FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DEVIN LAMARR WICKER (CRD No. 4228250), Respondent.	Disciplinary Proceeding No. 2016052104101 Hearing Officer–LOM **EXTENDED HEARING PANEL DECISION** June 5, 2020

Respondent, Devin Lamarr Wicker, is barred from association with any FINRA member firm in any capacity for converting $50,000 of customer funds, in violation of FINRA Rules 2150(a) and 2010. He also is ordered to pay the customer $50,000 in restitution, plus prejudgment interest.

Appearances

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

For the Respondent: Jonathan Uretsky, Esq.

DECISION

I. Introduction

In a single cause of action, the Department of Enforcement ("Enforcement") charges that Respondent, Devin Lamarr Wicker ("Respondent" or "Wicker"), misused and converted $50,000 of customer funds, in violation of FINRA Rules 2150(a) and 2010. FINRA Rule 2150(a) prohibits the misuse of customer securities or funds. FINRA's Sanction Guidelines define conversion as a particularly egregious form of misuse. FINRA Rule 2010 requires that FINRA member firms and their associated persons adhere to "high standards of commercial honor and just and equitable principles of trade."

The Extended Hearing Panel finds that Wicker converted customer funds in violation of these Rules when he used customer funds for his own purposes, rather than the purpose for which he knew the customer intended them, and permanently deprived the customer of its property. We further find that Wicker would be a risk to investors and other securities market

participants if he were permitted to remain in the industry. Accordingly, we bar him from association with any FINRA member firm in any capacity, and further order that he pay the customer $50,000 in restitution, plus prejudgment interest.

A. Wicker's Misconduct

The essential facts are not in dispute. In February 2016, a company referred to here as the "Customer" engaged Wicker's broker-dealer firm, a partnership called Bonwick Capital Partners, LLC ("Bonwick" or the "Firm"), as underwriter for a proposed initial public offering ("IPO"). The Customer agreed to reimburse Bonwick for the legal fees and expenses of the law firm retained by Bonwick to work on the IPO ("Underwriter's Counsel").

At Wicker's direction, on March 17, 2016, Bonwick sent the Customer an invoice for $50,000 to be used for Underwriter's Counsel's retainer. The invoice instructed the Customer to wire the funds to a specified Bonwick bank account. In accord with the instruction, the Customer immediately wired the $50,000. About two weeks later, on April 4, 2016, Underwriter's Counsel sent Bonwick an invoice for $50,000, payable immediately.

Wicker understood that the Customer intended its $50,000 to be used for one purpose only—to pay Underwriter's Counsel. That purpose was clearly stated on Bonwick's invoice to the Customer, and Wicker himself directed that the $50,000 be obtained from the Customer before Bonwick finalized its contract with Underwriter's Counsel. He wanted to be sure that Bonwick had the money in hand before he committed to paying the law firm for its work as Underwriter's Counsel. Wicker admits that the Customer never gave him authority to use the funds for any purpose other than paying Underwriter's Counsel.

The bank account to which Bonwick directed the Customer's money was the bank account Bonwick used to fund its operations. The Firm paid its own expenses such as payroll and commissions from the account, and Wicker periodically made payments to himself from it. He described the payments to himself as guaranteed payments under the Firm's partnership agreement and repayments of undocumented loans he had made to the Firm. The Customer's funds were commingled with the other funds in the account, without segregating or earmarking them as Customer funds.

Wicker controlled Bonwick and its bank account. He was a co-founder of the Firm in 2010, and the majority owner. He also was the managing member of the partnership that owned the Firm, and the Firm's Chief Executive Officer ("CEO"), Chief Financial Officer ("CFO"), and Chief Compliance Officer ("CCO"). Wicker's approval was necessary for any wire transfers from the Firm's bank account, and he was the only person who could write checks or make cash withdrawals from the account.

Despite repeated requests from April 2016 through the fall of 2016 either to pay Underwriter's Counsel, or to refund the money to the Customer, Wicker did neither. Instead, he treated all funds in the account as belonging to Bonwick. Wicker disbursed funds in the operating account for other purposes, including the Firm's payroll and payments to himself.

Throughout 2016, the balance in the Firm's account fluctuated, sometimes having less than $50,000 and sometimes more. In fact, once the account even had a negative balance. But, even when there were sufficient funds in the account, Wicker did not pay Underwriter's Counsel or refund the Customer's money. Instead, he dissipated virtually all the funds in the account—including the Customer's funds.

Bonwick ceased operations around the end of June 2016. Its bank account balance declined to $60 in the fall of 2016 and remained at that level through December 2016, when Bonwick filed a Form BDW (Uniform Request for Broker-Dealer Withdrawal) to withdraw its registration with FINRA. The Firm's FINRA registration was canceled in February 2017 for failure to pay required fees to FINRA.

The Customer never recovered its $50,000. Wicker intentionally, and without authority, used the Customer's funds for purposes the Customer did not intend, and permanently deprived the Customer of its property. This misconduct constitutes conversion.

B. Wicker's Primary Defense

Wicker's primary defense is that an investment banker who was employed by the Firm from January 2016 through late July 2016 is responsible for permanently depriving the Customer of its property, not Wicker. According to Wicker, DM, the investment banker who worked on the IPO, proposed that Wicker pay the Customer's funds to him as commissions. The investment banker allegedly promised to pay the money owed to Underwriter's Counsel after another deal closed that would generate the money to do so. Wicker says he agreed to DM's proposal and paid him the money, expecting the investment banker later to pay Underwriter's Counsel. Then DM left Bonwick and never paid Underwriter's Counsel the $50,000.

As discussed more fully below, we reject Wicker's defense. There is no corroborating evidence to support the claim that DM made the proposal or agreed to be responsible for the $50,000. And DM testified credibly that he did not do what Wicker claims he did. Wicker testified that he paid DM the $50,000 intended for Underwriter's Counsel along with another $40,000, for a total of about $90,000. He said that financial records would demonstrate that he made the payment, but he did not identify what records those might be. The bank statements in the record do not appear to show such a payment.

Moreover, even if DM did propose that Wicker pay him the $50,000, promised to repay the money owed to Underwriter's Counsel in the future, and then failed to keep his promise to Wicker, that does not alter Wicker's obligation to use the Customer's money only as directed by the Customer. Regardless of whether DM broke his promise to Wicker, Wicker still had a duty to the Customer, as well as a contract with Underwriter's Counsel.

Finally, even if DM made the proposal, he could not have implemented it without Wicker's authorization. And if Wicker authorized the money to be paid to DM instead of Underwriter's Counsel, then Wicker intentionally, and without authority, used the Customer's

funds for purposes different than the Customer intended. Even in Wicker's version of what happened, he converted Customer funds.

II. Findings

A. Procedural History

The hearing was held in New York City on March 9-10, 2020. Five witnesses testified,[1] and almost three dozen exhibits were admitted.[2] The parties also entered into joint stipulations, thereby streamlining the presentation of the case.[3] Enforcement filed a pre-hearing brief; Wicker did not.[4] Both parties filed post-hearing briefs on March 31, 2020.[5]

B. Wicker and His Firm

1. Wicker

Wicker has a broad range of experience in the securities industry, having been registered in a variety of capacities for nearly 20 years through his association with five current and former FINRA member firms. He first became registered with FINRA as a General Securities Representative ("GSR") in October 2000.[6] He worked at his first firm for about ten years, eight of them as a trader of mortgage-backed securities. In 2010, he co-founded Bonwick.[7]

The events at issue occurred in 2016, while Wicker was registered through Bonwick.[8] During the relevant period, Wicker was the managing member of the partnership that owned the Firm, and he was the Firm's CEO, CFO, and CCO. He owned approximately 60% of Bonwick.[9]

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[1] In addition to Wicker, the following people testified: AD (Bonwick's unregistered administrative officer, who was responsible for certain back office duties), DM (an investment banker employed by Bonwick, who worked on the IPO), MM (the Customer's CFO, who reported Wicker to authorities after failing to get Wicker to refund the money to the Customer), and MB (a FINRA examiner, who testified about Bonwick's bank records).

The hearing testimony is referred to with the prefix "Tr." followed by the individual's name or initials in parentheses and then the identifying pages. For example, Wicker's testimony is cited as follows: Tr. (Wicker) 66.

[2] Exhibits are identified by a prefix (RX for Respondent's exhibits, and JX for joint exhibits) and a unique document number.

[3] Joint stipulations are referred to by the abbreviation "Stip." and a unique identifying number for each paragraph. The first stipulation, for example, is "Stip. ¶ 1."

[4] Enforcement's pre-hearing brief is referred to as "Enf. Br."

[5] Enforcement's post-hearing brief is referred to as "Enf. Post Br." Respondent's post-hearing brief is referred to as "Resp. Post Br."

[6] Wicker admitted in his Amended Answer ("Am. Ans.") a number of the factual allegations in the Complaint ("Compl."). Am. Ans. ¶ 2; Stip. ¶ 1.

[7] Tr. (Wicker) 57-58; JX-39, at 6.

[8] Stip. ¶ 2.

[9] Stip. ¶ 2; Tr. (Wicker) 66-67, 281.

According to the Central Registration Depository ("CRD"), in 2016 Wicker was Bonwick's sole control person.[10] While with Bonwick, Wicker held at various times at least nine different securities licenses: GSR, Equity Trader ("ET"), General Securities Principal ("GP"), Investment Banking Representative ("IB"), Municipal Securities Principal ("MP"), Operations Professional ("OS"), Research Principal ("RP"), Securities Trader ("TD"), and Proprietary Trader Principal ("TP").[11]

Between July 1, 2016 and May 30, 2017, and from December 13, 2017 through August 22, 2018, Wicker was registered through two other FINRA member firms. His registrations at those two firms included seven of the same licenses he had held at Bonwick (GSR, GP, IB, MP, OS, RP, and TD), plus three more: Financial and Operations Principal ("FINOP"), Options Principal ("OP"), and Municipal Securities Representative ("MR").[12]

The licenses Wicker held at Bonwick and elsewhere span a variety of activities from sales to financial operations to trading, research, and investment banking. Many of these licenses permitted Wicker to supervise others and perform high-level functions in a principal capacity. Wicker's extensive background and high level of responsibility in the securities industry give rise to a reasonable expectation that he would know that it is improper and unethical to spend customer funds designated for one purpose for a different purpose. His extensive qualifications to act at senior levels also undermine a theme of his defense—that he misunderstood what he should have done and made mistakes in the handling of the Customer's funds because of a lack of expertise.

2. Bonwick

Bonwick's headquarters were located in New York City, where Wicker was located.[13] On the Firm's record in CRD, Wicker was listed as Bonwick's contact person and the Firm's telephone number was the same as Wicker's number.[14] Before the Firm ceased operations around the end of June 2016, it had about 30 Registered Representatives in its five offices in

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[10] JX-38, at 6.

[11] Stip. ¶¶ 3, 4; Tr. (Wicker) 59-60.

[12] Am. Ans. ¶¶ 6, 7; Stip. ¶¶ 6, 7. Bonwick, however, did not file to terminate Wicker's registrations through it for another six months. Stip. ¶ 5. At the time of the hearing, Wicker was working, but nothing in the record indicates the nature of his work or whether this employer was a FINRA member. Tr. (Wicker) 56. The CRD summary of Wicker's professional history in the securities industry was only current as of November 4, 2018, but the hearing occurred in March 2020. JX-39.

[13] JX-38, at 4; Tr. (Wicker) 64-65; Tr. (DM) 162-63.

[14] JX-38, at 4; Tr. (Wicker) 65.

New York City, Santa Monica, Chicago, Dallas, and Houston.[15] By the time Bonwick wound down its operations, Wicker was the only person still associated with the Firm.[16]

We find that Bonwick was suffering regulatory and financial difficulties in 2015 and 2016. We further find that these difficulties put Wicker under pressure and caused him concern. He claimed that he did not recollect the Firm experiencing financial difficulties in early 2016,[17] but he did admit at one point that financial difficulties were "building up."[18] He also testified that he sometimes deferred his compensation in 2016, and that there were times that AD, the Firm's administrative officer, also did not take his compensation.[19]

Email correspondence at the beginning of 2016 reveals that the Firm's involvement in on-going litigation was draining it of resources. On January 2, 2016, an attorney sought $200,000 from Bonwick to pay for work his firm had done in 2015, saying in an email "I hate nagging clients on this type of thing, but once the amount outstanding becomes this substantial, I have to answer to my partners as well."[20] The attorney proposed a payment spread out over the next 30-40 days, acknowledging that he knew that Bonwick had "been dealing with a number of financial issues."[21]

Wicker emailed RW, a minority Bonwick partner in California, for his thoughts. "Death by a thousand legal fees," Wicker wrote. "I don't know how on earth we could possibly pay on this schedule [proposed by the attorney]."[22] Wicker and RW exchanged emails worrying about their financial situation and discussing their options for dealing with it. RW noted, "We have money coming in but overhead is killing us…and legal fees. Revenue isn't the same as profit."[23] Wicker responded that he personally had $175,000 in legal fees due by January 15, 2016, and that he owed $88,000 in taxes on "phantom" income from Bonwick in 2013.[24] Wicker argued that "we are so far in the hole that the real only other option is to see it through [referring to litigation in which they were involved] and hope that we still end up winning and recouping legal fees as a result."[25] He said "I leave all of my 'commissions' in the firm, so this is my only near-

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[15] Am. Ans. ¶ 3; Stip. ¶ 2.

[16] Tr. (Wicker) 59. Wicker remained with the Firm until it was no longer a FINRA member. Tr. (Wicker) 59.

[17] Tr. (Wicker) 72, 400.

[18] Tr. (Wicker) 416-17.

[19] Tr. (Wicker) 72-73.

[20] JX-4, at 2.

[21] JX-4, at 2. The attorney's law firm was not Underwriter's Counsel. The attorney was seeking payment for work unrelated to the IPO or the $50,000 at issue in this case.

[22] JX-4, at 2.

[23] JX-4, at 1.

[24] JX-4, at 1.

[25] JX-4, at 1.

term option to have a personal path forward."[26] In 2016, Wicker was going through a contentious divorce and was involved in various arbitrations. He also was trying to complete a merger or business combination of the Firm with another broker-dealer. Wicker agreed that he was distracted from supervising the Firm's day-to-day activities, and said that it was a "stressful" period.[27]

In addition to the litigation that was draining the Firm's resources, at the beginning of 2016 Bonwick was engaged in a dispute with FINRA staff about its 2015 annual audit report and how it should calculate its net capital.[28] On January 19, 2016, Bonwick filed a financial notification with FINRA declaring that the Firm had net capital below the minimum amount required, which was $100,000. The Firm reported that it had *negative* net capital of -$314,096 and a total net capital deficiency of more than $400,000.[29]

On March 17, 2016, FINRA initiated a notice of suspension relating to Bonwick's 2015 annual audit report.[30] The Firm was to be suspended in 21 days if the matter was not resolved.[31] At the conclusion of the notice period, on April 8, 2016, the Firm requested a hearing, which stayed the imposition of the suspension. But by July 12, 2016, FINRA concluded that the Firm had abandoned its defense. As of July 13, 2016, the Firm was suspended, with the prospect that it would be automatically expelled in three months if the Firm did not obtain a termination of the suspension.[32] Wicker testified that at the point of the suspension Bonwick had wound down its business operations and completed a business combination with another firm.[33] The suspension was lifted three months later, on October 13, 2016.[34] Wicker testified that the suspension was lifted because Bonwick had acquiesced in the FINRA staff's views regarding its net capital calculations.[35]

At the hearing, Wicker minimized the net capital deficiency problem relating to its 2015 audit report, calling it "a paperwork issue."[36] He said the problem was resolved in October 2016

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[26] JX-4, at 1.

[27] Tr. (Wicker) 318-19.

[28] Tr. (Wicker) 401-06.

[29] JX-6; Tr. (Wicker) 400-06.

[30] JX-38, at 9; Tr. (Wicker) 407-08.

[31] JX-38, at 9; Tr. (Wicker) 407.

[32] JX-38, at 10.

[33] Tr. (Wicker) 409-10.

[34] JX-38, at 11.

[35] Tr. (Wicker) 409-10.

[36] Tr. (Wicker) 416.

when FINRA and the Firm were able to "fine tune" a footnote to the financials to everyone's satisfaction.[37]

Although we do not know the details of the dispute, we decline to view the net capital problem as a minor concern. When viewed in conjunction with other evidence of regulatory and financial strains on Wicker and the Firm, it becomes significant.

In November 2016, FINRA initiated another regulatory action for Bonwick's failure to pay an annual assessment of $4,500.[38] On December 12, 2016, the Firm was suspended for this failure.[39] In January 2017, the Firm failed to pay more than $17,000 in fees owed to FINRA, and, as a consequence, Bonwick's membership with FINRA was canceled as of February 7, 2017.[40]

In June 2017, Wicker and Bonwick settled a proceeding brought by the Securities and Exchange Commission ("SEC") against them without admitting or denying the charges. The SEC's charges in that proceeding suggest that the Firm was already in serious financial difficulties in 2015, and that Wicker had improperly attempted to conceal those difficulties.

The SEC charged the Firm in that proceeding with having failed to properly accrue certain payables and, as a result, having failed to properly calculate and report its net capital from January 2015 through May 2015. When the Firm's net capital was properly calculated, the calculation revealed that the Firm had improperly operated a securities business a number of times during the first five months of 2015 despite having a net capital deficiency. In the same proceeding, the SEC charged Wicker with having caused the Firm's violations by failing to communicate the existence of certain payables to the Firm's FINOP. Wicker consented to entry of the SEC order sanctioning him and Bonwick for the charged violations.[41]

The Firm's 2016 financial records confirm that it was suffering financial difficulties. The balance in Bonwick's operations account fluctuated widely during the first half of the year from several hundred thousand dollars to as little as $12,000.[42] The Firm required multiple infusions of cash from the partnership to stay afloat.[43] On July 28, 2016 (shortly after it was suspended on

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[37] Tr. (Wicker) 410.

[38] JX-38, at 13.

[39] JX-38, at 13-14.

[40] JX-38, at 15-16; Tr. (Wicker) 65-66.

[41] JX-38, at 17-18; JX-39, at 21. Wicker signed the offer of settlement in April 2017 on behalf of Bonwick and himself. Tr. (Wicker) 62-64; JX-27, at 8-9.

[42] JX-1, at 1-26.

[43] The partnership that owned the Firm deposited substantial sums into the Firm's bank account during the first half of 2016. JX-1, at 2 (over $100,000 on 1/7/2016), 3 (almost $50,000 on 1/27/2016), 10 ($115,000 on 3/14/2016), 14 (roughly $188,000 on 3/31/2016), 17 (roughly $61,000 on 4/29/2016), 21 (roughly $80,000 on 5/31/2016), 22 ($250,000 on 6/15/2016). The $250,000 was immediately withdrawn on the same day it was deposited. JX-1, at 22.

July 13, 2016), Bonwick had a *negative* bank balance.[44] With an infusion of almost $95,000 from the partnership on August 4, 2016, the Firm's bank balance temporarily increased, but the closing balance at the end of August was less than $15,000.[45] By the time the suspension was lifted, in mid-October 2016, the Firm held only $60 in its account.[46] After that, it did not engage in transactions and simply maintained a balance of $60 in November and December.[47] As noted above, it failed to pay assessments it owed to FINRA and was expelled in February 2017.

3. Wicker's Control

We find that Wicker controlled Bonwick and its bank account. He held multiple positions of power in the Firm, including CEO, CFO, and CCO. He also was the majority owner of the Firm[48] and the partnership's managing member.[49] And, importantly, Wicker alone had the power to authorize wire transfers, write checks, and make withdrawals from the Firm's bank account.[50] He authorized individual transfers from the Firm's account and gave general authorization for recurring payments.[51] In the Firm's CRD, Wicker was identified as the sole control person.[52] He was identified to regulators as the Firm's contact person.[53] Finally, as will be seen from the discussion below, Bonwick's employees sought Wicker's approval to take any significant action on behalf of the Firm.

C. Jurisdiction

FINRA has jurisdiction to bring this case against Wicker because he was associated with a FINRA member firm, Bonwick, and registered through it at the time of the alleged misconduct in 2016, and Enforcement filed the Complaint on August 8, 2018, while Wicker was associated with another FINRA member firm. FINRA retains jurisdiction to commence a disciplinary proceeding against a person associated with a FINRA member firm for two years after the

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[44] JX-1, at 26.

[45] JX-1, at 28.

[46] JX-1, at 33.

[47] JX-1, at 35-36.

[48] Stip. ¶ 2; Tr. (Wicker) 66-67.

[49] JX-38, at 4.

[50] Tr. (Wicker) 69, 72; Tr. (AD) 130-34. DM, the investment banker for the IPO, testified that Wicker had ultimate authority over Bonwick's finances. Tr. (DM) 151. AD, the Firm's administrative officer, said, "Any compensation as it relates to commissions or monies being transferred out of the firm need[ed] Mr. Wicker's approval." Tr. (AD) 130.

[51] Tr. (Wicker) 71-72, 291-92.

[52] JX-38, at 6.

[53] Tr. (Wicker) 65.

person's association and concomitant registration have ended, if the complaint is based on alleged misconduct that occurred while the person was associated with a FINRA member.[54]

D. Relevant Events

1. Customer Retains Bonwick as Underwriter for IPO

In February 2016, the Customer, a company based in California, retained Bonwick as the underwriter for a planned initial public offering.[55] Wicker understood that the company was Bonwick's client.[56]

On February 12, 2016, DM, an investment banker employed by Bonwick, and RW, a Bonwick partner located in California, signed an agreement on Bonwick's behalf by which the Firm agreed to serve as exclusive financial advisor to the Customer in connection with the company's proposed IPO. The Customer's president and CEO signed the agreement on its behalf.[57]

DM had just joined the Firm in January 2016 at its California office.[58] He did not have authority to sign the agreement alone.[59] RW was a minority Bonwick partner who supervised DM and reported to Wicker until he left Bonwick in May 2016.[60] Wicker became DM's supervisor in May after RW left the Firm.[61]

The agreement with the Customer provided that "[u]pon execution of this Agreement the Company shall pay Bonwick an Advisory Fee of USD$50,000."[62] On February 12, 2016, the Customer wired $50,000 to Bonwick pursuant to that provision of the agreement.[63] This $50,000 was the advisory fee paid to Bonwick in advance for its work on the IPO. The Customer promised to pay another $50,000 once the IPO was concluded.[64]

The agreement further provided that the Customer would reimburse Bonwick for all its reasonable out-of-pocket expenses in connection with the IPO or any transaction covered by the

[54] FINRA By-Laws, Article V, Section 4.

[55] Stip. ¶ 8.

[56] Tr. (Wicker) 74-75, 77.

[57] JX-7, at 6.

[58] Tr. (Wicker) 73; Tr. (DM) 150, 160-62.

[59] Tr. (Wicker) 411-12.

[60] Tr. (Wicker) 73; Tr. (DM) 151, 170.

[61] Tr. (Wicker) 74.

[62] JX-7, at 4.

[63] JX-1, at 6; JX-22, at 1.

[64] JX-7, at 4.

agreement, "including reasonable fees and expenses of its legal counsel."[65] As discussed below, the Customer made a separate, later payment to Bonwick of $50,000 for attorneys' fees and expenses in connection with the IPO. That later payment is the subject of Enforcement's Complaint.

2. Wicker Directs the Investment Banker to Obtain $50,000 Retainer from the Customer for Underwriter's Counsel

In March 2016, DM, the investment banker employed by Bonwick, discussed arrangements for the IPO with JB, a partner in the California law firm that Bonwick ultimately hired as Underwriter's Counsel. DM received a proposed engagement letter dated March 9, 2016, from Underwriter's Counsel in an email, which he forwarded to Wicker and Wicker later edited with redlined changes.[66]

On March 16, 2016, Wicker responded to DM by email. Wicker was reluctant to sign the agreement with Underwriter's Counsel without having the $50,000 in hand to pay the law firm. He proposed that Bonwick obtain the money from the Customer before signing the law firm's engagement letter.[67] He wrote,

> [DM] – let's think about the risk for this particular client. By signing this [engagement agreement with Underwriter's Counsel], we are on the hook for at least $50k of expense for a client that has limited revenue. Let's invoice [the Customer] and get the first payment before we sign.[68]

The investment banker responded the same day, "Ok,"[69] and immediately implemented Wicker's plan to invoice the Customer before formally retaining Underwriter's Counsel. As Wicker had directed him to do, DM sent a Bonwick invoice to the Customer on March 16, 2016.[70] The invoice specified that the $50,000 was for "Underwritier's [sic] Counsel Retainer."[71] The invoice provided wire instructions for a specified Bonwick bank account and stated that the invoice was "[p]ayable upon receipt."[72] DM followed up with an email to an executive at the

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[65] JX-7, at 4.

[66] JX-12, at 1-13.

[67] JX-9; Tr. (Wicker) 78-79.

[68] JX-9, at 1.

[69] JX-9, at 1.

[70] Stip. ¶ 9; Tr. (Wicker) 79, 81.

[71] JX-10.

[72] JX-10.

company, explaining that Bonwick needed a $50,000 retainer "as part of the engagement of Underwriter's Counsel" for the IPO.[73]

On March 16, 2016, the day before the Firm received the retainer for Underwriter's Counsel, the balance in Bonwick's bank account was slightly less than $35,000.[74] The Firm did not at that time have enough money in its operating account to pay the proposed $50,000 legal retainer. At the hearing, Wicker claimed that the Firm had as much as $900,000 in other accounts,[75] but we have no financial records to corroborate his testimony, and his attempt to portray the Firm as financially comfortable is inconsistent with the tenor of his email correspondence with RW in January 2016 discussed above. The inconsistency between Wicker's testimony and the evidence of the Firm's precarious condition undermines his credibility.

3. Customer Wires Bonwick $50,000 as a Retainer for Underwriter's Counsel

The next day, on March 17, 2016, the Customer wired $50,000 to the Bonwick bank account designated on the invoice.[76] That afternoon, DM forwarded Wicker an email he had received from an executive with the company confirming that the company had wired $50,000 into Bonwick's account that morning.[77]

Wicker responded about an hour later saying that even though the $50,000 deposit was pending (and not yet posted to the account) he would execute the engagement letter with Underwriter's Counsel the next morning.[78] Wicker testified that he knew that the deposit was still pending because he had asked AD, the Firm's administrative officer, to check the status of the $50,000 wire.[79] Wicker was evidently closely tracking the arrival of the money.

DM asked for Wicker's authorization to sign the engagement letter with Underwriter's Counsel on behalf of Bonwick once the $50,000 arrived in Bonwick's bank account.[80] DM apparently lacked authority to commit Bonwick to the engagement without Wicker's approval.

The $50,000 from the Customer posted to Bonwick's account on March 17, 2016.[81]

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[73] JX-11, at 1.

[74] JX-1, at 10.

[75] Tr. (Wicker) 317.

[76] JX-11; Stip. ¶ 10.

[77] JX-11, at 1.

[78] JX-12, at 2.

[79] Tr. (Wicker) 83-84.

[80] JX-12, at 2.

[81] JX-1, at 10; Tr. (Wicker) 84-85.

Wicker admits that the Customer transferred the funds to Bonwick's account for the sole purpose of paying Underwriter's Counsel's retainer,[82] and he knew that at the time of the deposit to Bonwick's bank account.[83]

Wicker did not, however, segregate the Customer's funds from the other funds in Bonwick's bank account or otherwise earmark or preserve them. The Customer's funds were simply commingled with the other funds in Bonwick's operating account.[84] Once the funds were in the account, the Firm had no mechanism for distinguishing the funds intended to be paid to Underwriter's Counsel from other funds in the account.[85] The funds in the operating account were then used to pay the Firm's expenses.[86]

Bonwick had an outsourced FINOP.[87] Wicker testified that he was unsure whether the FINOP was told to set up a subsequent liability payable to Underwriter's Counsel.[88] He said that he "imagine[d]" that the FINOP would have asked why the money came into the account and that "they" would have told him. He "imagine[d]" that was how it would have been set up as a liability.[89]

Significantly, this testimony was no more than speculation. Wicker said he would not have told the FINOP of the prospective $50,000 liability. If someone did, Wicker said, it would have been AD.[90] But AD testified that he did not distinguish between the funds commingled in the account.[91] We do not credit Wicker's speculation that someone probably told the FINOP about the $50,000 liability. No one distinguished between the Customer's funds and any other funds in Bonwick's operating account.

With the addition of the $50,000 intended to pay Underwriter's Counsel, Bonwick's bank account had a balance on March 17 of about $85,000.[92] Over the next couple of weeks Bonwick paid various expenses from that total, including the Firm's payroll and a regular twice-monthly payment to Wicker of $8,333.33. The bank account balance fell to a little more than $12,000 by

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[82] Stip. ¶¶ 10, 12; Tr. (Wicker) 93-94, 97, 293. He also admits that the Customer never authorized him at some later time to use the funds for any other purpose. Stip. ¶ 16.

[83] Tr. (Wicker) 93-94.

[84] Stip. ¶ 13; Tr. (Wicker) 98.

[85] Tr. (Wicker) 317-18.

[86] Tr. (Wicker) 303.

[87] Tr. (Wicker) 68.

[88] Tr. (Wicker) 341-43.

[89] Tr. (Wicker) 343.

[90] Tr. (Wicker) 341-42.

[91] Tr. (AD) 141.

[92] JX-1, at 10.

March 30.[93] At the time of the Firm's end-of-month payroll debit, the Firm did not have enough money in the account to meet that payroll without the Customer's funds.[94]

As discussed above, Bonwick received the Customer's funds on March 17, the same day that FINRA initiated a notice of suspension to the Firm relating to its 2015 annual audit and net capital position.[95]

4. Wicker Signs Engagement Letter with Underwriter's Counsel

The following day, March 18, 2016, Wicker sent DM, the investment banker, a redlined copy of Underwriter's Counsel's engagement letter.[96] The redlined copy shows that Wicker wanted to have the document revised so that he would sign it instead of DM.[97] Wicker also added a provision that the lawyers' work would be billed in $50,000 increments.[98] DM responded with a proposed change to Wicker's new provision. He proposed that the $50,000 increments be paid in advance.[99] Wicker rejected that proposal and responded, "Why add that if they don't ask for it? It gives us leverage on them stopping work if it is not paid in advance."[100] Wicker told DM to send Wicker's redlined version of the engagement letter to the law firm.[101]

Thus, Wicker dictated the terms on which he would commit Bonwick to pay Underwriter's Counsel, and revised the engagement letter for his signature. He knew that it required Bonwick to pay the law firm's bills.[102] He rejected DM's proposal that Bonwick forward the $50,000 to Underwriter's Counsel in advance, which would have removed Wicker's ability to use the funds for his own purposes.

DM sent the document with Wicker's redlined changes to JB, the partner at Underwriter's Counsel with whom he had been dealing, saying "If ok, we can sign a clean final

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[93] JX-1, at 10, 13-14. Wicker described the regular twice-monthly payment of $8,333.33 as a "guaranteed" payment to him under the partnership's operating agreement. Tr. (Wicker) 307-09.

[94] JX-1, at 10, 13-14; JX-45; Tr. (MB) 245-48. The partnership that owned the Firm deposited $188,000 in the account shortly afterwards. Enough money remained in the account when Underwriter's Counsel billed Bonwick on April 4, 2016, for $50,000 that Bonwick could have paid the law firm. JX-1, at 14. But, as discussed below, Wicker did not authorize payment to Underwriter's Counsel.

[95] JX-38, at 11-12.

[96] JX-12, at 1, 6-13.

[97] JX-12, at 6-7.

[98] JX-12, at 7.

[99] JX-13, at 3.

[100] JX-13, at 2.

[101] JX-13, at 1-2.

[102] Tr. (Wicker) 85-92.

copy."[103] JB asked for clarification with respect to the language that Wicker had added. He asked whether Bonwick's prior approval was required for any charges over the $50,000 increment, and whether such prior approval was required for each $50,000 increment.[104]

DM told JB that he would ask Wicker to clarify, which he did. Wicker wrote back to DM confirming JB's understanding that any charges above the $50,000 increments had to receive prior approval in writing from Bonwick.[105]

The executed document, which was a clean version containing Wicker's changes, is dated March 18, 2016.[106] Wicker signed it on behalf of Bonwick.[107]

Wicker asserted at the hearing that DM ran his own deals as an independent operation, as though Wicker had no control over what happened or the monies involved.[108] The above-recounted events are inconsistent with that assertion. DM could not take on the client by signing the agreement between the Customer and Bonwick by himself. He needed a partner's signature, which RW provided. DM also could not sign the agreement with Underwriter's Counsel without Wicker's approval. In the end, Wicker signed the agreement with Underwriter's Counsel, and Wicker dictated what that agreement would say. And, as discussed below, DM could request that funds be paid to him or to others who worked on his deals, but the payments would only be made if Wicker authorized them.[109]

5. Wicker Does Not Pay $50,000 Retainer to Underwriter's Counsel

In email correspondence toward the end of March 2016, DM, told Underwriter's Counsel to send an invoice and Bonwick would then wire the initial retainer of $50,000 to the law firm. DM copied Wicker on an April 4, 2016 email to Underwriter's Counsel specifically promising to "wire the initial retainer of $50,000 to [Underwriter's Counsel]" upon receipt of an invoice.[110] DM received Underwriter's Counsel's invoice later on April 4, 2016.[111] He requested AD, Bonwick's administrative officer, to wire Underwriter's Counsel the $50,000 once Wicker

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[103] JX-15, at 2.

[104] JX-15, at 2.

[105] JX-15, at 1-2.

[106] JX-14, at 1.

[107] Stip. ¶ 11; JX-14, at 2; Tr. (Wicker) 110.

[108] Tr. (Wicker) 296.

[109] Tr. (Wicker) 296-97.

[110] JX-16, at 1-2.

[111] The invoice had a date of 2015, but Wicker agreed in his testimony that it was a typographical error. Tr. (Wicker) 109-11.

approved the payment. He copied Wicker on this email, too.[112] There is no evidence in the record of Wicker responding to either of DM's April 4 emails to signify approval or to say anything else about the payment to Underwriter's Counsel.

Wicker agreed at the hearing that he knew Bonwick owed the money to the law firm as of April 4, 2016.[113] The Firm had sufficient funds in its bank account to pay the $50,000 retainer upon receipt of the invoice. The balance at the start of the day was roughly $156,000, and at the end of the day it was almost $62,000.[114] Yet, Wicker did not authorize the payment to Underwriter's Counsel.

A few days after Underwriter's Counsel invoiced Bonwick, the Firm staved off the suspension that had been previously noticed on March 17, by asking for a hearing.[115] As a result, the suspension was stayed and the Firm could continue operations despite the unresolved issue concerning its net capital calculations.

After the Firm paid its payroll on April 15, the balance in its bank account was a little more than $6,000.[116] The Firm no longer had the money to pay Underwriter's Counsel.

Three days later, on April 18, Bonwick received a wire transfer of $125,000 from its clearing firm.[117] A number of debits occurred that day and the next, including the regular twice-

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[112] JX-16, at 1; Stip. ¶ 17. DM, the Bonwick investment banker, referred to AD in his emails with Underwriter's Counsel as Bonwick's CFO. But AD held no securities licenses and could not have been registered as CFO. AD referred to himself as Bonwick's administrative officer and said that was his title the entire time he was employed at Bonwick. Tr. (AD) 128-29. AD described his job duties as consisting of "overseeing payroll, management reporting, IT support, office facilities, assisting the [FINOP] with data collection … and some administrative duties." Tr. (AD) 129.

AD began with the Firm in August 2014. Tr. (AD) 128. Wicker claimed that AD had been the Firm's CFO until sometime in 2016, when FINRA staff objected in an examination that AD had no license. Wicker said that he then "inherited" the title CFO. Tr. (Wicker) 67-68, 287.

Although AD could look at what was happening in Bonwick's bank account, he had no authority over the account independent of Wicker. Anything that involved monies being transferred out of the Firm's operating account required Wicker's approval. Tr. (AD) 129-30. AD could not write checks on the account or withdraw cash, or, for most of the time he was at Bonwick, effect wires out of the account. AD was granted the ability to wire funds out of the account in the second quarter of 2016, because Wicker was traveling extensively and the Firm's payroll had to be paid. AD did not remember sending any wires from Bonwick's bank account other than for the payroll. Tr. (AD) 128-34, 142-43. The Firm's procedure was for Wicker to authorize any checks AD issued. Tr. (Wicker) 69. No one but Wicker and AD had the ability to effect approved transactions. Tr. (Wicker) 287-88; Tr. (AD) 131-34. The FINOP only had the ability to look at transactions in the account. Tr. (AD) 131.

[113] Tr. (Wicker) 111.

[114] JX-1, at 14; Tr. (Wicker) 111.

[115] JX-38, at 11.

[116] JX-1, at 15.

[117] JX-1, at 15. The clearing firm is identified in the Firm's CRD record. JX-38, at 7.

monthly payment of $8,333.33 to Wicker.[118] By April 19, the Firm's bank account balance was a little less than $60,000, but still enough to pay Underwriter's Counsel.[119]

Wicker testified that he instructed AD to pay Underwriter's Counsel on April 19, 2016. Wicker says that he has no idea why AD did not do it.[120] Wicker explained that he needed first to show AD how to effect the wire, because they were using technology new to them to do it. According to Wicker, AD came to Wicker's office and Wicker showed him how to transact the wire, but for some reason they did not actually effect the wire to Underwriter's Counsel while they were going through that process.[121] There is no dispute that the funds were never actually wired to Underwriter's Counsel.[122]

At best, the evidence may show that Wicker had a fleeting thought about paying Underwriter's Counsel. AD testified that he does not recollect ever receiving an instruction from Wicker to wire the $50,000 to Underwriter's Counsel.[123] Even if Wicker did at one point instruct AD to pay Underwriter's Counsel, it evidently did not make a strong impression on AD and he did not do it.[124] Later events are inconsistent with any firm, continuing intention by Wicker to pay Underwriter's Counsel.

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[118] JX-1, at 15.

[119] JX-1, at 15.

[120] Tr. (Wicker) 293-94, 333-34, 363-66, 386-87, 397.

[121] Tr. (Wicker) 397-98.

[122] Stip. ¶¶ 19, 22, 23.

[123] Tr. (AD) 134.

[124] Wicker testified that a document he provided to Enforcement in discovery corroborated his testimony about having given AD the instruction to pay Underwriter's Counsel around April 19, 2016. Tr. (Wicker) 362-66, 397-98. Two versions of a chat screen were located, printed, and entered into evidence over Enforcement's objection that the documents were not sufficiently authenticated and reliable. Tr. (remarks by Enforcement counsel) 357-58, 391-93. These appear to be one-page excerpts of an ongoing chat in Google Hang-Out between Wicker and AD. One version, which had no date, had been produced in discovery; the other, which Wicker produced the second day of the hearing, had the date April 19, 2016. RX-1; RX-1a.

Although Enforcement had requested in a Rule 8210 letter that Wicker produce the metadata for what became RX-1, Wicker and his counsel explained the circumstances in which they obtained the documents and said they were unable to figure out how to produce the metadata. Tr. (Wicker and remarks of defense counsel) 353-57, 359-61, 385-91, 393-94. As the matter stands, we have no indicia of authenticity or completeness and can give the print-outs from the chat little weight. Because the excerpts from the chat are the only evidence Wicker cited to corroborate his testimony, however, they were admitted and considered by the Hearing Panel. Tr. (Hearing Officer's remarks) 361-62, 395-96. Admission of the documents also gave the Hearing Panel the opportunity to evaluate Wicker's testimony interpreting the chat.

In the chat, Wicker said to AD, "Hey – You can send that wire to [Underwriter's Counsel] now for [DM's] deal. Let's send it before we end up under the amount again." Wicker testified that he needed to show AD how to do the wire because they were using an unfamiliar technology. AD responded in the chat that he would swing by to see how to do it. RX-1; RX-1a.

In early May, Underwriter's Counsel still had not received the retainer payment. The law firm's staff asked DM when the payment would be processed. DM expressed surprise to AD, the Firm's administrative officer, saying in a May 5, 2016 email, "I thought the $50k was wired to Underwriter's Counsel in March?"[125] This time the investment banker did not copy Wicker, but AD responded that he would "check with Devin [Wicker] if he ever sent the wire."[126] Although AD's email shows that he did not send the $50,000 in April, there is no evidence that Wicker chastised him or directed him in May to wire the money to Underwriter's Counsel.

At the beginning of May, the Firm had over $200,000 in its bank account, but by May 20, 2016, the balance reached a low of $9,500.[127] The Firm received wire transfers at the end of the month that included an infusion of cash from the partnership that owned the Firm.[128] Those wire transfers brought the balance back up on to more than $500,000.[129] Three weeks later, however, on June 21, 2016, the account balance was down to $4,726.08.[130]

On July 1, 2016, Wicker became licensed through another FINRA member.[131] On July 12, 2016, FINRA issued an Order deeming Bonwick to have abandoned its defense to the previously noticed suspension. The next day, the suspension took effect. Bonwick was no longer permitted to conduct a securities business while the suspension was in effect, and the Firm would be expelled automatically in three months if it did not take steps to resolve its regulatory issues.[132]

As suggested by Wicker's comment in the chat excerpt, on April 19, 2016, Bonwick had enough money to pay the retainer. The balance in its bank account was around $59,000. JX-1, at 15.

The chat excerpts do not change our findings. Although they could be viewed as showing that Wicker intended at one point in April 2016 to pay the $50,000 to Underwriter's Counsel, Wicker did not persist in that intention. When DM later sought in May to have Bonwick pay Underwriter's Counsel, Wicker did nothing to make it happen.

Furthermore, the chat excerpts actually confirm that Wicker intentionally used Customer funds for purposes the Customer did not intend. The excerpts show that Wicker was conscious that he had not yet paid Underwriter's Counsel because he had not maintained a sufficient balance in the Firm's bank account to do it. He suggested paying the law firm "before we end up under the amount again," meaning before Bonwick's bank account balance once again slipped under $50,000. Wicker further testified that he thought he had tried once before April 19, 2016, to pay Underwriter's Counsel, but another expense had been paid around the same time, after which the Firm did not have enough money to pay Underwriter's Counsel. Tr. (Wicker) 365-66. Thus, Wicker knew at the time of the chat excerpts that he had used the Customer's funds for different purposes than the Customer intended.

[125] JX-17, at 2.

[126] JX-17, at 2.

[127] JX-1, at 19.

[128] JX-1, at 21.

[129] JX-1, at 22.

[130] JX-1, at 23.

[131] Stip. ¶ 6.

[132] JX-38, at 11-12.

On July 20, 2016, DM asked Underwriter's Counsel's staff in an email whether they had received their retainer. Underwriter's Counsel's staff responded the same day that they had not. DM then forwarded the email string to AD, asking him to pay the $50,000 that Underwriter's Counsel had invoiced in early April.[133] DM copied Wicker, because he wanted to emphasize that the payment was past due and "a considerable amount of time had transpired."[134] Wicker did not respond to DM's email.[135]

That same day, the Firm's bank account balance was less than $18,000.[136] It could not have paid the retainer even if Wicker had directed that it be done.

On July 22, 2016, DM met with Wicker in New York City. DM had heard from a competitor that Bonwick was suspended. No one had informed DM. The suspension meant that the Firm was unable to conduct business. DM had his license through Bonwick and was upset to think that he could have been unknowingly conducting a securities business while the Firm was suspended.[137] DM and Wicker discussed DM's intention to leave the Firm, with Wicker asking if DM would stay.[138] DM brought up the unpaid retainer for Underwriter's Counsel and asked Wicker to ensure that it was paid.[139] At that meeting, DM recalled, "Wicker was not able to tell me definitively whether or not it had or had not been paid."[140] Wicker responded with "[s]omething along the lines that he would look into it."[141] Wicker did not admit to DM that Underwriter's Counsel had not been paid. Nor did he tell DM that as of July 20, two days before, the Firm did not have $50,000.

On July 23, 2016, DM officially resigned as Managing Director and Registered Representative of Bonwick in a one-sentence email sent to Wicker, attached to an email string that reflected many of his efforts to have the $50,000 retainer wired to Underwriter's Counsel.[142]

On July 28, 2016, DM sent an email to AD attaching some of the earlier emails about the $50,000 retainer. DM told AD that he had met with Wicker the day before, July 27, and Wicker had then suggested that "he thought Underwriter's Counsel might have been already paid, and

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[133] JX-17, at 1.

[134] Tr. (DM) 155.

[135] Tr. (DM) 155.

[136] JX-1, at 26.

[137] Tr. (DM) 193-94.

[138] Tr. (DM) 158.

[139] Tr. (DM) 158.

[140] Tr. (DM) 157-58.

[141] Tr. (DM) 158-59.

[142] JX-18.

they just can't locate the incoming wire from some time ago."[143] DM asked AD to send "a wire confirm or other proof of payment so [Underwriter's Counsel] can find it."[144]

Wicker denies that he ever said to DM that the law firm might already have been paid. But the record contains no response to DM's email. Wicker did not try to correct DM's statements about their conversation.[145]

On the day that DM sought proof of payment, the Firm had a negative bank balance of -$282.57.[146] It could not have paid the $50,000 it owed to Underwriter's Counsel.

DM began working for another broker-dealer firm, referred to here as MBS, at the end of July 2016, and MBS became the underwriter for the Customer's IPO.[147] On August 10, 2016, an MBS executive asked Underwriter's Counsel whether the law firm had received an initial $50,000 payment from Bonwick in connection with the IPO.[148] Underwriter's Counsel responded that same day that it had not.[149] Later in the day, DM sent an urgent email to Wicker and AD asking them to wire the $50,000 to Underwriter's Counsel or provide confirmation that the funds were previously sent.[150] The failure to confirm that the $50,000 had been sent to Underwriter's Counsel was causing difficulty with the completion of the IPO.[151] Wicker did not respond to the email.[152]

On August 24, 2016, JB, the law firm partner who was working on the IPO with DM, emailed Wicker directly, asking that the $50,000 be sent to the law firm or sent back to Bonwick's client so that it could pay for the work Underwriter's Counsel had done so far on the IPO.[153] Wicker did not respond to this email either.[154]

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[143] JX-19, at 1.

[144] JX-19, at 1.

[145] Tr. (Wicker) 117-19.

[146] JX-1, at 26.

[147] JX-20, at 3-5; Tr. (DM) 163-65.

[148] JX-20, at 1.

[149] JX-20, at 1.

[150] JX-20, at 1; Tr. (Wicker) 120-21.

[151] Tr. (DM) 159. DM testified that after he moved to MBS the necessary due diligence by Underwriter's Counsel could not be completed because the law firm had not been paid. Tr. (DM) 176.

[152] Tr. (Wicker) 121.

[153] JX-21.

[154] Tr. (Wicker) 122-23.

6. Wicker Does Not Refund the $50,000 Retainer to the Customer

On October 7, 2016, the Customer's CFO, MM, sent a letter to Wicker demanding the immediate return of the $50,000 law firm retainer. MM told Wicker he had only discovered the day before that Bonwick had failed to forward the money to Underwriter's Counsel. MM attached the invoice Bonwick had sent for Underwriter's Counsel expenses and a confirmation of the wire transfer from the Customer to Bonwick. He threatened to report Bonwick and Wicker to FINRA and other regulators and enforcement agencies if the money was not wired to Customer's bank account.[155]

On October 12, 2016, Wicker responded to MM, first saying that he would "address the issue with the banker today on your funds."[156] Later in the day, Wicker emailed MM that he was unable to get a response to his emails and voicemails because of the holiday.[157] The next day, Wicker emailed MM saying that he "was able to discuss with the banker and have a path to resolution."[158]

MM responded in exasperation:

> Devin you are trying my patience. I do not know, nor do I care, what these other issues are that you keep referring to, and I do not intend to patiently wait while you give me excuse after excuse. First it was Yom Kippur; now it's something else. They do not concern me.[159]

MM again threatened to report Wicker and Bonwick to FINRA and other authorities:

> If I don't have the money in my account tomorrow, I will contact FINRA, the SEC, the California Attorney General, and anyone else I think can make your life miserable. You failed to forward our funds to [Underwriter's Counsel] and you did not return them to us. It's very simple; wire the $50,000 and we are done. Don't wire it, and you'll be mired in things you don't want to deal with.[160]

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[155] JX-22. The day before, on October 6, 2016, as the Customer was trying to file the initial draft of its IPO document with the SEC, Underwriter's Counsel declared that it would do no more work until it had been paid its retainer. Tr. (MM) 202, 204. In the October 7 email to Wicker, the Customer's CFO, MM, noted that it had also paid Bonwick $50,000 for its work on the IPO, but MM did not ask for a refund of that money. JX-22, at 11.

[156] JX-23, at 6.

[157] JX-23, at 5.

[158] JX-23, at 5.

[159] JX-23, at 4.

[160] JX-23, at 4.

On October 14, 2016, Wicker emailed MM that he did "not appreciate the threatening approach you feel you need to take regarding this matter."[161] Wicker intimated that DM, the investment banker, was the problem:

> Understand that I was only recently made aware of the fact that [DM] did not satisfy this outstanding amount when he left the firm. I don't know what [DM] communicated to you, but your anger escalation directed at me is unwarranted.[162]

MM responded later on October 14, 2016, reciting the various excuses Wicker had given him and saying, "That's why I'm unhappy. Just wire the funds and we never have to have another conversation."[163] After that MM had an attorney attempt to discuss the matter with Wicker, but Wicker did not return the attorney's calls. MM continued to email Wicker over the next three weeks about the retainer without receiving any response.[164] On November 11, 2016, MM wrote, "I'm not going away, Devin; you have confiscated our funds. Simply return them."[165] Finally, on November 17, 2016, MM emailed Wicker saying that he had filed fraud complaints with FINRA and the New York Securities Division, and that he had complained to the New York and California Attorneys General about theft.[166]

At the time that MM complained to Wicker, Bonwick did not have the money to refund the Customer. In October 2016, Bonwick's bank balance declined from a little over $3,500 to $60.[167] It maintained a $60 balance in November and December 2016.[168]

Although it had already paid Bonwick $50,000 as a retainer for Underwriter's Counsel, the Customer separately paid Underwriter's Counsel for the work that it had done on the IPO so as to keep the IPO process moving.[169] The IPO eventually closed in June 2017.[170]

In sum, beginning in April 2016 and continuing through November 2016, Wicker was copied on or received directly multiple written requests from DM, Underwriter's Counsel, and

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

[162] JX-23, at 4.

[163] JX-23, at 3; Tr. (MM) 213-14.

[164] JX-23, at 1-3; Tr. (MM) 216.

[165] JX-23, at 1.

[166] JX-23, at 1.

[167] JX-1, at 33.

[168] JX-1, at 35-36.

[169] Tr. (MM) 207-08, 222-25; Tr. (DM) 178.

[170] Tr. (DM) 183; Tr. (MM) 218, 229.

the Customer, asking him either to pay the $50,000 to Underwriter's Counsel or return the funds to the Customer.[171] Wicker did neither.[172]

7. Wicker Dissipates the Funds in Bonwick's Bank Account, Including the Customer's Funds

Wicker dissipated the funds in Bonwick's bank account, including the Customer's funds. All withdrawals from Bonwick's bank account required Wicker's approval, either for the specific withdrawal or a general approval for recurring withdrawals.[173] He reviewed Bonwick's bank account statements every month. He knew that commission payments were made monthly and payroll payments were made bi-monthly, and he received information about the actual amounts from the head of operations each month.[174]

From April 4, 2016, the date on which Underwriter's Counsel invoiced Bonwick for the $50,000, until November 2016, when transactions in Bonwick's bank account stopped, Wicker authorized several hundred transactions in the Firm's bank account. He authorized payments to himself,[175] and payments for various Bonwick expenses, including its payroll, rent, and legal fees incurred in litigation.[176] Around the end of July, after Bonwick ceased operations and Wicker transferred his licenses to another firm, Bonwick had a negative balance in its bank account.[177] The Firm's account received an infusion of funds in August, but Wicker rapidly ran down the balance to $60 in mid-October.[178] The Customer's funds were gone.

8. Wicker Benefits from Not Paying Underwriter's Counsel

Wicker benefited from his failure to use the Customer's funds as intended, both indirectly as the majority owner of the Firm and directly for his personal account.

Using the Customer's funds to support Bonwick and pay its expenses enabled Wicker to keep the Firm going a little longer. Although Wicker claims the Firm had other funds available, we have no evidence of it other than his testimony, and other record evidence is inconsistent with his assertion that the Firm had ample resources. As discussed above, Wicker and the Firm were under regulatory and financial pressure, and, without the Customer's $50,000, Bonwick could

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[171] Stip. ¶ 18.

[172] Stip. ¶¶ 19, 22, 23.

[173] Tr. (Wicker) 291-92.

[174] Tr. (Wicker) 71-72, 288-90; Tr. (AD) 137-39.

[175] Stip. ¶ 20.

[176] JX-1, at 10-33.

[177] JX-1, at 26.

[178] JX-1, at 28-39.

not have covered its payroll expenses on March 30, 2016, from its operating account.[179] While the Firm did receive a cash infusion the next day from the Firm's partnership that would have been sufficient to cover that payroll—and pay the $50,000 to Underwriter's Counsel—Wicker did not preserve any of that cash infusion to pay Underwriter's Counsel.[180] Rather, Wicker continued to spend money in other ways.[181]

Wicker also personally benefited. He received regular transfers from Bonwick's account in the amount of $8,333.33. He characterized these payments as "guaranteed" payments owed to him.[182] He additionally received other transfers of funds that he characterized as repayments of money he had loaned the Firm, although the loans were not documented.[183] Between April 4, 2016, and November 30, 2016, Wicker transferred or withdrew approximately $440,500 that he deposited into his own personal bank account.[184] Wicker received these payments even though the Firm owed the Customer's $50,000 to Underwriter's Counsel. His payments would have been reduced if he had used some of the money to pay the $50,000 legal retainer. But he testified that he had a right to the payments he paid himself and those payments were separate and apart from the Customer's funds, essentially putting his interests ahead of the Customer's interest.[185]

E. Wicker Shifts Blame to the Investment Banker

Wicker claims that DM, the investment banker on the IPO, was responsible for Bonwick's failure to apply the retainer as intended. As Wicker tells the story, DM requested that Bonwick pay him certain commissions, and Wicker and DM discussed what expenses would be taken out before payment of the commissions. They disagreed on the calculation of commissions owed.[186] Bonwick owed $50,000 to Underwriter's Counsel, and Wicker's only solution to the problem of paying Underwriter's Counsel was to deduct the $50,000 from DM's commissions. Wicker testified that he never considered any other alternative for paying Underwriter's

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[179] JX-1, at 14.

[180] JX-1, at 14.

[181] JX-1, at 14-15.

[182] Tr. (Wicker) 307-09. For example, on April 4, 2016, the day that Underwriter's Counsel invoiced Bonwick for the $50,000, Wicker received an $8,333.33 transfer from Bonwick's account. JX-1, at 14; Tr. (Wicker) 308-09. On April 29, 2016, he received another $8,333.33 transfer from Bonwick's account. JX-1 at 17. On May 2 and 31, 2016, he also received transfers in the same amount. JX-1, at 18, 22. Wicker believed that he received, in 2016, between $125,000 and $175,000 in guaranteed payments. Tr. (Wicker) 70-71.

[183] Wicker claimed that as of March 2016 he had loaned Bonwick more than $500,000. Tr. (Wicker) 281-82, 309. He also claimed that he had made capital contributions of more than $1 million. Tr. (Wicker) 309-10.

[184] Stip. ¶ 20; Tr. (Wicker) 112.

[185] Tr. (Wicker) 310-16.

[186] Tr. (Wicker) 351.

Counsel.[187] DM did not want the $50,000 deducted from his commissions.[188] According to Wicker, DM then asked Wicker to pay his commissions from the funds designated for Underwriter's Counsel, and DM told Wicker that he would replenish those funds once another deal closed.[189] Wicker said he checked the funds held in escrow for the other deal and ascertained that when the deal closed there would be sufficient funds to cover the retainer for Underwriter's Counsel in the Customer's IPO.[190] Wicker testified that he agreed to the proposal to pay DM the $50,000 owed to Underwriter's Counsel and paid the money to DM, along with another $40,000.[191] When asked what happened to the $50,000 that was supposed to be paid to Underwriter's Counsel, Wicker said flatly, "It was paid to [DM]."[192]

Wicker's story lacks corroboration and is inconsistent with other evidence. In an attempt to give his story a credible context, Wicker testified that DM ran his investment banking deals as independent operations and directed the flow of funds from those deals.[193] He called DM's business "self contained," as though it were separate from Bonwick's business.[194] Wicker's characterization of DM's independence is inaccurate and misleading.

While it may be that DM worked independently day-to-day on his deals, he was not operating a separate business from Bonwick. Bonwick was the underwriter and had the contractual relationships. The Customer paid the Firm, and Wicker controlled the payment of monies from the Firm's account. DM was the Firm's employee. Even Wicker's own testimony demonstrates that he was in control. According to that testimony, DM might advise Wicker how money should be distributed, but Wicker controlled any payments from the Firm's account. He explained, "If [DM] asked me to direct funds, I would authorize it…. If there were enough funds to make a payment, we would make it. If there were not but there were commissions due to [DM] we would deduct it from [DM's] commissions."[195]

Wicker claims that he and DM discussed payment of the $50,000 legal fee to DM two times, once in May and once in July.[196] According to Wicker, in May "there was back and forth about whether or not to send [the payment to Underwriter's Counsel]. So I didn't know if at the

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[187] Tr. (Wicker) 333-38, 351.

[188] Tr. (Wicker) 338-39.

[189] Tr. (Wicker) 294-97, 299-301.

[190] Tr. (Wicker) 336.

[191] Tr. (Wicker) 336-37.

[192] Tr. (Wicker) 337.

[193] Tr. (Wicker) 295-97.

[194] Tr. (Wicker) 286. Similarly, Wicker said, "[DM] was sort of running his own business and I was trying to do other things around the business." Tr. (Wicker) 400.

[195] Tr. (Wicker) 296-97.

[196] Tr. (Wicker) 300, 333.

same time [DM] told [AD] not to send it but it didn't get sent."[197] At another juncture, Wicker testified that DM "told us" that the Firm should "hold off on sending" the funds to Underwriter's Counsel.[198] According to Wicker, DM "instructed" Wicker to make the full commission payment to him and told Wicker that the money would later be paid to Underwriter's Counsel from another deal.[199] Wicker claimed that he paid DM almost $90,000, which included the $50,000 legal retainer.[200]

There is no evidence other than Wicker's testimony that DM blocked the payment to Underwriter's Counsel in May or made the proposal to pay the $50,000 legal fee to him. Nor is there any evidence that DM received a payment of $90,000 that would have included the $50,000 retainer for Underwriter's Counsel. Although Wicker testified that financial records would show that he paid the money to DM,[201] he failed to identify or present any such records. We would have expected corroborating evidence if, in fact, Wicker had paid DM almost $90,000.[202]

Wicker's story regarding the events in May is also inconsistent with evidence that more than a month later DM asked Wicker again to pay Underwriter's Counsel. On July 20, 2016, DM copied Wicker on an email to AD asking him to pay Underwriter's Counsel the $50,000 Bonwick owed the law firm. DM complained about how long he and the law firm had been trying to obtain payment.[203] It is difficult to understand why DM would have sent this email if DM blocked payment of the funds in May and asked that the money be paid to him instead of Underwriter's Counsel. When asked about the email, Wicker had no credible explanation. He said,

> Yes, he wrote that e-mail at the time but he had also told us prior to that to hold off on sending it. So I misunderstood how he was running his deal and

[197] Tr. (Wicker) 294.

[198] Tr. (Wicker) 330-31, 369.

[199] Tr. (Wicker) 294-95. The word "instructed" connotes a relationship in which Wicker was subordinate to DM. The record overwhelmingly demonstrates that Wicker was not subordinate. At least with respect to the payment of monies from Bonwick's bank account, Wicker was in control. The inconsistency between Wicker's testimony regarding the conversation with DM and the evidence of Wicker's authority diminished Wicker's credibility.

[200] Tr. (Wicker) 300, 337-38.

[201] Tr. (Wicker) 332.

[202] In fact, the only payments Bonwick made to DM directly from the Firm's operating account were a wire of $20,000 on February 2, 2016, and another wire of $25,000 on March 16, 2016. Both of these payments were made before the Customer deposited the $50,000 for Underwriter's Counsel and long before the purported agreement to pay the $50,000 to DM. JX-1, at 6, 10. On May 24, 2016, the Firm actually *received* from DM a payment of $4,500. JX-1, at 19. Conceivably, the alleged $90,000 payment to DM could have been made but not been visible to us. Bonwick paid its payroll by a debit to its operating account to the credit of a third-party vendor. That third party then disbursed the funds to individual recipients. Tr. (Wicker) 290; JX-1. But we would have expected Wicker to identify precisely when the payment was made to DM and provide documentation, which he did not do.

[203] JX-17, at 1.

> it was – that he was just sending the e-mail as a way to appease the client until the payments were made.[204]

DM testified about two conversations in late July with Wicker in which they discussed the $50,000 Bonwick owed to Underwriter's Counsel. The first conversation was on July 22, 2016, one day before DM officially resigned from Bonwick.[205] As noted above, DM testified that he asked Wicker to ensure that Underwriter's Counsel was paid and thought Wicker was vague about the exact status of the payment. The second conversation was on July 27, 2016, shortly before DM joined MBS. DM testified that in this conversation Wicker suggested that Bonwick might already have paid Underwriter's Counsel.[206] Wicker testified that in this conversation DM promised to pay the $50,000 to Underwriter's Counsel even though he was joining another firm.[207]

DM's testimony is more consistent than Wicker's with what happened next. The next day, on July 28, DM sent an email to AD, the Firm's administrative officer, asking for proof of payment.[208] It would make no sense for DM to send that email if DM had agreed the previous day to take responsibility for paying Underwriter's Counsel.

The investment banker denied that he asked for the $50,000 intended for Underwriter's Counsel to be paid to him, and testified that he did not agree to pay Underwriter's Counsel sometime later.[209] His multiple efforts to have the $50,000 paid to Underwriter's Counsel or refunded to the Customer are consistent with his testimony—and inconsistent with Wicker's. As discussed above, DM continued to request that Bonwick pay Underwriter's Counsel even after the conversations in which Wicker claims that DM agreed to pay Underwriter's Counsel himself.

In any event, Wicker maintained control of the funds in Bonwick's account and those funds could not have been directed by DM to anyone without Wicker's approval.[210] Wicker admits that at no time did DM himself wire out or otherwise withdraw the $50,000 in Customer

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[204] Tr. (Wicker) 331.

[205] Tr. (Wicker) 119.

[206] Tr. (DM) 157-59.

[207] Tr. (Wicker) 319-21, 333.

[208] JX-19, at 1.

[209] Tr. (DM) 153.

[210] Tr. (Wicker) 284-85 ("[DM] would coordinate the payment of certain items through [AD] and I would authorize them."); Tr. (DM) 152; Tr. (AD) 135.

funds designated to be paid to Underwriter's Counsel.[211] Although DM "coordinated" the payment of certain items,[212] Wicker's authorization was still required.[213]

F. Credibility

1. Wicker

We have noted numerous specific instances where Wicker's testimony was not credible because it was inconsistent with other documentary and testimonial evidence, or because his testimony lacked corroboration when one would have expected it. We have also explained that his primary defense—blaming DM, the investment banker—is not consistent with the other evidence, and therefore is not credible.

We will not repeat those findings here. We do have additional reasons for finding Wicker's testimony not credible.

Wicker's testimony lacked overall credibility because it was often speculative and vague. It amounted to little more than innuendo. He noted, for instance, that DM had direct contact with the Customer, not Wicker, seeming to suggest that as far as Wicker knew DM had obtained the Customer's consent for DM to be paid the retainer. Wicker also suggested that he had no way of knowing what the Customer wanted done with the $50,000 because DM had all the contact with the Customer.[214] Both those suggestions are inconsistent with DM's repeated attempts to prompt Wicker to pay Underwriter's Counsel, and there is no evidence that the Customer ever changed its original intent for the retainer to be paid to Underwriter's Counsel. Wicker admits that he never contacted the Customer to find out if it had changed its intent and wanted the money to be paid to DM.[215]

Wicker's theme that he misunderstood how the IPO was going to work and how to

[211] Stip. ¶ 14.

[212] Tr. (Wicker) 284.

[213] Tr. (Wicker) 285. Wicker testified that he and AD, the administrative officer, would approve the payments. But AD never had authority to make payments without Wicker's approval (either for a specific payment, or general approval for a recurring payment such as payroll). This is an example of Wicker trying to diffuse responsibility and deny his exclusive control over the flow of funds from Bonwick's bank account.

[214] Tr. (Wicker) 300-03.

[215] Tr. (Wicker) 303.

handle the Customer's funds[216] is inconsistent with his extensive experience and qualifications. It also is inconsistent with his behavior. He was repeatedly asked to pay Underwriter's Counsel, but he did not act to fix the "mistake" when it was called to his attention.

We do not find Wicker's purported remorse credible.[217] We are not persuaded that he understands and is sorry for what he did. Although Wicker sometimes expressed regret for what happened to the Customer's funds, he did so as though he had little to no responsibility for the loss of those funds. Wicker blames DM, the investment banker, and complains that he made no profit from the Customer's IPO, as though he was as much a victim as the Customer.[218] "I didn't even receive the money back that I lent the [F]irm, Wicker said. "So that money was paid to [DM] and never retrieved to this point."[219]

Wicker is engaged in litigation to recover the money he believes he lost. His only offer to make restitution to the Customer is contingent on his recovery of more than $50,000 in that litigation.[220] This offer is not consistent with true remorse.

Furthermore, Wicker views the payments he made to himself (the regularly recurring guaranteed payments and the repayment of undocumented loans) as separate items to which he was entitled, regardless of his duty to the Customer.[221] Wicker still does not acknowledge the connection between the payments to him and the failure to pay Underwriter's Counsel, *i.e.*, the more money he paid himself from the account, the less money was available to pay Underwriter's Counsel.

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[216] Tr. (Wicker) 76-77 (there was "confusion" because in the other deals we had not engaged counsel directly), 78-79 (Wicker "misunderstood" the process that required Bonwick to pay the money to Underwriter's Counsel), 97-98 (Wicker did not segregate the Customer's funds, although he knew in March they were intended to be paid to Underwriter's Counsel, because he "misunderstood how that should be handled."), 282 (Wicker claimed he failed to monitor the investment banker closely enough "in hindsight apologetically" because he did not have "investment banking expertise to that degree"), 294 (Wicker "misunderstood what the funds were supposed to be used for" when he spoke to DM), 295 ("I am sorry that I mistakenly, I misunderstood about the process of the deal"), 297 ("I, you know, mistakenly misunderstood that that is not necessarily the right way to do, to run an investment banking business."), 300 ("I misunderstood about how the deal was going to be run …."), 302 (Wicker said he did not have "enough expertise in the businesses that we were conducting."), 336-37 (Wicker "misunderstood" that the money held in escrow for another deal run by DM could not be attributed to DM's business at that time), 345 ("I apologize, I misunderstood and I let [DM] run the deals."), and 369 ("I misunderstood the intent of how [DM's] business was being run ….").

[217] Resp. Post Br. 12.

[218] Tr. (Wicker) 324.

[219] Tr. (Wicker) 324.

[220] Tr. (Wicker) 323, 325-26, 346.

[221] Tr. (Wicker) 309-12. Wicker testified that the twice monthly payments to him of $8,333.33 were payments he was guaranteed, and that he took regardless of the $50,000 owing to Underwriter's Counsel. "Yes, I mean I'm sorry that [the Customer] was not paid but this [money returned to me] was separate." Tr. (Wicker) 310.

When his counsel asked if Wicker would do anything different today, Wicker responded,

> Yes, I would try to have a better understanding as to how [DM] ran his deals. I am sorry that the funds were improperly used. I, you know, I wouldn't have, I would have fought I guess more to have the client pay directly to [Underwriter's Counsel]. I would have withheld the money from [DM] and properly used funds. I would have done everything differently.[222]

Wicker blames himself only for not being more assertive with DM.

2. DM, the Investment Banker

DM testified credibly in a way that was consistent with the documentary evidence. Months of emails reflect that he continued to try to persuade Wicker to pay Underwriter's Counsel, both before and after he supposedly directed Wicker to pay the retainer to him instead.

DM's testimony was not only supported by documentary evidence, but sometimes even by Wicker's own testimony. The emails in which DM sought various approvals or sought to have Underwriter's Counsel paid went largely unanswered. DM testified that it was difficult to conduct business because Wicker "would go completely dark for long periods of time" and would be "totally unresponsive to e-mails, phone calls, requests for meetings."[223] According to DM, Wicker grew increasingly "dark" from January 2016 through July 2016.[224] Wicker concurred that he was often unavailable. He explained that he was traveling in May to Hong Kong to investigate whether to open a Bonwick branch there.[225]

Both DM and Wicker thus testified to conduct by Wicker that is not consistent with what one would expect of a person who had simply made a mistake and was trying to figure out the right thing to do. Wicker ignored repeated requests to pay the Customer's funds to Underwriter's Counsel, as the Customer intended.

DM's testimony was precise and detailed,[226] which increased its credibility. It contradicted Wicker's description of DM as independently controlling the flow of funds in connection with the IPO. DM explained how monies were disbursed among the vendors and parties who participated in bringing the IPO to a conclusion. A consensus was created among the participants regarding how the funds would be divided. Although DM coordinated the

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[222] Tr. (Wicker) 324-25.

[223] Tr. (DM) 186.

[224] Tr. (DM) 186-88.

[225] Tr. (Wicker) 419-20.

[226] *See*, *e.g.*, Tr. (DM) 172-80.

accounting and developed the consensus, he could not independently dictate the allocation of monies.[227] Only Wicker could authorize the payment of the funds from Bonwick's bank account.

III. Conclusions of Law

A. Applicable Law

Wicker is charged with misusing and converting customer funds. FINRA Rule 2150(a) prohibits the misuse of customer securities or funds. It specifies, "No member or person associated with a member shall make improper use of a customer's securities or funds." Misuse occurs whenever customer funds are not applied in the manner they were intended to be applied. It can be the product of misunderstanding or carelessness, but, even when a customer's funds are later returned, there is a violation if the funds were used for an unintended purpose before their return or if the return of the funds was delayed.[228]

Conversion is a particularly egregious form of misuse. It is not the product of misunderstanding or carelessness, but, rather, as defined in FINRA's Sanction Guidelines ("Guidelines"), conversion is "an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[229] A person may be liable for conversion even if the funds improperly taken are eventually returned.[230]

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[227] Tr. (DM) 178-81.

[228] *See*, *e.g.*, *Blair Alexander West*, Exchange Act Release 74030, 2015 SEC LEXIS 102, at *52 & n.42 (Jan. 9, 2015) (respondent misused funds that should have been held in escrow by spending them on his firm's expenses and his personal debts, even though he replaced the funds after two months); *Daniel Joseph Alderman*, 52 S.E.C. 366 (1995) (respondent misused funds by mistakenly transferring them to wrong account and then deliberately withholding them for two months), *aff'd*, 104 F.3d 285 (9th Cir. 1997); *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001) (collecting cases).

[229] Guidelines at 36 (Mar. 2019), https://www.finra.org/industry/sanction-guidelines. In FINRA disciplinary proceedings, it is this definition of conversion that governs, not state laws, which have their own definitions and interpretations of what constitutes conversion. *Dep't of Enforcement v. Doni*, No. 2011027007901, 2017 FINRA Discip. LEXIS 46, at *26-27 (NAC Dec. 21, 2017).

[230] *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *28 (Sept. 3, 2015) (respondent who used her firm's corporate credit card to make personal purchases committed conversion, even though after detection she reimbursed her firm); *Dep't of Enforcement v. Kendzierski*, No. C9A980021, 1999 NASD Discip. LEXIS 40, at *7 (NAC Nov. 12, 1999) (representative converted funds when he used customer funds to pay his own bills, even though he eventually repaid the money).

Conversion may occur in a variety of business-related contexts.[231] But regardless of the circumstances, the conduct is viewed as a fundamentally dishonest act that reflects negatively on a person's ability to comply with regulatory requirements and raises concerns that the person is a risk to investors, firms, and the integrity of the securities markets.[232] Conversion is "among the most grave violations committed by" a securities professional.[233] It "is extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that [FINRA] seeks to promote."[234]

FINRA Rule 2010 requires that business conduct be consistent with "high standards of commercial honor and just and equitable principles of trade." Rule 2010 is a broad and generalized ethical provision that applies to any unethical business-related conduct whenever the "misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business."[235] Whenever another violation of a FINRA rule is found, including FINRA Rule 2150(a), it is also a violation of the high standard of ethical conduct required by Rule 2010.[236]

Rule 2010 may also be violated regardless of whether the conduct in question violates another specific rule. Rule 2010 "prohibits dishonest practices even if those practices may not be illegal or violate a specific rule."[237] Conversion is a dishonest practice that violates FINRA Rule

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[231] *See*, *e.g.*, *Stephen Grivas*, Exchange Release No. 77470, 2016 SEC LEXIS 1173 (Mar. 29, 2016) (respondent, who took customer funds intended to be invested in the Facebook IPO and used the money to make up his broker-dealer's capital deficiency, committed conversion); *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952 (Dec. 4, 2015) (respondent who used customer insurance premium payments for personal and business expenses committed conversion); *Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 SEC LEXIS 4568 (Nov. 5, 2015) (respondent who directed clearing firm to wire funds to an account he controlled instead of his employer's account committed conversion), *aff'd*, 2015 SEC LEXIS 4568; *Olson*, 2015 SEC LEXIS 3629 (respondent who used corporate credit card to make personal purchases committed conversion); *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012) (respondent who used gift certificates and wine purchased with funds of a charitable foundation committed conversion); *Doni*, 2017 FINRA Discip. LEXIS 46 (respondent who copied and made unauthorized use of confidential computer code for his own purposes committed conversion).

[232] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013); *Dep't of Enforcement v. Casas*, No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *19 (NAC Jan. 13, 2017); *Dep't of Enforcement v. Harrington*, No. 2015047303901, 2018 FINRA Discip. LEXIS 31, at *90 (OHO Nov. 12, 2018), *modified on other grounds sub nom. Dep't of Enforcement v. Milberger*, 2020 FINRA Discip. LEXIS 4 (NAC Mar. 27, 2020).

[233] *Reeves*, 2015 SEC LEXIS 4568, at *15 (internal quotations omitted).

[234] *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *23 (June 2, 2016) (alteration in original) (internal quotation omitted).

[235] *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). *See also Mullins*, 2012 SEC LEXIS 464, at *28-29 (collecting cases).

[236] *E.g.*, *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007).

[237] *Butler*, 2016 SEC LEXIS 1989, at *25-26.

2010 even if the person from whom the funds or property is converted is not a customer,[238] and even if no securities are involved.[239] Participants in the securities industry must conduct all their business dealings honestly and honorably, even in a non-securities context, so that people may confidently entrust them with their money.[240]

B. Violation

1. Wicker Converted the Customer's $50,000

In simple terms, the elements of conversion break down into four parts: (i) intentional (ii) unauthorized (iii) taking or use of (iv) property that belongs to someone else. Wicker's conduct meets the four elements of conversion.

- Wicker acted intentionally. He knew that the Customer wired the $50,000 to Bonwick for only one purpose—as a retainer to be paid to Underwriter's Counsel. He knew that the funds belonged to the Customer and should only be used as the Customer directed. Nevertheless, Wicker authorized wire transfers and withdrawals from the funds in the commingled account for other purposes—including payments to himself—eventually dissipating all but $60 in the account. He knowingly exercised dominion over property belonging to another.

- Wicker acted without authorization. He knew that the Customer had authorized the money to be used for one purpose and no other. He admits he received no authority from the Customer to use the Customer's funds for any other purpose.

- Wicker used the Customer's funds for his own purposes, commingling the money with other money in Bonwick's account and treating it as Bonwick's money—which he controlled. As majority owner of Bonwick, Wicker benefited to the extent the Customer's funds were used for the benefit of Bonwick. Wicker also

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[238] *See*, *e.g.*, *Saad v. SEC*, 873 F.3d 297, 303 (D.C. Cir. 2017) (sustaining finding that associated person violated Rule 2010 predecessor by misappropriating funds of the member firm's parent by submitting a false reimbursement claim, but remanding to determine what effect, if any, the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) might have), *on remand*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216 (Aug. 23, 2019) (holding *Kokesh* has no effect), *petition for review filed*, No. 19-1214 (D.C. Cir. Oct. 17, 2019).

[239] *See*, *e.g.*, *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (affirming findings that a representative violated identical predecessor of FINRA Rule 2010 by misappropriating funds from a political club while serving as the club's treasurer and misrepresenting that the club's funds were held in an account at the representative's member firm); *Manoff*, 55 S.E.C. at 1161-62 (sustaining finding that associated person violated FINRA Rule 2010 predecessor by misappropriating and using the credit card information of a co-worker); *Leonard John Ialeggio*, 52 S.E.C. 1085, 1089 (1996) ("We consistently have held that misconduct not related directly to the securities industry nonetheless may violate [just and equitable principles of trade]."), *aff'd*, No. 98-70854, 1999 U.S. App. LEXIS 10362, at *4-5 (9th Cir. May 20, 1999).

[240] *Dep't of Enforcement v. Potter*, No. 2017052871401, 2019 FINRA Discip. LEXIS 36, at *40-44 (OHO Aug. 7, 2019) (respondent held liable for conversion in non-securities context).

benefited directly when he withdrew more than $400,000 from Bonwick's account for his own personal expenses without setting aside $50,000 to refund to the Customer.

- The $50,000 belonged to the Customer, not Bonwick and not Wicker. No one disputes that.

Wicker permanently deprived the Customer of its property when he ran down the balance in Bonwick's bank account without paying Underwriter's Counsel or refunding the Customer's $50,000. Permanent deprivation of property is not required to show conversion.[241] Even in cases where funds are eventually refunded to their owner, delay may constitute conversion.[242] But when permanent deprivation does occur as a result of an intentional and unauthorized taking of someone else's property, it is conversion.[243]

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[241] *Doni*, 2017 FINRA Discip. LEXIS 46, at *27-29 (deprivation not a necessary element of conversion).

[242] *See*, *e.g.*, *Alderman*, 52 S.E.C. 366 (funds mistakenly transferred to wrong account and then deliberately withheld for two months); *Robert L. Johnson*, 51 S.E.C. 828 (1993) (registered principal of broker-dealer failed promptly to register unit trust in customer's name and failed to return funds to customer for almost two years).

[243] *E.g.*, *Wiley*, 2015 SEC LEXIS 4952, at *16-22; *Potter*, 2019 FINRA Discip. LEXIS 36, at *40-44 (when associated person never applies funds for the intended purpose and never returns them, it is conversion).

Wicker had the Customer's funds deposited in a Bonwick bank account where those funds were commingled with other Bonwick funds. Wicker then treated the Customer's funds the same as Bonwick's funds. Money is fungible. *Robers v. United States*, 572 U.S. 639, 643 (2014); *In re Miss. Valley Livestock, Inc.*, 745 F.3d 299, 304 (7th Cir. 2014); *Modoc Lassen Indian Hous. Auth. v. United States HUD*, 881 F.3d 1181, 1203 (10th Cir. 2014). As a result, it is difficult to trace precisely where the Customer's funds went and when they were used.

Enforcement discussed in its pre- and post-hearing briefs several methodologies for tracing funds in a commingled account, concluding that the first-in-first-out ("FIFO") methodology would be the most generous to Wicker because it would assume that he spent other funds in Bonwick's bank account before he spent the Customer's funds. On that basis, Enforcement argues that Wicker began spending the Customer's money on March 28, 2016 (when the balance in Bonwick's bank account fell below $50,000), spent most of the money by March 30, 2016 (when the balance fell to $12,000), and that he had spent it all by June 29, 2016 (when the balance in Bonwick's account fell below zero). Enf. Br. 6-7; Enf. Post Br. 5-6.

In any event, although it is helpful to have the record of Bonwick's expenditures from the account where the Customer's funds were deposited, it is unnecessary in this case to trace the Customer's funds precisely. We do not have to specify a date on which Wicker fully dissipated the Customer's funds. The ultimate result of Wicker's actions was that the Customer was permanently deprived of its property. *See generally Dep't of Enforcement v. Braeger*, No. 2015045456401, 2017 FINRA Discip. LEXIS 48, at *103-11 (OHO Dec. 27, 2017) (where customer funds disappeared after respondent took control of them, evidence was sufficient to prove that respondent converted those funds without tracing exactly what he did with the money), *aff'd*, 2019 FINRA Discip. LEXIS 55, at *32-33 (NAC Dec. 19, 2019).

2. Wicker's Defenses Fail

a. The Investment Banker Was Not to Blame

Wicker claims that he paid the $50,000 retainer for Underwriter's Counsel to DM, the investment banker who worked on the IPO, after DM asked him to do it and promised that he would pay Underwriter's Counsel later from other funds. Wicker argues that it was DM's failure to keep that promise that caused the Customer's loss.[244]

As discussed above, the factual record does not support Wicker's story. Wicker acknowledges that there is no documentary evidence to corroborate his story. There is no written agreement stating that DM was undertaking the payment of $50,000 to Underwriter's Counsel, and there are no emails reflecting a discussion of such an undertaking. Wicker did not identify or present any bank records demonstrating that the payment to DM was made. DM denies making the proposal, and his conduct—repeatedly asking the Firm to pay Underwriter's Counsel—is inconsistent with Wicker's story. Wicker's own conduct in response to requests to pay Underwriter's Counsel is also inconsistent with his story. He did not respond to any email asking him to pay Underwriter's Counsel by asserting that DM was responsible for the $50,000 payment, until much later, in October 2016. When MM, the Customer's CFO asked for a refund, Wicker implied—but did not directly claim—that DM was responsible. Even then, he did not clearly lay out the purported arrangement he had with DM.

Separately, even supposing that the investment banker made an oral promise to Wicker to pay the $50,000 retainer to Underwriter's Counsel later and then failed to keep his promise, that is not a defense. DM's alleged failure to keep his promise to Wicker did not relieve Bonwick of its duty to its client to use its money only as it directed. Nor did it relieve Bonwick of its contractual obligation to Underwriter's Counsel.

Finally, even if events happened exactly as Wicker says they did, Wicker intentionally used the Customer's funds for a purpose different than the Customer intended. By his own admission, he never received authorization from the client to pay the $50,000 legal retainer to DM.

b. Wicker Committed Conversion, Not Merely Misuse

Wicker argues that at most he misused the Customer's funds. He claims that he misunderstood how the money should have been handled and did not have the intention necessary for conversion.[245]

As a factual matter, Wicker was under no misunderstanding. He knew from the outset that the Customer intended its funds to be paid to Underwriter's Counsel, and he never received

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[244] Resp. Post Br. 4.

[245] Resp. Post Br. 9-11.

any other directive from the Customer. There is no evidence that he was later misled into thinking that the Customer wanted the funds to be paid instead to DM, the investment banker. To the contrary, Wicker was repeatedly asked to pay the money to Underwriter's Counsel, starting in April and running into the summer. Even aside from all the requests to pay Underwriter's Counsel, Wicker's experience and extensive qualifications undercut any claim that he did not know how to handle the Customer's funds. We note that Wicker and the Firm were under regulatory and financial pressure during the same period, which gave Wicker a reason to delay and avoid paying Underwriter's Counsel. In light of all the particular facts and circumstances, we reject Wicker's story as implausible.[246]

As a legal matter, Wicker had the requisite intent. He is incorrect that conversion requires proof of an elaborate scheme or "malevolence."[247] Scienter is not required.[248] It is sufficient if circumstantial evidence shows an intent to exercise ownership over funds that belong to someone else.[249] In this case, Wicker knew that the funds belonged to the Customer and were entrusted to him and Bonwick for the purpose of paying Underwriter's Counsel. Despite that knowledge, he used the funds for other purposes to benefit Bonwick and himself. He commingled the Customer's funds with other funds without distinguishing between them so that there is no record tracking precisely what happened to the Customer's funds. The failure to maintain any record is compelling evidence that Wicker intended to exercise ownership over the funds and did not think he was accountable to the owner of the funds.[250]

c. Wicker's Argument that the Charges Should Be Dismissed Because of Alleged Misconduct by Enforcement Fails

Wicker argues in his post-hearing brief that all of Enforcement's arguments, pleadings, and evidence should be disregarded and the case against Wicker dismissed.[251] He claims that FINRA failed to provide him with the impartial forum to which he is entitled,[252] and he alleges

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[246] *Reeves*, 2015 SEC LEXIS 4568 (affirming FINRA decision finding claim of innocent mistake implausible).

[247] Resp. Post Br. 10-11.

[248] *Dep't of Enforcement v. Reeves*, No. 2011030192201, 2014 FINRA Discip. LEXIS 41, at *12 & n.5 (NAC Oct. 8, 2014) (no scienter requirement).

[249] *Id*. (circumstantial evidence of intent to exercise ownership over funds that did not belong to respondent is sufficient).

[250] *Butler*, 2016 SEC LEXIS 1989, at *18 (respondent's intent to convert demonstrated in part by "his failure to maintain records concerning his conversion or how he used [the victim's] funds."); *Dep't of Enforcement v. Clarke*, No. 2016050938301, 2019 FINRA Discip. LEXIS 24, at *26 & n.146 (OHO May 8, 2019) (respondent's failure to maintain records of where and when he spent customer's money demonstrated intent); *Casas*, 2015 FINRA Discip. LEXIS 63, at *48 (failure to maintain any records of how he used investor funds was compelling evidence that respondent did not regard himself as accountable for his use of them), *aff'd*, 2017 FINRA Discip. LEXIS 1 (NAC Jan. 13, 2017.

[251] Resp. Post Br. 8.

[252] Resp. Post Br. 6.

that Enforcement has engaged in contemptuous misconduct under FINRA Rule 9280.[253] Rule 9280 authorizes an adjudicator to prohibit a party from supporting designated claims or introducing matters into evidence as a remedy for contemptuous conduct during a proceeding.

Wicker's argument arises from a unique set of circumstances. The charges against Wicker were originally heard and decided by another Hearing Panel, and after the decision was issued the Hearing Officer on that Panel took a senior position in Enforcement. The Chief Hearing Officer later learned that circumstances existed where the fairness of the former hearing officer "might reasonably be questioned,"[254] which is a basis for an adjudicator's recusal under FINRA Rule 9233.

In light of the circumstances, and pursuant to FINRA Rule 9233(a), the Chief Hearing Officer vacated the original decision, ordered a new hearing with a different Hearing Panel, and directed that no weight or presumption of correctness be given to any prior decisions, orders, or rulings previously issued in the matter.[255] In connection with the rehearing, additional steps were taken to ensure (i) that no one involved in the rehearing had discussed the case with the former Hearing Officer outside of the hearing process and Wicker's presence, (ii) that no one involved in the rehearing was involved in the employment process that led to the former Hearing Officer joining Enforcement, and (iii) that the persons in Enforcement who would conduct the rehearing would not be supervised or evaluated by the former Hearing Officer in connection with the case.[256]

The 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.[257] Wicker is incorrect that the circumstances here entitle him to dismissal of the charges against him.

d. Wicker's Attack on FINRA's Disciplinary Process Is No Defense

With regard to the rehearing before a different Hearing Panel, Wicker broadly argues in his post-hearing brief, that FINRA's disciplinary process is systemically unfair and deprives a respondent of due process based on the "FINRA Enforcement/FINRA OHO set-up."[258] The

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[253] Resp. Post Br. 6-8.

[254] *See* Order Vacating Decision and Assigning New Hearing Officer, dated Nov. 12, 2019.

[255] *See* Order Vacating Decision and Assigning New Hearing Officer, dated Nov. 12, 2019.

[256] *See* Order Directing the Department of Enforcement to File Affidavits or Declarations, dated Nov. 20, 2019.

[257] *See Scott v. United States*, 559 A.2d 745 (D.C. Ct. App. 1989) (en banc) (unanimously reversing defendant's conviction and remanding for a new trial where judge should have recused himself); *DeNike v. Cupo*, 958 A.2d 446 (S. Ct. N.J. 2008) (decision vacated and new trial ordered where judge should have recused himself "to restore public confidence in the integrity and impartiality of the proceedings, to resolve the dispute in particular, and to promote generally the administration of justice.").

[258] Resp. Post Br. 2-3.

Securities Exchange Act requires FINRA to establish a fair process for disciplining its members and associated persons for misconduct.[259]

Consistent with the requirement to establish a fair process, FINRA has promulgated, and the SEC has approved, a Code of Procedure for disciplinary proceedings. Pursuant to FINRA Rules 9231 and 9232 of the Code, Wicker was provided a new Hearing Panel composed of a Hearing Officer and two Panelists, none of whom have any connection to the events that led the Chief Hearing Officer to vacate the prior decision.[260]

FINRA Rule 9144 of the Code contributes to the establishment of a fair disciplinary process by mandating a separation of functions between adjudicators in FINRA disciplinary proceedings and FINRA staff involved in investigating potential misconduct and issuing complaints. The Chief Hearing Officer's Order vacating the original decision and ordering a new hearing with a different Hearing Panel gives effect to the separation of functions and demonstrates the commitment to a fair process.

IV. Sanctions

For a conversion violation, FINRA's Sanction Guidelines state that a bar from associating with any FINRA member in any capacity is the "standard" sanction, and they recommend that this sanction be imposed regardless of the amount converted.[261] Thus, even if the amount converted is relatively small, a bar is nevertheless the recommended sanction.[262] Except in extraordinary circumstances not present here, adjudicators have consistently followed the recommendation in the Guidelines and barred respondents found liable for conversion.[263]

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[259] *See* 15 U.S.C. § 78o-3(b)(8) (self-regulatory organization must promulgate rules that provide a fair procedure for disciplining members and associated persons) and § 78o-3(h)(1) (setting forth the basic requirements for a fair disciplinary process).

[260] Wicker incorrectly describes the Hearing Panel in the rehearing as composed of FINRA employees. Resp. Post Br. 6. While the Hearing Officer is a FINRA employee, the other two Panelists are not. As indicated when the Panel members were introduced to the parties at the rehearing, one Panelist is a retired former member of the District 8 Committee and the other is a retired former member of the National Adjudicatory Council. Tr. (introductory remarks of Hearing Officer) 3-5.

[261] Guidelines at 36.

[262] *See Olson*, 2015 SEC LEXIS 3629 (bar imposed for conversion of $740.10, accomplished by submission of false expense report).

[263] *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *37-39 (Sept. 30, 2016) (bar is standard sanction for conversion); *Butler*, 2016 SEC LEXIS 1989, at *29 (the SEC has "consistently sustained FINRA's decision to impose a bar for conversion"); *Grivas*, 2016 SEC LEXIS 1173, at *24-26 (bar is standard for conversion because "[t]his approach reflects the judgment that, absent mitigating factors, conversion poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry.") (internal quotations deleted). *Cf. Doni*, 2016 FINRA Discip. LEXIS 10, at *67 n.157 (bar not imposed for conversion of computer code because respondent demonstrated deeply felt remorse and was a changed man, so that recurrence of a violation was unlikely), *aff'd*, 2017 FINRA Discip. LEXIS 46.

The reason that the Guidelines recommend a bar as the standard sanction in conversion cases is that conversion is a fundamentally dishonest and culpable act, signifying that the person who engages in it poses a high degree of risk to investors and other market participants.[264] Conversion of customer funds violates "the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession."[265] Such misconduct demonstrates a lack of fitness to be in the securities industry, where customers must be able to trust securities professionals with their money.[266]

We have looked for mitigating factors that might support a lesser sanction and have found none. As discussed above, Wicker testified that 2016 was a stressful time because he was going through a contentious divorce, was involved in several arbitrations, and was working on a business merger or combination with another firm. He also testified that he was traveling abroad at the time of some of these events and not paying as much attention to office issues as he would have if he had not been traveling. Wicker did not explain how these matters prevented him from paying Underwriter's Counsel except to say that they distracted him. Distraction is insufficient to justify or mitigate Wicker's failure to use the Customer's funds as the Customer intended. This is particularly so because Wicker ignored multiple requests to pay Underwriter's Counsel over the course of months. His misconduct was not the result of a momentary distraction.[267]

Wicker also argues that he is sorry, has apologized, and "accepted and acknowledged the improper use of funds."[268] As discussed above, we do not credit Wicker's professed remorse. We view it as a hollow attempt to re-characterize what happened in a less bad way and then profess regret for that.

We have found numerous aggravating factors. Wicker, either indirectly as the majority owner of Bonwick or directly as the recipient of over $400,000 from Bonwick in 2016, gained a

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[264] *Clarke*, 2019 FINRA Discip. LEXIS 24, at *27 ("The SEC and federal courts recognize that at the core of conversion misconduct is 'deception and fraud in the handling of others' property that endangers the integrity of the securities industry.'") (quoting *Saad*, 873 F.3d at 303); *Braeger*, 2019 FINRA Discip. LEXIS 55, at *40 ("[C]onversion is 'by its very nature…extremely serious and patently antithetical to the high standards of commercial honor and just and equitable principles of trade that underpin the self-regulation of the securities markets.'") (quoting *Mullins*, 2012 SEC LEXIS 464, at *73).

[265] *DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *16-17 (Jan. 6, 2012) (quoting *Heath*, 586 F.3d 122, 130 (2nd Cir. 2009)).

[266] *Grivas*, 2016 SEC LEXIS 1173, at *25.

[267] *Saad*, 873 F.3d at 303 (stress lacked mitigating force where respondent's conversion "was not a momentary or impulsive action driven by stress.").

[268] Resp. Post Br. 12.

financial benefit from his misconduct. He used the entire $50,000 retainer for Bonwick's and his personal benefit.[269] We reject his assertion that he had zero gain from his misconduct.[270]

It is further aggravating that Wicker insisted at the hearing that the money he disbursed to himself was his own money and had nothing to do with the Customer's $50,000. He was and is oblivious to the connection between the Customer's loss of its funds and his use of those funds in the commingled account for his own purposes.

Wicker's misconduct injured the Customer by permanently depriving it of a substantial amount of property, and, moreover, the injury inflicted went beyond the amount of money Wicker converted. In order to complete its IPO, the Customer had to pay Underwriter's Counsel an additional sum for its work, and the IPO was delayed.[271]

Although Wicker's misconduct occurred over the course of less than a year, it still covered a substantial period of time.[272] DM, the investment banker, repeatedly asked Wicker to release the funds to Underwriter's Counsel, and Underwriter's Counsel separately asked that the money be paid. The Customer later asked for a refund. Wicker failed to comply with any of these requests. His misconduct was intentional,[273] and his repeated choice to ignore and avoid requests to pay Underwriter's Counsel or refund the money was the equivalent of a pattern of misconduct.[274]

Wicker attempted to conceal his misconduct, first by suggesting to DM, the investment banker, that Underwriter's Counsel had already been paid but had lost track of the payment, and later by suggesting to the Customer's CFO, MM, that the investment banker was to blame for the retainer not having been paid to Underwriter's Counsel. Wicker's attempts to conceal his misconduct are aggravating.[275]

It is also aggravating that Wicker has extensive experience in the securities industry and should have been aware of the unethical nature of his conduct. Furthermore, Wicker has held high level positions that require the exercise of sound ethical judgment, including the position of

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[269] Guidelines at 5, General Principle 6; Guidelines at 8, Principal Consideration 16.

[270] Resp. Post Br. 11.

[271] Guidelines at 7, Principal Consideration 11. *Blair C. Mielke*, Exchange Act Release 75981, 2015 SEC LEXIS 3927, at *76 n.83 (Sept. 24, 2015) (misuse of significant sum—$45,000—was aggravating factor).

[272] Guidelines at 7, Principal Consideration 9.

[273] Guidelines at 8, Principal Consideration 13.

[274] Guidelines at 7, Principal Consideration 8.

[275] Guidelines at 7, Principal Consideration 10. *See also Butler*, 2016 SEC LEXIS 1989, at *30 n.42.

CCO. He also has been licensed to supervise others. It is aggravating that someone with such experience and positions of responsibility should behave dishonestly.[276]

There is no guarantee of changed behavior in the future.[277] To the contrary, Wicker's lack of recognition of what he has done wrong demonstrates that he would be a danger to the investing public and other market participants in the future.[278] We reject his assertion that he has accepted responsibility.[279]

For all of these reasons, we see no reason to depart from the standard sanction for conversion. Wicker should be barred to prevent the recurrence of violations by him and to protect public investors and industry participants from the risk of future harm at his hands.[280]

In addition, we order Wicker to pay the Customer $50,000 in restitution, plus prejudgment interest. Under the Sanction Guidelines, adjudicators may order restitution where an identifiable person or firm has been injured in a quantifiable amount and the respondent's misconduct is the proximate cause of the injury.[281] The Customer is the injured party; it lost $50,000; and Wicker's misconduct was the cause. Prejudgment interest is also appropriate to remediate the Customer's loss of the use of its funds for the last four years.[282]

V. Order

As charged, Respondent Devin Lamarr Wicker converted $50,000 of Customer funds. He intentionally, and without authorization, took and used the Customer's funds as though they belonged to Bonwick. He used the funds for the Firm's and his own personal benefit. In so doing, he permanently deprived the Customer of its property and violated FINRA Rules 2150(a)

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[276] *Dep't of Enforcement v. Mut. Servs. Corp.*, No. EAF0400630001, 2008 FINRA Discip. LEXIS 62, at *128-29 (OHO Dec. 16, 2008) (with respect to one of the individual respondents in a multi-count case, the Hearing Panel took into account her "unique role" and "important position" in the firm's supervisory system as an aggravating factor).

[277] Guidelines at 5, General Principle 7.

[278] Guidelines at 7, Principal Consideration 2.

[279] Resp. Post Br. 12.

[280] We have found that Wicker converted customer funds. But even if we labeled his misconduct misuse, we would still impose a bar. The Sanction Guidelines recommend that a bar be considered for a misuse violation, although a lesser sanction is appropriate if the misuse resulted from a misunderstanding about the customer's intended use of the funds or other mitigation exists. We have found that Wicker's misuse did not result from a misunderstanding, and no mitigating factors exist. Many of the same aggravating factors apply, regardless of whether his misconduct is labeled misuse or conversion. Even if the customer was permanently deprived of its property by virtue of a misunderstanding or mistake, the circumstances show that Wicker would be a risk to customers and other market participants in the future.

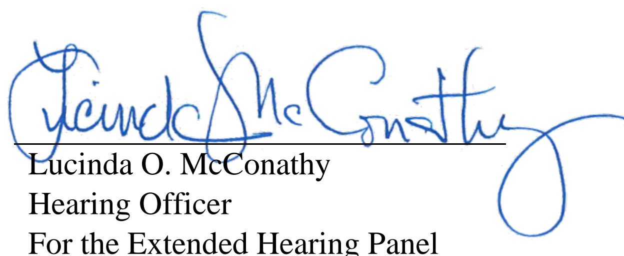
[281] Guidelines at 4, General Principle 5.

[282] The Extended Hearing Panel has considered and rejected without discussion all other arguments by the parties that are inconsistent with this decision.

and 2010. For this misconduct, he is barred from association with any FINRA member firm in any capacity. He is further ordered to pay $50,000 in restitution to the Customer,[283] plus interest at the rate set in 26 U.S.C. Section 6621(a)(2)[284] from April 4, 2016, until paid in full. If this decision becomes FINRA's final disciplinary action, payment of restitution shall be due within 60 days of the date of this Decision.

In the event that the Customer cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the Customer's last known address.

Respondent is also ordered to pay costs in the amount of $4,370.72, which includes a $750 administrative fee and $3,620.72 for the cost of the transcript. If this decision becomes FINRA's final disciplinary action, Wicker's bar will take immediate effect.



Lucinda O. McConathy
Hearing Officer
For the Extended Hearing Panel

Copies:

Devin Lamarr Wicker (via email and overnight courier)
Jonathan Uretsky, Esq. (via email and overnight courier)
Kerry J. Land, Esq. (via email)
David C. Pollack, Esq. (via email)
Jessica Brach, Esq. (via email)
Kay Lackey, Esq. (via email)

[283] The Customer is identified in Addendum A to this decision, which is served only on the parties.

[284] The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.