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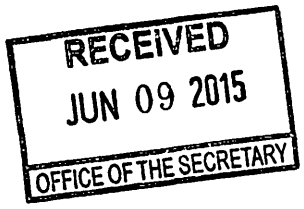
SECURITIES AND EXCHANGE COMMISSION



SECURITIES EXCHANGE ACT OF 1934
Release No. 74855/ April 30, 2015

Admin. Proc. File No. 3-16461

In the Matter of the Application of KEILEN DIMONE WILEY For Review of Disciplinary Action Taken by FINRA

OPENING BRIEF

June 8, 2015

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STATEMENT REGARDING ORAL ARGUMENT

Respondent, Keilen Dimone Wiley requests oral argument. This disciplinary proceeding involves many complex issues that can easily become convoluted and confusing. Oral argument may assist the Securities and Exchange Commission ("SEC") with the numerous issues involved herein and help clarify questions or concerns. Dawn Meade will represent the Respondent if oral argument is granted.

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STATEMENT OF APPEAL

For the reasons set out below, Keilen Dimone Wiley ("Wiley") requests that the SEC reverse and dismiss with prejudice the Decisions in this matter and the sanctions imposed upon Wiley by the National Adjudicatory Counsel's Decision (the "NAC Decision") upholding the Hearing Panel Decision (the "Decision") (collectively referred to herein as the "Decisions"). First, the Panel Majority and the NAC exceeded their scope of disciplinary authority. Second, the Hearing Panel Majority (the "Panel Majority") and the National Adjudicatory Counsel ("NAC") provided no substantial evidence to support their factual and legal conclusions. Third, the Panel Majority and the NAC do not satisfy their burden to prove FINRA Rule 2010 and 8210 claims. Finally, Panel Majority and the NAC abused their authority by issuing Decisions that are unwarranted in law and without justification in fact. An affirmative finding of any one of these reasons warrants reversal and dismissal of the Decisions and the sanctions against Wiley. All sanctions and the Decisions should be reversed and dismissed with prejudice.

FACTS

Wiley was registered with FINRA but never participated in the securities industry (FINRA 339; 938; 1522; 1534). Wiley was an independent insurance agent doing business as Wiley Insurance Agency and Associates ("WIA") (FINRA 113). From July 2002 until June 2011, Wiley was an independent contractor for Farmers Insurance Group ("Farmers"), an affiliate of Farmers Financial Solutions, LLC (FINRA 113, 133). Wiley and Farmers had an independent contractor arrangement which was governed by the Agent Appointment Agreement (the "Agreement") (FINRA 34-36; 54). The Agreement established Wiley and Farmers' obligations, roles and duties owed to each other as a result of their independent contractor relationship (FINRA 34-36). The Agreement required Wiley to register with FINRA because

Farmers is an affiliate of Farmers Financial Solutions, LLC (FINRA 113; 933-947). There is no dispute that FINRA had jurisdiction over Wiley regarding matters within FINRA's scope of disciplinary authority (FINRA 18, 1294). Not once, in all his years of contracting with Farmers, did Wiley ever sell any securities.

Wiley had total control over the operations of his insurance business practices and operated WIA according to the good business practices of the insurance industry (FINRA 36, 601-602; 628; 477; 479; 532; 601). Although Farmers' agents have control over their agency businesses, Farmers offers guidelines and programs to assist the agents' business operations (FINRA 602; 679; 953-972; 973-1009). These "guidelines" are not mandatory and were not mandatory under the terms of the Agreement (FINRA 34-36; 407-408 473-474; 360-366; 408). One of these recommended programs is the Agents Credit Advice Program ("ACA Program"). The ACA Program is a computer program that assists agents in maintaining accurate and up-to-date financial records (FINRA 974). For those agents who choose to use the ACA Program, Farmers provided an e-Agent ACA Co/Banking User Guide & Fastpath Manual ("ACA Manual") and an Agency Operations Guide ("Agents Guide") (FINRA 973- 1009). Nothing in the Agreement mentions the ACA Program or the Agents Guide, nor does it have any language requiring Wiley to use the ACA Program (FINRA 407-408; 949-951).

The independent contractor relationship between Wiley and Farmers was based on a credit and debt relationship (FINRA 626). The customers who purchase insurance are WIA customers, not Farmers customers. They buy insurance that WIA places with Farmers, as opposed to another insurer. When WIA received an insurance premium payment from a client, Wiley enters the payment amount into the ACA banking system, either by using the ACA Program or other means (FINRA 626). Once the customer's payment is reported in the ACA

system, that customer's insurance premium is deemed "credited," is automatically renewed and Farmers issues a receipt of coverage to the policyholder (FINRA 1587). Later, the agent pays Farmers the amount credited, which usually occurred at the end of the month (FINRA). If an agent uses the ACA Program, that co-account is connected with the ACA Program so that the ACA Program can automatically keep track of the records entered into the ACA Program, the credit issued, the amounts paid and balances of the co-bank accounts (FINRA 1094). When the ACA system record differs from the co-account balance, an automatic email notifies the agent of the shortage or surplus (FINRA 476). If the co-account balance continues to differ from the amount entered into the ACA Program, subsequent notifications are sent and eventually Farmers' initiates an internal audit in attempt to resolve the discrepancy (FINRA 370-371).

This is exactly what happened in this case. Wiley missed a payment owed to Farmers, an internal investigation was initiated, the accounts were balanced out, and all the debt owed to Farmers was remitted and the issues between Farmers and Wiley were resolved (FINRA 370-378; 938). Farmers' internal audit concluded that Wiley committed no legal violations, no money was lost or unaccounted for, there was no material harm to anyone and Wiley did not participate in the securities industry[1] (FINRA 601, 937-938, 1197).

Shortly after the audit, Farmers purchased Wiley's book of business for the amount designated in the Agreement (FINRA 949-951, 1095, 34-36). If Wiley had committed any legal infractions or materially breached the Agreement, Farmers could have taken his book of business without providing any consideration or being required to purchase it (FINRA 949-951). Despite

[1] Farmers terminated Wiley's registration with FINRA by filing a Uniform termination notice for Securities Industry Registration ("Form U5") on June 7, 2011 (FINRA 117). Specifically, Farmers indicated on Wiley's U5 Statement that, "the firm received notice from the affiliated insurance groups internal audit department that the agent/RR, in his capacity as an insurance agent, allegedly used property and casualty insurance premiums for personal use. The agent/RR has subsequently remitted the property and casualty insurance premiums to the insurance company" (FINRA 937). Farmers also noted on Wiley's U5 Statement that, "the firm's internal review concluded after determining the matter did not involve any securities transactions, securities products or firm customers" (FINRA 938).

this, and despite the fact that Wiley sold no securities to invoke FINRA's jurisdiction, FINRA filed an enforcement action against Wiley related to Farmer's actions.

On September 11, 2012, Wiley submitted a Wells Submission letter explaining to FINRA that the enforcement staff members made their recommendations without a proper factual basis for doing so, without an adequate and objective investigation and argued that a disciplinary proceeding over this dispute would inappropriately interfere with the regulation of the insurance business industry as well as Texas contract law (FINRA 1293). FINRA's enforcement department disregarded everything in this letter and completely ignored Texas law relating to independent contractors.

PROCEDURAL HISTORY

On February 13, 2013, FINRA's enforcement division initiated a disciplinary proceeding alleging two things. First, FINRA alleged that Wiley violated FINRA Rule 2010 by converting customer insurance premiums for his own use. Second, it alleged that Wiley violated FINRA Rule 8210 and 2010 by providing false and misleading testimony to FINRA (FINRA 5-6). Wiley filed an Answer and a Motion for a More Definite Statement on March 12, 2013 (FINRA 27). On April 23, 2013, the Hearing Officer denied Wiley's Motion for More Definite Statement and rejected Wiley's arguments that Texas law applies (FINRA 105). On April 29, 2014, in a 2-1 decision, (the "Decision"), the Panel Majority found Wiley violated FINRA Rules 8210 and 2010 for conversion of insurance premiums and for giving false and misleading testimony (FINRA 1590-1593). The dissenting opinion (the "Dissent") supports Wiley's defenses, arguments and factual conclusions (FINRA 1093-1095). Essentially, the Dissent concluded that:

> "[t]he premiums belong to WIA and WIA owed a debt to Farmers for the customer premiums Wiley collected. Wiley did not deceive Farmers. He informed Farmers when he collected premiums, and the customers' insurance policies were not in jeopardy of lapsing... I do not believe the testimony or the exhibits prove that Wiley was required to

use the Farmers co-bank account... The ACA Manual only recommends that agents deposit premiums daily and refers to this as a 'good business practice.' Enforcement provided no documentation that Wiley was required to pay premiums into the co-bank account, and there is no signed acknowledgment by Wiley that the Farmers policy on paying premiums within a business day of receipt was anything more than a guideline applicable to him as an independent contractor....[there is no] weight to Wiley's written statement, which was taken by Edmonds, because [it] was signed under duress... it [is] significant that Farmers ... purchased Wiley's book of business... Because Wiley did not convert the premiums and did not mislead FINRA when he provided his on the record testimony... both causes of actions should have been dismissed." (FINRA 1094-1095).

Ultimately, the Panel Majority permanently barred Wiley from associating with any FINRA member in any capacity (FINRA 1075-1096). The Decision was upheld by the NAC (FINRA 1585-1599). Now, Wiley appeals to the SEC.

ARGUMENT AND AUTHORITIES

Wiley requests that the SEC reverse and dismiss this matter with prejudice the Decisions and sanctions against him. The Panel Majority and the NAC both exceeded their scope of disciplinary authority and the Panel Majority and the NAC failed to provide sufficient evidence to support their factual and legal conclusions. The Panel Majority and the NAC did not satisfy their burden of proof for a Rule 2010 violation (FINRA 1093-1095). Lastly, the Panel Majority and the NAC abused their discretion by issuing Decisions that are unwarranted in law and without justification in fact.

I. THE PANEL MAJORITY AND THE NAC HAVE EXCEEDED THEIR SCOPE OF DISCIPLINARY AUTHORITY

FINRA is a congressionally approved SRO subject to SEC approved SRO rules, which include all of FINRA's rules and FINRA's Code of Procedure.[2] FINRA was created for the sole purpose of assisting the SEC with regulating the securities industry.[3] The purpose of FINRA's

[2] *See*, Securities Exchange Act of 1934, § 15A; 15 U.S.C.A. § 78o–3; *see also, Birkelbach v. S.E.C.*, 751 F.3d 472 (7th Cir. 2014).
[3] *Id.*

regulatory programs is to regulate the securities industry in order to protect public interests and investors in the *securities industry*.[4] The Supreme Court explained that federal securities laws should be "construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes'" to assist in regulating the securities industry.[5] Further, FINRA Rules "shall be interpreted in light of the purposes sought to be achieved by the Rules and to further FIRNA's regulatory programs."[6] Importantly, the Supreme Court recognized that, "[t]he broad remedial goals of the [securities laws] are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.'"[7] Throughout this disciplinary proceeding, the Panel Majority and the NAC ignored the clear instructions regarding FINRA's disciplinary authority and limiting jurisdiction over the securities industry only. Instead, FINRA has ventured into the distinctly separate and different realms of insurance and Texas independent contractor and contract law. This failure to recognize its limitations and its asserting jurisdiction over non-securities areas of State law are at the heart of the issues in this appeal.

A. THE PANEL MAJORITY AND THE NAC HAVE EXCEEDED THEIR SCOPE OF DISCIPLINARY AUTHORITY BY REGULATING THE INSURANCE BUSINESS ACTIVITIES OF A MEMBER WHO IS ALSO AN INSURANCE COMPANY

Since 1869, federal and state regulatory laws specifically segregated insurance regulation from securities regulation and mandated that insurance regulation be expressly subject to state regulation.[8] The McCarran-Ferguson Act, (the "MFA") vested in the states the primary power to

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[4] 15 U.S.C. §78s(e)(2); *In re Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002).
[5] *SEC v. Zanford*, 535 U.S. 813, 819 (2002); see also, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963).
[6] FINRA Rule 0130.
[7] *Pinter v. Dahl*, 486 U.S. 622, 653 (1988); see also, *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *SEC v. Sloan*, 436 U.S. 103, 116 (1978); *Aaron v. SEC*, 446 U.S. 680, 695 (1980); *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 690 (3d Cir. 1991).
[8] *Paul v. Virginia*, 75 U.S. 168, 183 (1869); (FINRA 001294).

regulate the insurance industry.[9] The MFA provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance."[10] Pursuant to the MFA, Texas has enacted specific laws for the purpose of regulating the insurance industry; i.e., the Texas Insurance Code.[11] The Texas Department of Insurance regulates insurance agents' business practices.[12]

The Exchange Act does not specifically relate to the business of insurance and therefore does not grant the SEC or FINRA the authority to regulate disputes involving issues purely related to the insurance business industry.[13] This omission constitutes significant evidence that Congress did not intend to authorize the SEC to regulate insurance business participants for matters involving issues inherent to the insurance business industry. *Id.* This is because the regulatory scheme "carefully particularizes an array of available remedies," for securities related violations that do not include remedies for insurance business violations. *Id.*

Congress has made it abundantly clear that *only* States have the authority to regulate the insurance business industry and that any silence on the part of Congress *shall not* be construed to impose any barrier to the States regulation of the insurance business industry.[14] Specifically, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance."[15] Therefore, under federal law, the Exchange Act, and

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[9] 15 U.S.C. §1012.
[10] *Fredericksburg Care Co., L.P., v. Lira*, 407 S.W.3d 810, 814-15 (Tex. App. 2013); 15 U.S.C. § 1012(b); see also, *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500–01 (1993); *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir.1998).
[11] TEX. INS. CODE ANN. (Vernon)..
[12] TEX. INS. CODE ANN. § 30.001 (Vernon).
[13] 15 USCA §78; see also, *Fiero v. Fin. Indus. Regulatory Auth. Inc.*, 660 F.3d 569 (2d Cir. 2011).
[14] 15 USCA §§1011-1012 (West).
[15] 15 USCA §1012(b) (West).

subsequently the SEC and FINRA rules are not to be construed to invalidate, impair, or supersede any State regulation of the insurance business industry.[16]

Federal and State courts have held that insurance business activities are beyond the scope of FINRA's disciplinary authority. The California appeals court determined that 'insurance-only' or 'intrinsically insurance' disputes fall beyond the scope of arbitration.[17] Some appeals courts have found that "decisions based on matters involving disputes arising out of insurance business activities are expressly excluded from FINRA arbitration and disciplinary proceedings and decisions based on [insurance business] matters are not enforceable."[18] The purposes of the exclusion is to keep FINRA away from regulating issues that are,

> "peculiar to insurance, such as reserves, reinsurance, actuarial calculations, rates, coverage, and mandatory terms, and to prevent arbitrators from being swamped with insurance claims, which are apt to be more numerous than securities claims... [and FINRA] regulatory agencies would not have the requisite knowledge and experience to understand the intricacies of the insurance agency."[19]

Furthermore, FINRA Rules ***expressly*** state, "disputes involving insurance business activities of a member that is also an insurance company," are exempt from FINRA's jurisdiction in FINRA arbitration proceedings.[20] Although FINRA Rules 12200, 12201, 13200 and 10101 pertain to FINRA's arbitration proceedings, and FINRA's disciplinary proceedings are governed by the FINRA Code of Procedure ("FINRA COP"), the omission of similar rules in FINRA's COP does not mean that FINRA has disciplinary authority over such issues inherent to the insurance business industry.[21] The omission of such rules in FINRA's COP, taken together with

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[16] *Id.*
[17] *Thomas v. Westlake*, 204 Cal.App.4th 605, 619 (2012); see also, *In re Prudential Ins. Co. of America Litigation*, 133 F.3d 225, 232 (3d Cir. 1998).
[18] *Thomas v. Westlake*, 204 Cal.App.4th, 605, 619 (2012); see also, *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 653 (7th Cir. 2001); *In re Prudential Ins. Co. of America Sales Practice Litigation*, 133 F.3d 225, 232 (3d Cir. 1997); *Wilson v. American Inv. Services, Inc.*, 22 Fed.Appx. 424, 429 (10th Cir. 2002).
[19] See, *Thomas v. Westlake*, 204 Cal.App.4th 605, 619 (2012); citing, *IDS Life Ins. Co.*, 133 F.3d at 653.
[20] FINRA Rules 12200, 12201, 13200 and 10101.
[21] *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 571 (2d Cir. 2011).

well-established federal and state law and FINRA's arbitration rules, *supra*, create, at the very least, an exception to FINRA's disciplinary authority. That exception being "disputes involving insurance business activities of a member that is also an insurance company" are not within FINRA's disciplinary authority.[22]

Furthermore, the Panel Majority and the NAC ignored the business insurance exception. Disputes involving multiple claims where the factfinder is required to engage in a comprehensive evaluation of a party's insurance practices in order to resolve the overarching claim is not just a case about that central claim, but instead it is many claims regarding several "disputes involving the insurance business" and thus outside the scope of FINRA arbitration.[23] According to the *In re Prudential Court*, the distinguishing feature of the case is the need to engage in a comprehensive review of the defendant's insurance business in order to resolve the [central] employment claims.[24] Like *In re Prudential*, the Panel Majority and the NAC's claims against Wiley, require a comprehensive review of Wiley's business practices and are the claims really about Wiley's insurance business activities - not FINRA Rule violations. In fact, the majority of the Panel Majority and the NAC's issues and investigation focus on Wiley's insurance business practices. The Panel Majority and the NAC must show that Wiley's business practices were inappropriate or unethical in order to succeed in a Rule 2010 claim. To analyze Wiley's practices, FINRA must apply Texas independent contractor law because it is the law that governs Wiley's relationship with Farmers and his rights to possess and own the insurance premiums. Because a comprehensive evaluation of Wiley's insurance business practices pursuant to Texas law and

[22] *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F.Supp. 1282, 1291 (N.D.Ill.1995), "Rather, to successfully trigger the exception, a plaintiff must allege unlawful insurance practices and not simply wrongful conduct directed toward the plaintiff"; see also, *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 924 F.Supp. 627 (D.N.J.1996).; *Thomas*, 204 Cal.App.4th at 619; *Prudential Ins. Co. of Am. v. Shammas*, 865 F.Supp. 429, 432–33 (W.D.Mich.1993). (exception not applicable where employment discrimination and retaliation claims had nothing specifically to do with insurance business practices).

[23] *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 924 F.Supp. 627 (D.N.J.1996).

[24] Id.

insurance agency practices and customs would be the basis of the investigation, the business insurance exception is applicable to the Panel Majority and the NAC's claims, therefore making their claims outside FINRA's scope of discipline authority.

Regardless of the aforementioned federal and state statutory and common law and FINRA's Rules, the Panel Majority and the NAC argue that their disciplinary authority is broad enough to encompass insurance business activities, even if that activity does not involve a security because of the broad jurisdiction of Rule 2010 (FINRA 1592-93).[25] The Panel Majority and the NAC argue that Wiley's argument regarding insurance activities being beyond the scope of FINRA's disciplinary authority, has been repeatedly rejected in a long line of case decisions (FINRA 1594). However, the Panel Majority and the NAC's legal support for their positions are not relevant and are dissimilar to case law and administrative rulings (FINRA 10593). The Panel Majority and the NAC fail to distinguish the fact that none of the references involve an independent contractor insurance agent who never participated in the securities industry.

For instance, in *Vail*, the SEC sanctioned a securities broker for violating [Rule 2010] for misappropriating funds of a political organization.[26] *Vail* is substantially different from Wiley's case because *Vail* involved a respondent who actively participated in the securities industry and the respondent misappropriated funds of a political organization. *Id.* In *In re Daniel D. Manoff*, a broker dealer who participated in the securities industry.[27] The Panel Majority and the NAC fail to reveal that *Manoff* clarifies how Rule 2010 applies when the "misconduct reflects the associated person's ability to comply with the regulatory requirements of the ***securities business*** and [their ability] to *fulfill fiduciary duties* in handling other people's money." *Id.* Wiley was not involved in securities and there is no evidence that he breached any fiduciary duties whatsoever. The

[25] *Vail v. SEC,* 101 F.3d 37, 39 (5th Cir. 1996).
[26] *Vail* v. *SEC,* 101 F.3d 37, 39 (5th Cir. 1996).
[27] *In re Daniel D. Manoff*, S.E.C. Release No. 46708 (Oct. 23, 2002).

James A. Goetz administrative proceeding involves a respondent who was an employee, but also an investment company for Prudential Insurance Company and actively participated in the securities industry, misappropriated funds through fraudulent means and falsification of documents.[28] In *Leonard John Ialeggio,* the respondent was employed with an insurance company and induced his employer to pay for country club initiation fees when he was not entitled to such payment.[29] In *Dep't. of Enforcement* v. *Mizenko,* the respondent was active in the securities industry as a registered general securities representative and investment company representative and forged the name of a corporate officer on a corporate resolution.[30]

In *Cipriani,* the respondent was an employee of a debt insurance agency and was responsible for collecting premium payments directly from policyholders.[31] The *Cipriani* respondent misappropriated insurance premiums for his pecuniary benefit, failed to remit payment to the debt insurance agency, supplied false paperwork to conceal the misappropriation of the funds and allowed customers' policies to lapse. *Id.* In *Paratore*, the respondent was an employee of a FINRA member firm who participated in the securities industry as an investment company and also sold insurance.[32] In the *Kendzierski* proceeding, the respondent was *employed* with a securities firm and registered as an investment company/variable contracts representative and sold a mixture of insurance products and securities.[33] *Kendzierski* found conversion when the respondent deposited a customer's check for an insurance policy into his own personal bank account instead of the customer's account *without authorization* and falsified bank documents. *Id.* The *Shegon* proceeding involves a respondent who was a registered representative and was

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[28] *James A. Goetz,* 53 S.E.C. 472,478 (1998).
[29] *Leonard John Ialeggio*, 52 S.E.C. 1085 (1996).
[30] *Dep't. Of Enforcement* v. *Mizenko,* Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20 (NASD NAC Dec. 21, 1994).
[31] *In re Ernest A. Cipriani,* 51 S.E.C. 1004 (1994).
[32] *In re Paul Douglas Paratore*, 2008 WL 696457, at * 1 (2008).
[33] *Dep't of Enforcement v. Kendzierski*, 1999 WL 1489031, at *1 (NASD NAC Nov. 12, 1999).

associated as a general securities representative with a securities firm.[34] In *Shegon*, the respondent failed to apply customer funds to purchase an annuity and deposited customer checks into his personal business checking account.[35] The respondent also admitted that it was wrong to do so and did not respond to any of NASD's requests for information. *Id.* The *In re Thomas E. Jackson* proceeding involved a respondent who was an employee for a securities firm and was hired to sell mutual funds and insurance.[36] The respondent forged signatures on insurance applications to obtain commissions and was ultimately fired. *Id.*

None of the authorities cited by the Panel Majority and the NAC are similar to the facts of Wiley's case and are so substantially dissimilar that they are not applicable. Wiley was never an employee of Farmers, never misappropriated insurance premiums through fraudulent means, never fraudulently induced anyone and did not falsify any documents. Wiley never allowed any clients' policies to lapse and did not fail to remit payment to Farmers. Wiley never participated in the securities industry and did not take insurance premiums without authorization. Wiley was an independent contractor who acted with authorization according to his independent contractor relationship with his clients.

The Panel Majority and the NAC make several conflicts of law arguments alleging that SRO Rules approved by the SEC preempt state law when the two are in conflict and any state law claims that challenge the existence or operation of the SRO program or its rules are federally preempted and that a state law claim is a direct challenge to SEC approved SRO rules and is also preempted (FINRA 1087). However, the Panel Majority and the NAC fail to give an accurate rendition of the preemptive power of SROs. Conflicting law should be preempted by exchange self-regulation 'only to the extent necessary to protect the achievement of the aims of the

[34] *In re Shegon,* 1997 WL 1121282 (November 20, 1997).
[35] *Shegon,* 1997 WL 1121282 at *2.
[36] *In re Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975).

Securities Exchange Act.'[37] The SEC was authorized to take action only when "necessary or appropriate for the protection of investors or to insure fair dealing....".[38] Contrary to what the Panel Majority and the NAC assert, there is no conflict of law in this case. As explained above, insurance law and securities regulation are completely separate. In fact, federal law expressly separates the two industries and the Exchange Act and FINRA's rules do not specifically address regulating the insurance business industry. Therefore FINRA's Rule 2010 should not be interpreted to expand FINRA's regulatory authority to the insurance business industry. This interpretation would violate the Exchange Act, federal and state law as explained above.[39]

B. THE HEARING PANEL MAJORITY AND THE NAC HAVE EXCEEDED THEIR SCOPE OF DISCIPLINARY AUTHORITY BY INTERPRETING PRIVATE CONTRACTUAL RIGHTS

Like insurance regulation, contract law is exclusively regulated by the States.[40] This concept has been well established for more than a century and is explicitly codified by Texas statute. The SEC has long recognized that contractual disputes are not within its jurisdiction. In relation to the application of the language of FINRA Rule 2010, the SEC has already determined that it is not the SEC or FINRA's function "to decide the private contract rights between the parties."[41] Despite this clear separation of contract and securities law, in this case FINRA determined that "FINRA Rules, not Texas law, governed Wiley's obligations." (FINRA 1087).

In order to find a Rule 2010 violation, the Panel Majority and the NAC determined that Wiley converted insurance premiums. In order to make this fact finding, FINRA had to decide the private contract rights between Wiley, his clients and Farmers, as well as apply the Texas law regarding conversion. Since the Agreement does not govern how or when Wiley is required to

[37] *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 361 (1963).
[38] 15 U.S.C. § 78s(b); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005).
[39] 15 USCA §§1011-1012 (West).
[40] *DeSantis v. Wackenhut Corp.*, 793 S.W.2d. 670, 677 (Tex. 1990).
[41] *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957).

make payments to Farmers, it plays no part in the analysis under Texas law except to the extent that it is the mechanism that creates Wiley's debt.

The Panel Majority and the NAC determined that, "Wiley's agency obligations are well defined in his contract with Farmers and called for no interpretation" (FINRA 1596). This fact finding is just plain wrong because the Agreement is incredibly vague. The Panel Majority and the NAC had to seek outside sources to interpret Farmers and Wiley's private rights under the Agreement and determined that Wiley did not have authorization to possess and use his customers' insurance premiums, that he was not the "owner" of the premiums and that his entitlement to possess them was transitory because he was obligated to deposit them within a business day after receiving them (FINRA 1087). The Panel Majority found that Wiley had "no right to exercise ownership over these funds" or to use the premiums for his own benefit for more than a month or commingle funds (FINRA 1087; 1591). The Panel Majority and the NAC determined that Wiley "would sell insurance 'in accordance with' company rules'" and that "Wiley agreed to sell the classes and lines of insurance products underwritten by Farmers Insurance 'in accordance with their published rules and manuals'" (FINRA 1586; 1077). Obviously, the Panel Majority and the NAC interpreted the Agreement and decided the private rights of Farmers and Wiley in order to make these conclusions. When the Panel Majority and the NAC interpreted the private rights of two parties, it violated their scope of disciplinary authority and departed from *In re Samuel.*

II. FINRA MADE FACT FINDINGS THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Fact findings by the SEC are conclusive if supported by substantial evidence.[42] "Supported by substantial evidence," means that the finding need only be supported by evidence sufficient to support a reasonable factfinder's decision."[43] It is more than a scintilla, but less than a preponderance.[44] Findings of facts that are not supported by evidence in the record and form the basis of a decision are arbitrary and an abuse of discretion.[45] The fact that two or more possible competing inferences may be drawn from the facts "does not prevent an administrative agency's finding from being supported by substantial evidence."[46]

A. MOST OF FINRA'S FACT FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

There are several material Panel Majority and NAC fact findings in the Decisions which are not supported by substantial evidence. First, the Panel Majority and the NAC determined that Farmers *required* all agents to use the ACA Program, including Wiley (FINRA 1077). The Panel Majority and the NAC used this conclusion to further find that the terms of the ACA Manual and Agents Guide are binding on Wiley (FINRA 1590). These conclusions formed the factual basis of the Decisions. However, there is nothing in the Agreement which states that Wiley is required use the ACA Program or is bound by the terms of the ACA Manual and Agents Guide. In fact, the ACA Program, ACA Manual and Agents Guide are not even mentioned in the Agreement. There are only three unrelated general references to manuals and guides in the Agreement and none of those references support the Panel Majority and the NAC's conclusions. Those references state exactly:

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[42] 15 U.S.C.A. § 78y(a)(4). *Vail v. S.E.C.*, 101 F.3d 37, 39 (5th Cir. 1996); *Whiteside,* 883 F.2d 7 at 9; *Birkelbach,* 751 F.3d at 480.
[43] *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, (1938).
[44] *Meadows v. SEC*, 119 F.3d 1219, 1224 (5th Cir.1997). (quoting 5 U.S.C. § 706(2)(A))
[45] *Gann v. S.E.C.*, 361 Fed. Appx. 556, 559-560 (5th Cir. 2010).
[46] *Ill. Cent. R.R. v. Norfolk & W. Ry.*, 385 U.S. 57, 69, (1966) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620, (1966)); *Kleinser v. S.E.C.*, 539 Fed. Appx. 7, 8-9 (2d Cir. 2013).

> "(1) the Agent agrees "to sell insurance for the Companies and to submit to the Companies every requested application for insurance for the classes and lines underwritten by the Companies and eligible in accordance with their published Rules and Manuals. All business acceptable to the Companies and written by the Agent will be placed with the Companies" (FINRA 949).
>
> (2) "[t]he Companies agree... [t]o provide approved Company manuals, forms and policyholder records necessary to carry out the provisions of this Agreement" (FINRA 949).
>
> (3) "[t]he Agent acknowledges that all manuals, lists and records of any kind (including information pertaining to policyholders and expirations) are the confidential property of the Companies and agrees they shall not be used or divulged in any way detrimental to the Companies and shall be returned to the Companies upon termination of the Agency" (FINRA 951).

Those references show that (1) Wiley is required to *submit* every application for insurance only *for* the classes and lines underwritten by the Companies and *eligible* in accordance with their published Rules and Manuals; (2) that Farmers would *provide* its manuals, forms and policyholder records; and (3) that Wiley *acknowledges* that all manuals, lists and records... are the confidential property of Farmers. (FINRA 949). In the first reference, Wiley is required to submit applications for insurance that is *eligible in accordance with the written rules and manuals*. So, if the insurance that the customer needs is eligible for Farmers pursuant to its written manuals and rules, then Wiley has to place that insurance with Farmers, as opposed to placing it with another insurer. That is the Agreement. The provision does not relate to any requirement that Wiley abide by any particular rules or manuals regarding how he operates his insurance office because, under independent contractor law, Farmers cannot dictate the manner in which Wiley operates his business, otherwise the relationship would be considered an employer-employee relationship. (FINRA 1077, 1586). The Panel Majority and the NAC omit a majority of the first reference's language in order to create a completely different meaning from the plain language of the Agreement. It only means that Wiley must submit insurance

applications that fall within Farmers' specified classes and lines and that are eligible according to published rules and manuals (FINRA 949). The other two references have nothing to do with Wiley's selling obligations. None of the references mean that Wiley must use the ACA Program or that the terms of the ACA Manual and Agents Guide are binding.

In addition to intentionally misapplying and interpreting the language of the Agreement to support their conclusion, The Panel Majority and the NAC provide no substantial evidence[47] to support their interpretation that Wiley must use the ACA Program, or that the terms of the ACA Manual and Agents Guide are binding upon him. The Panel Majority and the NAC only make conclusory statements and provide no facts found in the record to support their finding (FINRA 1077; 1590-1591). For instance, the Decision determines that Wiley contracted with Farmers to "sell insurance 'in accordance with' company rules,'" *supra* (FINRA 1077). As explained above, there is no language in the Agreement that states that Wiley "would sell insurance according to company rules" (FINRA 949-951). Furthermore, there is no evidence in the record of any "company rules" or any reference to any "Company rules." Similarly, the NAC Decision found that Wiley "agreed to sell the classes and lines of insurance products underwritten by Farmers 'in accordance with their published rules and manuals'" (FINRA 1586). Again, as stated above, this is a misapplication of the language in the Agreement. The NAC cites to no evidence to support that statement. Instead, the Panel Majority and the NAC completely disregard the plain language of the Agreement to make their finding that Farmers' rules and manuals apply to all independent agents and that their terms are binding.

What is most concerning is that the Panel Majority and the NAC completely ignores the terms of the Agreement which explicitly state, "no change, alteration or modification of this

[47] Because the Panel Majority and the NAC failed to support their fact findings with substantial evidence, those findings regarding the binding nature of the ACA Manual and Agents Guide are not conclusive. 15 U.S.C. § 78y(a)(4); *Meadows v. SEC*, 119 F.3d 1219, 1224 (5th Cir.1997) (quoting 5 U.S.C. § 706(2)(A)).

Agreement may be made unless it is in writing and signed by the Agent and an authorized representative of the Companies" (FINRA 951). The Panel Majority and the NAC provide no evidence showing that the Agreement was changed or modified in writing and signed by Wiley and Farmers. Therefore, unless Wiley and Farmers executed a written amendment to the Agreement, no obligations are binding on Wiley and Farmers except for those clearly mentioned in the plain language of the Agreement. Regardless of the fact that the Panel Majority and the NAC have not produced any evidence to show any executed written amendments to the Agreement or any evidence to show that Wiley must use the ACA Program or that the ACA Manual and Agents Guide are binding on Wiley, the Panel Majority and the NAC made those conclusions anyway. This interpretation is a massive expansion of Wiley's obligations and duties owed to Farmers and should be supported by more than one misapplied statement in the Agreement. Worse, the imposition of such requirements would make Wiley a statutory employee of Farmers, under Texas law, when Farmers and Wiley clearly executed and intended to act under an independent contractor agreement, specifically - the Agreement.

Aside from the language in the ACA Manual and Agents Guide, the only evidence the Panel Majority and the NAC use to support their conclusions that the ACA Manual and Agents Guide are binding on Wiley is Mr. Edmonds' ("Edmonds") testimony. Edmonds is an experienced Farmers Insurance Group auditor (FINRA 1078). However, Edmonds' testimony has no merit because he testified that he does not know whether the agents are required to abide by the manuals (FINRA 408). Edmonds does not know anything regarding Farmers' relationship with independent contractors and the duties, obligations and rights of the independent contractor agents (FINRA 418; 420). Edmonds admits that he has not had the requisite training to comment on independent contractor relationships and the obligations they owe to Farmers (FINRA 421).

Therefore, Edmonds' testimony regarding Wiley's rights, duties and obligations have no evidentiary value at all. Nonetheless, the Panel Majority and the NAC give more credit and gravitas to Edmonds' testimony and completely discredit Wiley's testimony, regardless of the fact that Edmonds has no requisite knowledge and Wiley does.

Another materially misapplied phrase in the Agreement is, "[t]he Agent agrees... [t]o provide the facilities necessary to furnish insurance services to all policyholders of the Companies including, but not limited to, collecting and promptly remitting monies due to the Companies..." (FINRA 949). The Agreement does not define "promptly remitting monies," and thus the term should be interpreted according to the industry standards. Without providing any evidence to show how the ACA Manual and Agents Guide can be used to supplement the meanings of the language of the Agreement, the Panel Majority and the NAC applied the ACA Manual and Agents Guide instruction to deposit premiums in order to assist in defining "promptly remitting monies" (FINRA 1587). The Panel Majority and the NAC determined that "promptly remitting monies" means to deposit premiums within one day upon receipt of customer insurance premiums (FINRA 1077). Although the ACA Manual and Agents Guide and their one day deposit time limit is not mentioned or referenced in the Agreement, The Panel Majority and the NAC determined that Farmers *required* Wiley to deposit the premiums into the co-bank account within one day upon receipt of the insurance premiums (FINRA 1077). Thus, because Wiley did not deposit the insurance premiums within that 24 hour timeframe, the Panel Majority and the NAC determined that Wiley violated Rule 2010.

Contrary to the Panel Majority and the NAC, the Dissent concluded that the ACA Manual and the Agents Guide only *recommends* that agents deposit premiums daily and refers to this 24 hour timeframe as "good business practices" (FINRA 001094). Wiley testified that

Farmers allows about a thirty day window from the date the agent enters the premiums into the ACA banking receipt system to when an agent must deposit the premiums because the agent has discretion with regard to when he deposits the premiums (FINRA 600-602, 619).

Furthermore, the Panel Majority and the NAC completely ignore the bulk of the language of the ACA Manuals, the Agent Guide and the Agreement. The ACA Manual explains how there are many ways to process payments, such as EasyPay, over the phone, by cash or credit card, paper method and how some flood insurances may not be processed through this ACA system and how to enter an insurance premium payment without having access to a computer (FINRA 998, 1077). The ACA Manual compares its options with other insurance companies, like Texas Windstorm, which have similar preferences and offer different programs which agents can chose depending on what works best and is convenient for them (FINRA 614). The plain language of ACA Manual and the Agreement supports Wiley's testimony because the language actually shows that the ACA Program is a recommendation agents may elect to follow. The ACA Manual states, that "the e-ACA Program was introduced in the Spring of 2003 and ***is now available*** to all agents on the Agency Dashboard... [i]t has always been the ***recommendation*** of the Companies that agents open and close ACA's and deposit premiums each day premiums are collected to avoid theft, loss, auditing questions and to assure that policyholder's accounts are ***credited*** in a timely fashion... Here are some ***guidelines to follow***..." (FINRA 974,1001, 1001). Also, Wiley testified as to how Farmers offers guidelines and programs as a means to assist agents and how those programs and guidelines are not binding or mandatory (FINRA 600-602, 619).

The Panel Majority and the NAC omit the fact that the quotes it uses are from a section of the Agents Guide on how to resolve discrepancies in co-bank accounts and the ACA system (FINRA 000967-968). The Panel Majority and the NAC's omission of the fact that co-bank

account balance discrepancies are so common, that Farmers provides guidelines and recommendations on how to remedy these discrepancies, is a misleading interpretation of the evidence (FINRA 967 -968). The Panel Majority and the NAC fail to mention how account discrepancies are so commonplace that Farmers' internal audit department only investigates accounts with a minimum $3,000.00 discrepancy and about 10 to 25 agents a month are reported to Farmers' internal auditing department for having such discrepancies (FINRA 370). If the ACA Manual and Agents Guide were truly binding on all independent agents, FINRA should be bringing enforcement actions against 10 to 25 Farmers insurance agents a month. This evidence contradicts FINRA's argument that all Farmers' agents *must* deposit insurance premiums into the co-bank account within one business day of receipt of insurance premium.

The Panel Majority and the NAC ignore all of this evidence and insists Wiley was required to use the ACA Program, and that the ACA Manual and Agents Guide were binding on Wiley (FINRA 1077, 1587, 1093-1095). There is no more than a scintilla of evidence to support the Panel Majority and the NAC's fact conclusions. Nonetheless, without substantial evidence the Panel Majority and the NAC uses these fact findings to determine that Wiley violated FINRA Rules.

The Panel Majority and the NAC even misinterprets the evidence regarding Wiley's false statements. The Panel Majority and the NAC found that Wiley's on-the-record interview response to the question, "'Did customer collections end up being used to pay for personal and business expenses?' Wiley *plainly* replied, 'No.'" (FINRA 927-929, 1025, 1592). This rendition is a complete misstatement of the evidence. Wiley did not plainly reply "no" but, instead, gave a lengthy explanation as to why he didn't believe he used the money to pay for personal and business expenses in an unauthorized manner (FINRA 927). Essentially, because of the credit-debt relationship between Wiley and Farmers, and Wiley's contractual relationship with his customers, Wiley could use the

insurance premiums for personal and business expenses so long as he remitted the amounts owed to Farmers within the requisite time in order to maintain insurance coverage for his clients (FINRA 927). Since Wiley had a right to possess and use the insurance premiums under his contractual relationship with his clients, he did not think that he improperly used the premiums for personal and business expenses in the manner that FINRA's enforcement was insinuating or that he used the premiums in a manner that violated the law or his contracts (FINRA 927). Furthermore, the statement is not misleading because Wiley clearly stated that he did use the premiums for personal and business expenses several times (FINRA 510, 519, 1025). Wiley believed that the statements were vague and misleading (FINRA 519). The Dissent found that Wiley signed the written statements while under duress. Wiley's response was not vital to FINRA's investigation and the Panel Majority determined that Wiley's denial was transparently false but did not appear to mislead or impede FINRA's investigation (FINRA 1092). The Dissent believed that Wiley was coerced to sign the written statements while he was under duress (FINRA 1094). Therefore, that statement should not be given that much weight (FINRA 1593-1595).

However, based on this one statement alone, the Panel Majority and the NAC determined that Wiley deliberately provided false and misleading information that was integral to FINRA's investigation (FINRA 1599). The Panel Majority and the NAC have not provided any evidence to support their conclusion that Wiley deliberately provided false information or that this information was misleading and integral to FINRA's investigation. The Panel Majority and the NAC have not provided any evidence to support their conclusion that Wiley's response was "vitally important to FINRA's investigation and would support the imposition of a bar" (FINRA 1599). Therefore, the Panel Majority and the NAC's factual conclusions regarding Wiley's false and misleading statement are not supported by substantial evidence and are therefore not conclusive and are arbitrary.

III. THE PANEL MAJORITY AND THE NAC DID NOT MEET THEIR BURDEN OF PROOF TO FIND RULE 2010 AND 8210 VIOLATIONS.

A. FINRA HAS NOT PROVEN A RULE 2210 VIOLATION.

According to the Dissent, the Panel Majority and the NAC have not met their burden to prove that Wiley violated Rule 2010 and 8210 (FINRA 1093-1095). FINRA determined that "[w]hile insurance regulation does not fall within FINRA's jurisdiction, Wiley's conduct was unethical and violated FINRA's requirement to observe high standards of commercial honor and just and equitable principles of trade in the conduct of his business. Wiley was appropriately disciplined for his unethical business conduct in accordance with FINRA rules" (FINRA 1593). The Panel Majority and the NAC never established what the applicable "high standards of commercial honor and just and equitable principles of trade" actually are, especially as they pertain to Wiley's insurance business practices. The Panel Majority did not allow evidence related to the insurance business industry's standards and practices to be introduced into evidence because the Panel Majority held that determining the standards for the insurance business industry practices is not relevant to the conversion of customer premium payments under FINRA Rules (FINRA 1594-1595). However, the Panel Majority and the NAC ultimately found that Wiley violated FINRA rules based on the evaluation of Wiley's business activities and whether he converted insurance premiums (FINRA 1593).

This is incredibly problematic because without introducing evidence regarding the insurance business industry standards for independent contractors in a debt-creditor agency relationship, the Panel Majority and the NAC did not have the requisite knowledge and experience to properly evaluate the intricacies of such relationship.[48] The Panel Majority and the

[48] *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 652 (7th Cir. 2001); *see also, Fredericksburg Care Co., L.P. v Lira*, 407 S.W.3d 810, 814-15 (Tex. App. 2013); *Thomas*, 204 Cal. App. 4th at 619; *In re Prudential Ins. Co. of America Litigation*, 133 F.3d 225, 232 (3d Cir. 1998).

NAC would not know how to interpret debt-credit insurance agency relationship issues, contracts, rights and duties owed by insurance agents and companies as those items should be interpreted according to their industry standards.[49] Despite not allowing evidence to be presented on this vital issue on which requisite knowledge is needed to make a determination, the Panel Majority and the NAC made legal and factual conclusions regarding Wiley's insurance business activities, interpreted his contractual rights and evaluated his insurance business industry practices according to the Panel Majority and the NAC's own standard, whatever that standard may be.

Despite claiming that the Panel Majority and the NAC evaluated whether Wiley upheld the "high standards of commercial honor and just and equitable levels of trade," the Panel Majority and the NAC actually evaluated the legitimacy of his business activities and whether he converted the insurance premiums. Under Texas law, money cannot be converted as a matter of law. Even though Texas Law governs the relationship between Wiley, his clients and farmers, the Panel Majority and the NAC refused to apply Texas law or even entertain the definition of conversion under Texas law. Instead, it determined to apply FINRA definitions and then didn't even apply the correct FINRA definition. Under FINRA's Sanction 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" (FINRA 1087). Under that standard, the Panel Majority and the NAC must show that Wiley (1) intentionally; (2) without authorization; (3) took or exercised ownership over property; (4) that Wiley did not own or was not entitled to possess.[50]

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[49] *IDS Life Ins. Co.*, 133 F.3d at 653.
[50] FINRA Sanction Guidelines, note 2, page 36, (2015).

Although it is clearly defined in FINRA's Sanction Guidelines, FINRA did not use this definition (FINRA 1087). Instead, the Panel Majority and the NAC used an abbreviated version, "conversion occurs when a person uses another's funds for personal benefit, instead of for the purpose for which the funds are intended" (FINRA 1087). This abbreviated version is not the SRO approved standard from the Sanction Guidelines. Therefore, Wiley not only did not have notice that his insurance business activities would be reviewed under Texas law, he did not have notice that he would be interpreted under this abbreviated version of conversion, which prejudiced him and violated his due process rights.

This version eliminates most of the elements of the Sanction Guidelines' conversion standard and drastically reduces the Panel Majority and the NAC's burden to prove conversion. Under this version, the Panel Majority and the NAC only had to show that a person *used* another person's funds in a manner that those funds were not intended for. Therefore, the only evidence the Panel Majority and the NAC offered to prove that Wiley converted insurance premiums are instances showing how Wiley used the insurance premiums (FINRA 1075, 1076, 1081, 1083, 1084, 1588, 1589, 1591, 1590, 1591). Merely showing that Wiley used insurance premiums does not satisfy the Sanction Guidelines definition for conversion, especially since they were money paid by his clients to his company.

As explained in Section II of this Opening Brief, the Panel Majority and the NAC only made conclusory statements not supported by substantial evidence. The Panel Majority and the NAC stated that Wiley's possession of the insurance premiums was only "transitory" and that he was not the owner, had no ownership rights in the premiums and that his actions were intentional and unauthorized (FINRA 1590-91, 1087). The Panel Majority and the NAC determined that Wiley was obligated to promptly deposit insurance premiums within 24 hours of receiving them,

but failed to do so (FINRA 1590). None of these conclusory statements are supported by evidence in the record. The Panel Majority and the NAC presented no evidence of the contractual relationship between Wiley and his clients wherein that contract would show Wiley's possessory and ownership rights in the insurance premiums. Further there is no language in the Agreement which clarifies what Wiley's possessory and ownership rights are in the insurance premiums. Without a showing of such evidence, all of the Panel Majority and the NAC's statements regarding the same are arbitrary and not conclusive.

The Panel Majority and the NAC's failure to provide substantial evidence to support their fact findings prevent the Panel Majority and the NAC from meeting their burden of proof as to conversion according to the Sanction Guidelines. The Panel Majority and the NAC's use of the abbreviated conversion standard is an abuse of discretionary power because it is not a binding SRO approved sanction. The Panel Majority and the NAC's conclusory statements to support conversion are neither conclusory nor persuasive. Since the Panel Majority and the NAC failed to prove conversion and did not properly establish the "high standards of commercial honor and just and equitable principles of trade," the Panel Majority and the NAC have not met their burden to prove that Wiley violated Rule 2010.

B. FINRA HAS NOT PROVEN A RULE 8210 VIOLATION.

The Panel Majority and the NAC have not satisfied their burden of proof to prove a violation of Rule 8210. Wiley substantially complied with all aspects of the request and there are mitigating factors which the Panel Majority and the NAC have not considered. As explained above, Wiley testified in an on-the-record interview where he recanted the admissions he made during Farmers' internal audit. Wiley's response was not vital to FINRA's investigation and the Panel Majority determined that Wiley's denial was transparently false but did not appear to

mislead or impede FINRA's investigation (FINRA 1092). The Dissent believed that Wiley was coerced to sign the written statements while he was under duress (FINRA 1094). During the on-the-record interview, when Wiley was asked "Did customer collections end up being used to pay for personal and business expenses?", Wiley gave his answer immediately (FINRA 510, 517). There was no substantial degree of regulatory pressure required to obtain this response. *Id.* The information Wiley provided was relevant and responsive to the request and Wiley gave a valid explanation for the deficiencies in the response. As explained above, Wiley answered "no," because he did not believe he was improperly using the funds to pay for personal and business expenses (FINRA 927-929, 510-517).

IV. THE DECISIONS AND SANCTIONS SHOULD BE REVERSED AND DISMISSED BECAUSE THEY ARE UNWARRANTED IN LAW AND WITHOUT JUSTIFICATION IN FACT

FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its financial industry members' compliance with Federal and State securities laws, SEC regulations, and FINRA's own rules and regulations.[51] The SEC must approve FINRA's rules which, once adopted by the SEC, have the force of law.[52] FINRA's disciplinary proceeding awards are binding except under very limited circumstances.[53] An aggrieved individual can petition the Court of Appeals for review of an SEC order.[54] An appeals court may only overturn an SEC disciplinary order if it is unwarranted in law or without justification in fact and the SEC's decision is not arbitrary or an abuse of discretion.[55] The authority granted to the SEC does not allow punishment for lawful behavior under the guise that "the punishment was to deter future

[51] Securities Exchange Act of 1934, § 15A; 15 U.S.C.A. § 78o–3; *Birkelbach v. S.E.C.*, 751 F.3d 472 (7th Cir. 2014).
[52] *Id.*
[53] *Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012).
[54] *Whiteside & Co., Inc. v. S.E.C.*, 883 F.2d 7, 9 (5th Cir. 1989).
[55] *Birkelbach,* 751 F.3d at 478.

behavior in an attempt to protect the securities industry."[56] In this case, the Panel Majority and the NAC punished Wiley for lawful behavior under the guise that this punishment will deter future behavior in an attempt to protect the securities industry. The Panel Majority and the NAC presented no evidence that the sanctions and Decisions will deter future behavior or promote protecting the securities industry because the Panel Majority and the NAC sanctioned Wiley's lawful insurance business practices which had nothing to do with the securities industry.

There is no way that the sanctions imposed on Wiley are appropriate.[57] The Panel Majority and the NAC abused their discretion and authority by failing to recognize that the issues in this case were not subject to FINRA's jurisdiction. Wiley provided several extensive letters and notifications regarding how the issues in this case are subject to Texas laws and outside FINRA's jurisdiction (FINRA 1241-1250, 1236-1238). Even worse, the Panel Majority and the NAC applied an unapproved abbreviated standard for proving conversion as their basis to find a Rule 2010 violation and did not provide substantial evidence to prove their conclusions for that abbreviated standards. The Panel Majority and the NAC's fact findings and legal conclusions are completely arbitrary, unwarranted in law and fact and a complete abuse of discretionary authority.

CONCLUSION

This case is truly an egregious action by the Panel Majority and the NAC because Wiley did nothing materially wrong. He violated no law, no contract, no duty, no insurance industry standard, no money was lost, no party was harmed, no insurance premiums were affected by Wiley's actions and no casualty occurred in this case. The only person harmed in this case is Wiley. Wiley had sanctions imposed against him and was banned from the securities industry for

[56] *Wright v. Sec. & Exch. Comm'n*, 112 F.2d 89, 94 (2d Cir. 1940).
[57] 15 U.S.C. §78s(h)(3); see also, *Fiero*, 660 F.3d 569 (2011).

reasons which are unsupported by substantial evidence and contrary to well-established law. This entire disciplinary proceeding has been a great tragedy, expense, hardship and major injustice to Wiley. For these reasons, Wiley respectfully requests that the SEC reverse and dismiss with prejudice the Decisions and sanctions found against Wiley.

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CERTIFICATE OF SERVICE

I certify that on this day, June 8, 2015, I caused the original and three copies of the foregoing Opening Brief in the Matter of Application for Review of Keilen Dimone Wiley, Administrative Proceeding No. 3-16461, to be served on the parties listed below

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