assocs., Inc.*, Exchange Act Release No. 33189, 1993 WL 469130, at *5 (Nov. 9, 1993) (remanding to NASD for a new hearing due to procedural problems).

34 *DeNike v. Cupo*, 958 A.2d 446, 450-51, 456 (N.J. 2008) (vacating and remanding for new civil trial where trial judge had engaged in employment negotiations with the law firm representing a party); *Scott v. United States*, 559 A.2d 745, 756 (D.C. 1989) (en banc) (remanding for new criminal trial where the judge had negotiated for and accepted employment "in the executive office for all federal prosecutors while one of those prosecutors was prosecuting" the defendant).

35 Exchange Act Release No. 42772, 2000 WL 571683 (May 11, 2000).

36 *Id.* at *2.

37 *Id.*

The NAC also cited *Datek Securities Corporation*[38] as support for the proposition that remand rather than dismissal was the appropriate remedy to impose based on the former hearing officer's possible conflict of interest. *Datek* involved an expedited proceeding before NASD, FINRA's predecessor, where the applicant repeatedly objected during the proceeding that two hearing panel members were conflicted because their firms participated as market makers in many of the transactions at issue.[39] We found that the conflict of interest infected the entire proceeding and therefore reversed the NASD's findings and sanctions, in part because NASD had done nothing to cure the conflict of interest.[40] Here, by contrast, FINRA cured the possible conflict of interest by providing Wicker with an entirely new hearing before an unbiased hearing panel, prosecuted by Enforcement staff who were insulated from the former hearing officer.

2. The NAC did not err by denying Wicker's motion to adduce additional evidence.

Wicker argues that the NAC erred in denying his motion to adduce additional evidence about Enforcement's employment negotiations with the former hearing officer. But we find that Wicker has not shown that the NAC's denial of this motion was unfair because he failed to request discovery regarding the employment negotiations during the new hearing.

Wicker suggests that he did not realize that he should seek discovery of this evidence until January 2021, when he first obtained the chief hearing officer's remand request and the NAC's remand order. He argues that these documents first alerted him that negotiations between Enforcement and the former hearing officer likely occurred while Wicker's case was pending before her. In fact, however, the remand motion and order do not state that the negotiations began before the first hearing panel's decision.

Moreover, Wicker's March 2020 post-hearing brief demonstrates that he knew then, well before January 2021, that Enforcement may have engaged in employment negotiations with the former hearing officer during the first hearing. Indeed, he argued in that brief that Enforcement bribed the former hearing officer with the job during the first hearing. In addition, in November 2019, the Hearing Officer informed Wicker and his counsel at a prehearing conference and in a written order that the former hearing officer had taken a job with Enforcement a couple of months after the first hearing panel's decision, thus notifying Wicker and his counsel that the employment negotiations may have occurred while the case was pending before the former hearing officer. At the prehearing conference, the Hearing Officer provided Wicker, through his counsel, with the opportunity to ask questions or make comments about the new hearing and the events leading up to it, but Wicker failed to ask any questions or make any comments. Accordingly, Wicker could have sought the requested evidence earlier, at the discovery stage of the new hearing. But he did not do so; rather, he waited until his second appeal before the NAC.

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38 Exchange Act Release No. 32560, 1993 WL 243632 (June 30, 1993).

39 *Id.* at *1-2.

40 *Id.* at *3.

Under these circumstances, it was not unfair for the NAC to deny his motion to adduce additional evidence.[41]

3. FINRA did not err by failing to *sua sponte* produce documents regarding Enforcement's employment negotiations with the former hearing officer.

Wicker argues that Enforcement's failure to *sua sponte* produce documents regarding Enforcement's employment negotiations with the former hearing officer rendered the proceeding unfair. But under FINRA Rule 9251(a)(1), Enforcement is only required to "make available for inspection and copying" documents "prepared or obtained . . . in connection with the investigation that led to the institution of proceedings." Here, there is no evidence that any documents related to Enforcement's employment negotiations with the former hearing officer were prepared or obtained in connection with the investigation that led to the complaint. Thus, Enforcement was not required to turn over these documents under Rule 9251(a)(1).[42]

Wicker argues that, nonetheless, these documents should have been produced under FINRA Rule 9251(a)(3), which provides that "[n]othing in paragraph (a)(1) shall limit the discretion of the Department of Enforcement to make available any other Document or the authority of the Hearing Officer to order the production of any other Document." But this rule did not require Enforcement or the Hearing Officer to produce or order the production of documents; rather, it simply vested them with discretion to do so. Here, it was fair for Enforcement and the Hearing Officer to decline to produce or order production of the documents, particularly because, as discussed above, Wicker could have requested them during the second hearing's discovery period.

Wicker also argues that dismissal is warranted because, according to him, staff across FINRA concealed Enforcement's and the former hearing officer's misconduct by, for example, failing to confirm whether their employment negotiations began before or after the first hearing panel issued its decision. But we find no evidence that FINRA staff concealed anything. Instead, at most, the record reflects that Enforcement failed to voluntarily produce information about the employment negotiations, which Wicker only sought after the second hearing's discovery period.

In addition, Wicker argues that FINRA's failure to turn over evidence about the employment negotiations violates the *Brady* doctrine. But the *Brady* doctrine requires

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41 *See* FINRA Rule 9346(b) (providing that a motion to adduce new evidence before the NAC must demonstrate good cause for failure to adduce it previously). We need not and do not reach the NAC's further determination that the motion to adduce was untimely because it was not filed within 30 days of the service of the original record index.

42 *See Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *17 (Jan. 30, 2009) (noting that FINRA was "required to produce only the investigatory file that led to [the applicant's] disciplinary proceeding" and rejecting applicant's claim that Enforcement should have provided him with documents that were "apparently compiled during FINRA's separate investigation of" a FINRA member firm), *pet. for rev. denied*, 416 Fed. App'x 142 (3d Cir. 2010) (unpublished).

government prosecutors to disclose exculpatory evidence to criminal defendants.[43] It does not apply in FINRA proceedings.[44] Although FINRA provides by rule that Enforcement may not withhold "material exculpatory evidence,"[45] this rule applies only to evidence that Enforcement is otherwise required to produce.[46] Here, as discussed above, Enforcement was not required to produce evidence about the employment negotiations. Nor has Wicker made a plausible showing that evidence regarding the employment negotiations between Enforcement and the former hearing officer is materially exculpatory (*i.e.*, that there is a reasonable probability that this evidence would have resulted in a different outcome as to either the finding of violation or the sanction against Wicker).[47]

4. Wicker failed to object to the chief hearing officer's orders vacating the first hearing panel's decision and appointing a new hearing officer.

Wicker argues that the chief hearing officer's orders vacating the first hearing panel's decision and appointing a new hearing officer were unfair. For example, he argues that the chief hearing officer lacked the authority to vacate the first hearing panel's decision; that the parties should have been given notice before the first decision was vacated; and that the chief hearing officer could not appoint a new hearing officer after the first hearing panel issued its decision.

Wicker was served with the order vacating the first hearing panel's decision and the order assigning a new hearing officer. Yet, during the second hearing, Wicker failed to raise any of these objections about the chief hearing officer's orders. Indeed, in his post-hearing brief, Wicker noted the unusual nature of the order vacating the first decision, but he did not object to it.[48] Instead, Wicker waited to raise these arguments until he appealed to the NAC following his second hearing. We will not set aside the entire proceeding as unfair based on alleged procedural errors that Wicker could have objected to at the time, during the second hearing.[49]

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43 *Brady v. Maryland*, 373 U.S. 83 (1963).

44 *See, e.g.*, *optionsXpress, Inc.*, Exchange Act Release No. 70698, 2013 WL 5635987, at *3 (Oct. 16, 2013) (noting that "*Brady* has no direct application to civil or administrative proceedings" such as an administrative proceeding before the Commission).

45 FINRA Rule 9251(b)(3).

46 *See* FINRA Rule 9251(a)-(b).

47 *See optionsXpress*, 2013 WL 5635987, at *3, *6 (explaining the scope of *Brady*).

48 Specifically, Wicker's brief stated that, "in an Order that provided Wicker with minimal information, and seemingly utilized no known Rule or other procedural mechanism, the Chief Hearing Officer *sua sponte* vacated the Decision, and gave Wicker a mulligan, only with an entirely new hearing panel."

49 *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *21-22 (Sept. 28, 2017) (holding that applicant forfeited challenge to FINRA hearing panelist's participation by failing to raise a timely objection to it before the hearing panel); *cf. United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (providing that, generally, "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice").

Indeed, it seems likely that Wicker made the strategic decision not to object to the orders vacating the first decision and appointing a new hearing officer, as objecting during the second hearing could have deprived him of the chance to prevail on the merits at that hearing. A litigant "cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action."[50]

Nor has Wicker shown that he was prejudiced by any of the chief hearing officer's actions in vacating the first hearing panel's decision and appointing a new panel. As discussed above, providing Wicker with a new hearing before a new hearing panel was the correct response to the former hearing officer's potential or actual disqualification.[51] Thus, any alleged procedural errors related to the chief hearing officer's orders were harmless.

5. FINRA committed at most harmless error when the NAC remanded the case.

Finally, Wicker raises multiple arguments regarding the remand request and order. At the outset, we find that the NAC had the authority to remand the proceeding.[52] In addition, we find that the NAC could consider the remand request from the chief hearing officer because FINRA Rule 9346(a)(1) allows it to consider any "papers submitted" to it in an appeal, and the rule is not expressly limited to papers submitted by the parties. And we find that the remand request was a motion for a remand, not a motion for leave to introduce additional evidence, and therefore the request did not need to comply with the additional requirements of FINRA Rule 9346(b) through (e). In addition, although the remand request was brief, it explained that remand was requested due to the possible disqualification of the former hearing officer, and therefore it provided the NAC with an adequate basis for remanding the case.

We reject Wicker's argument that the chief hearing officer could not submit the remand request because jurisdiction had vested in the NAC; to the contrary, the reason the chief hearing officer had to request remand (rather than simply vacate the first decision) was that jurisdiction had vested in the NAC. Finally, to the extent Wicker suggests that, on remand, the chief hearing officer did not comply with the terms of the remand request, we disagree. Specifically, Wicker argues that it was "extraordinary" for the chief hearing officer to "vacate the decision *sua sponte*, of its own accord and without the further consideration it promised in the . . . Remand Request or input from the parties." Contrary to Wicker's argument, however, the remand request did not state that the former hearing officer's potential disqualification itself would be the subject of additional consideration or proceedings. Instead, the request sought remand of "the case" to the Office of Hearing Officers "for consideration and further proceedings." Upon remand, that office considered the case further and conducted further proceedings—a new hearing.

Nevertheless, we acknowledge that some of FINRA's remand procedures were flawed. Most notably, the remand order and request should have been served on the parties. FINRA Rule 9349(c) explicitly requires the NAC to serve "its written decision on the Parties" if the

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50 *Epstein*, 2009 WL 223611, at *17 (quotation omitted).

51 *See supra* notes 33-34 and accompanying text.

52 *See* FINRA Rules 9348, 9349(a) (providing that the NAC can remand disciplinary proceedings).

FINRA Board of Governors does not call it for review, so the NAC should have served the remand order on the parties.[53] And FINRA Rule 9135(c) requires papers filed with the NAC to contain certificates of service, and therefore the remand request should have contained a certificate of service reflecting that it was served on the parties.[54]

Nonetheless, we find that FINRA's failure to serve the remand order and request on Wicker did not render the proceeding unfair, because it did not prejudice Wicker.[55] Wicker claims that he might have approached the proceeding differently if he had been contemporaneously served with the remand motion and order, as they would have shown him that the former hearing officer was actually subject to a disqualification at the time of the first hearing panel's decision and that she and Enforcement may have engaged in employment negotiations during the first hearing. But the remand request and order did not state that the former hearing officer was subject to a disqualification during the first hearing or that employment negotiations began during the first hearing.[56] And, again, Wicker's post-hearing brief after the second hearing argued that Enforcement had bribed the former hearing officer with a job during the first hearing, demonstrating that he understood during the second hearing that the former hearing officer may have been subject to a disqualification and that she and Enforcement may have engaged in employment negotiations during the first hearing. The Hearing Officer also put Wicker on notice of these circumstances by informing him at the beginning of the second hearing that Enforcement had hired the former hearing officer a couple of months after the first decision. Thus, FINRA's failure to serve the remand motion and order on Wicker did not prejudice him during the second hearing.

Wicker also argues that the NAC should have given him the chance to respond to the remand request before ruling on it. But he has not pointed to any FINRA rule requiring that the NAC do so. And he did not object to the order vacating the first hearing panel's decision, even though presumably he was also aware that he had filed an appeal with the NAC.

Wicker raises various other arguments about the remand procedures. For example, he argues that, under FINRA Rule 9331, the NAC should have appointed a subcommittee to consider Wicker's first appeal and the remand request; that, under Rule 9349(a), the NAC should have prepared a proposed written decision; and that, under Rule 9349(a) and (b), the remand

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53 *See also* FINRA Rule 9349(a) (requiring that the NAC prepare a "proposed written decision" when remanding a disciplinary proceeding).

54 *See* FINRA Rule 9135(c) (requiring any paper filed with "an Adjudicator" to contain a certificate of service); FINRA Rule 9120(a) (defining "Adjudicator" to include "a body, board, committee, group, or natural person that presides over a proceeding and renders a decision").

55 *See supra* note 25-26 and accompanying text (explaining that we examine the entire record for overall fairness and typically find proceedings unfair only if procedural flaws caused prejudice).

56 The remand request stated that the Office of Hearing Officers had "received information regarding whether the [former] Hearing Officer . . . was subject to disqualification on or before the date [of] the [first] decision," not that the information proved that she was disqualified by that date.

order should have included instructions and certain other information. But again Wicker has provided no basis for us to conclude that the outcome of the proceeding would have been any different if the NAC had conformed to these requirements.[57] To the contrary, we find it unlikely that the substantive outcome for Wicker would have been different, particularly given that he has not identified any similar case that was dismissed outright rather than remanded for a new trial.

Wicker also does not challenge any of the procedures adopted for the second hearing and appeal, other than FINRA's failure to dismiss the case outright. Wicker does not, for example, suggest that any of the new hearing panelists were subject to disqualification. In addition, Wicker, who was represented by counsel at the new hearing, had the opportunity to cross-examine the witnesses who testified, call his own witnesses, and present his own testimony and evidence at the hearing.[58] Wicker also had the opportunity to appeal the new hearing panel's decision to the NAC. Indeed, the NAC considered Wicker's appeal on the merits, even though it was untimely. Wicker was represented by new counsel for his appeal to the NAC, and Wicker does not suggest that any member of the NAC was subject to disqualification. In addition, both the Hearing Officer and the NAC imposed procedures that insulated the Enforcement personnel involved in the new hearing and appeal from the former hearing officer.

Thus, we find that FINRA's procedural errors in remanding Wicker's first appeal were harmless. Therefore, they do not render FINRA's overall procedures unfair, particularly because Wicker subsequently received a full and fair second hearing and appeal. And Wicker is not entitled to the extraordinary remedy of dismissal of all proceedings—the only remedy he seeks on appeal—based on FINRA's harmless procedural errors.[59]

* * *

Based on the entirety of the record before us, we find that the proceeding against Wicker was fair overall and that FINRA Rules 2150 and 2010 were applied consistent with the purposes of the Exchange Act.

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[57] For example, even assuming *arguendo* that a subcommittee should have considered whether to remand the case before the NAC considered the question, the mere fact that the question instead immediately proceeded to the NAC, which decided to remand the matter, does not demonstrate prejudice. *Cf. Thomas P. Reynolds Sec.*, 1991 WL 292140, at *4-5 (finding no prejudice, even though an ineligible person sat on the hearing panel); *Wilson*, 1989 WL 992510, at *4 (finding no prejudice, even though hearing panel was improperly composed of fewer than the required number of panelists).

[58] *See, e.g.*, *Michael Pino*, Exchange Act Release No. 74903, 2015 WL 2125692, at *9 (May 7, 2015) (finding applicant was provided with a fair proceeding where he "had an opportunity to testify on his own behalf, to call witnesses, and to cross-examine FINRA's witnesses"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *6 (Dec. 22, 2008) (same).

[59] *See supra* notes 27-30 and accompanying text (noting that dismissal of all proceedings is an extraordinary remedy, which generally requires a showing of prejudice).

III. Sanctions

Under Exchange Act Section 19(e)(2), we sustain FINRA sanctions unless we find that, giving due regard to the public interest and the protection of investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[60] We consider evidence of any aggravating or mitigating factors, as well as whether the sanctions serve remedial rather than punitive purposes.[61] Although they are not binding on us, FINRA's Sanction Guidelines serve as a benchmark in our review.[62]

Wicker does not assert, nor do we find, that FINRA's sanctions—namely, a bar and an order of restitution—are excessive or oppressive or serve a punitive rather than remedial purpose.[63] And we find that Wicker has forfeited any challenge to those sanctions by failing to directly challenge FINRA's imposition of them or to argue that any mitigating factors warrant lesser sanctions.[64]

An appropriate order will issue.[65]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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[60] 15 U.S.C. § 78s(e)(2). Wicker does not assert, nor do we find, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

[61] *See Saad v. SEC*, 718 F.3d 904, 906, 912-13 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

[62] *E.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013).

[63] *See, e.g.*, *Clarke*, 2023 WL 4422304, at *12, *14 (holding that "absent mitigating factors, conversion warrants a bar," and such a bar protects the public from further harm); *id.* at *15 (holding that imposing restitution that "is inherently proportional to the violation . . . is remedial and not excessive, oppressive, or punitive"); FINRA Sanction Guidelines, at 36 (Oct. 2020), https://www.finra.org/sites/default/files/2021-10/Sanctions_Guidelines_2020.pdf (recommending imposition of a bar for conversion of any amount).

[64] *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule 450(b)] may, at the discretion of the Commission, be deemed to have been waived by the applicant.").

[65] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 100148 / May 15, 2024

Admin. Proc. File No. 3-20705

In the Matter of the Application of

DEVIN LAMARR WICKER

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Devin Lamarr Wicker is sustained.

By the Commission.

Vanessa A. Countryman
Secretary