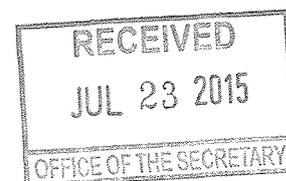


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**UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION**



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

**REPLY BRIEF**

**REPLY BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW**

July 22, 2015

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## REPLY 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 will assist the Securities and Exchange Commission (“SEC”) with the numerous issues involved herein and help clarify questions or concerns. This especially clear in FINRA’s Brief In Opposition to Application for Review, (“FINRA’s Brief”). First of all, FINRA’s Brief misstates and disregards the central issues in this case and Respondent’s arguments. Second, FINRA’s Brief is wrought with many fact misstatements, conclusory statements and fact conclusions that are unsupported and in some instances contrary to the evidence in the record. As stated in Respondent’s Opening Brief, Dawn Meade will assist the SEC if oral argument is granted.

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## REPLY BRIEF

FINRA's Brief in Opposition to Application for Review ("FINRA's Brief") misstates and disregards the issues Respondent Keilen Dimone Wiley ("Wiley") seeks on appeal. First, FINRA's Brief disregards Wiley's jurisdiction argument entirely by reiterating issues that are generally disputed. FINRA's Brief misstates the legal authorities in order to provide justification for the Decisions. Second, FINRA's Brief fails to present more than a scintilla of evidence to support the National Adjudicatory Counsel's Decision (the "NAC Decision") upholding the Hearing Panel Decision<sup>1</sup> (the "Majority Decision") (collectively referred to herein as the "Decisions"). Additionally, FINRA's Brief makes misstatements of fact that are not supported by the evidence and are even contrary to the Decisions themselves.

### ARGUMENT AND AUTHORITIES

#### I. FINRA'S REPLY BRIEF COMPLETELY IGNORES WILEY'S ARGUMENTS

It is undisputed that Wiley was registered with FINRA, and thus FINRA had jurisdiction over him regarding matters within FINRA's scope of authority. The issue in this case is whether FINRA has jurisdiction to assess Wiley's insurance business activities that are peculiar to the insurance industry, apply FINRA rules to them, and then determine whether his conduct in this completely separate industry violates FINRA's Rules. Federal law, state law, SEC Decisions and even some FINRA rules acknowledge that there is a limitation to FINRA's broad scope of authority to evaluate ethical business activities in insurance business actions.<sup>2</sup> Nevertheless, FINRA completely disregards this exception in its brief, failing to address or even mention the

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<sup>1</sup> In a 2/1 Decision, the Hearing Panel Majority found against Wiley and agreed with Enforcement's case. The Dissenting Panelist agreed with Wiley's case and support Wiley's arguments and fact conclusions.

<sup>2</sup> *Thomas v. Westlake*, 204 Cal.App.4th 605, 619 (2012); see also, *In re Prudential Ins. Co. of America Litigation v. Prudential Insurance Co. of America*, 133 F.3d 225, 232 (3d Cir. 1998); *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 653 (7th Cir. 2001); *Wilson v. American Inv. Services, Inc.*, 22 Fed.Appx. 424, 429 (10th Cir. 2002).

plain language of these legal authorities that spell out this exception to FINRA's broad jurisdiction.

FINRA's Brief argues, and Wiley does not dispute, that FINRA's disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security. While this may be true, FINRA's authority is limited and excludes matters involving issues that are particular to the insurance business industry. FINRA cannot evaluate reserves, reinsurance, actuarial calculations, rates, coverage and mandatory terms.<sup>3</sup> Federal courts reason that FINRA regulatory agencies would not have the requisite knowledge and expertise to understand the intricacies of the insurance agency.<sup>4</sup> Wiley invoked this insurance business exception several times (PR 1201-1210, 20-32). FINRA ignored Wiley's arguments and still evaluated issues peculiar to the insurance business industry in order to find that Wiley violated FINRA Rules. FINRA evaluated Wiley's reinsurance capability, whether he had sufficient reserves, whether his clients' coverage was affected and the mandatory terms of his agency contract in order to conclude that he violated FINRA rules (PR 1587-1589). These evaluations were outside FINRA's scope of authority.

In order to justify its evaluation of Wiley's insurance business activities peculiar to the insurance industry, FINRA applies several SEC decisions that are not relevant to this case. The SEC decisions FINRA applies involve insurance agents who committed clear wrongful civil and criminal acts in connection with their insurance business activities, such as forgery<sup>5</sup>, unauthorized charges to accounts<sup>6</sup>, inappropriate requests for reimbursement<sup>7</sup> and other wrongful

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<sup>3</sup> *Thomas*, 204 Cal.App.4th 605, 619 (2012).

<sup>4</sup> *Thomas*, 204 Cal.App.4th 605, 619 (2012); see also, *In re Prudential Ins. Co.*, 133 F.3d 225, 232 (3d Cir. 1998); *IDS Life Ins. Co.*, 266 F.3d 645, 653 (7th Cir. 2001); *Wilson*, 22 Fed.Appx. 424, 429 (10th Cir. 2002).

<sup>5</sup> *Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975) (forging signatures and falsifying insurance records).

<sup>6</sup> *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) (charged expenses to co-workers's credit care without authorization).

acts. In those cases, FINRA did not have to evaluate the issues peculiar to the insurance business. Forgery, unauthorized credit card charges and fraudulent reimbursement requests can be evaluated without determining possessory rights of insurance premiums according to independent contract agency agreements. To determine forgery, all that is required is a comparison of signatures. In Wiley's case, Wiley did nothing wrong. No contract was broken, no term breached, no client was harmed, no money was lost or unaccounted for, no crime was committed nor any improper civil act completed. The only issue here is whether Wiley's business model, wherein he paid Farmers on a schedule that displeased Farmers, violated FINRA's Rule 2010. If FINRA had determined that Wiley's ethical violations were based on an activity that was not peculiar to insurance business activities, then perhaps FINRA's jurisdiction over this case would not be an issue. However, this is not the case and without providing substantial evidence, the Decisions ultimately found Wiley's "transitory holding" of insurance premiums was conversion.

FINRA completely disregards the law set out in Wiley's Application. FINRA misstates Wiley's arguments regarding the importance of the McCarran-Ferguson Act and the clear separation of insurance and securities regulation.<sup>8</sup> FINRA does not address the McCarran-Ferguson Act at all. FINRA does not discuss the omission of insurance regulation in the Securities Exchange Act or how federal securities law specifically define and limit the SEC's authority, which does not include evaluating issues peculiar to the insurance industry. FINRA does not mention any of the federal cases to which Wiley cites that clarify the insurance business

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<sup>7</sup> *James A. Goetz*, 53 S.E.C. 472, 478 (1998)(submitting fraudulent reimbursement requests under employer's matching gift program in order to receive funds to pay for child's education).

<sup>8</sup> FINRA's Brief states that Wiley is attempting to blur the lines between securities and insurance regulation and states that FINRA is not attempting to regulate the insurance industry by bringing a disciplinary action against Wiley for his violations of FINRA Rules. Although FINRA makes this argument, the fact that Wiley was found in violation of FINRA's rules based on his activities that are peculiar to the insurance business, means that every insurance agent who is registered with FINRA should amend their insurance business activities to comply with securities standards, which is an indirect way to regulate the insurance industry.

exception.<sup>9</sup> Furthermore, like most of its conclusions in this case, FINRA misstates Wiley's arguments regarding how the Arbitration Code illustrates FINRA's limited authority regarding this subject matter.<sup>10</sup> Wiley was not arguing to apply the Arbitration Code to this case.

FINRA misapplies *Samuel B. Franklin & Co.* and accuses Wiley of vastly oversimplifying federal securities laws, again, without providing any evidence or explanation as to support its conclusion. *Franklin* supports Wiley's argument whole heartedly because *Franklin* held that, in the absence of "justifying or extenuating circumstances, a member's failure to live up to contractual obligations owed to a customer or a fellow member would constitute dishonorable and inequitable conduct not consistent with 'just and equitable principles of trade'".<sup>11</sup> *Franklin* also held that not every failure to perform a contract violates the rule, it must also appear that such failure was unethical or dishonorable.<sup>12</sup> In Wiley's case there is no breach or failed contract obligation. No customers were affected; no money was lost or unaccounted for, nothing (PR 1598). Wiley's business constraints at the relevant time required him to pay Farmers on a net 30 day basis. It was a business decision to which he admitted in several written correspondences and it was a business risk he was willing to take because Farmers could terminate their contract if Farmers wanted to be paid earlier (PR 1182).<sup>13</sup> Wiley knew that Farmers could terminate their business relationship, but also that his credit-debt relationship with

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<sup>9</sup> *Thomas*, 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); *IDS Life Ins. Co.*, 266 F.3d 645, 653 (7th Cir. 2001); *Wilson*, 22 Fed.Appx. 424, 429 (10th Cir. 2002).

<sup>10</sup> FINRA's Brief argues that Wiley attempted to apply the Code of Arbitration to this disciplinary proceeding to show FINRA's lack of jurisdiction over the issues. This is a misstatement of Wiley's argument. Wiley argued that FINRA's Code of Procedure is silent on whether FINRA's disciplinary authority is limited to issues peculiar to insurance, but that FINRA's Arbitration code illustrates the insurance business activities exception to FINRA's broad disciplinary authority, especially in light of federal and state statutes and federal case law that clearly define and limit FINRA's broad scope authority.

<sup>11</sup> *In the Matter of Samuel B. Franklin & Co. Nat'l Associates of Sec. Dealers, Inc.*, 38 S.E.C. 113 (S.E.C. Release No. Nov. 18, 1957)

<sup>12</sup> *Id.*

<sup>13</sup> FINRA completely misinterprets these letters and the quotes are cherry picked and taken out of context.

Farmers had guarantees and safeguards that prevented his customers' from being affected.<sup>14</sup> Wiley provided testimony regarding how independent insurance companies operate and had justifiable explanation for the manner in which payments were made to Farmers, FINRA just did not consider them (PR 670, 1028, 1091).

## **II. FINRA'S DECISIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

In addition to failing to address the insurance business activities exception, FINRA also failed to address the record's providing no substantive evidence to support the fact and legal conclusions made against Wiley. Fact findings by the SEC are conclusive if supported by substantial evidence.<sup>15</sup>

### **A. FINRA'S FACT AND LEGAL CONCLUSIONS REGARDING CONVERSION ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

The Decisions are based on the Hearing Panel Majority and the NAC's conclusion that Wiley *converted* funds.<sup>16</sup> FINRA's Sanction Guidelines clearly state conversion is "an intentional and unauthorized taking of and/or the exercise of ownership over property by one who neither owns the property nor is entitled to possess it." In order to find conversion, FINRA must show by substantial evidence that Wiley (1) intentionally took the money and (2) his taking was unauthorized or he exercised ownership over the property when he neither owned the

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<sup>14</sup> Wiley testified that Farmers would withhold his monthly commissions in the event payments were short. (PR 1985). FINRA asserts Edmonds testimony to contradict Wiley's testimony. However, Edmonds admits he has no knowledge or training of the agency agreements and does not know what responsibilities Farmers and the agents have towards each other. He later recants his statement by saying he does not know if Farmers holds agents money at Farmers' convenience and pays agents at its discretion. (PR 421-423).

<sup>15</sup> 15 U.S.C.A. § 78y(a)(4); see also, *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.

<sup>16</sup> As explained in Wiley's Opening Brief, the NAC and Hearing Panel Majority did not apply the correct standard for determining conversion according to FINRA's Sanction Guidelines. The Decisions do not state the correct standard for conversion. Additionally, Wiley refers to both Decisions because it appears as though the NAC's Decision is substantially identical or a mere image of the Hearing Panel Majority's Decision, both of which are not supported by substantial evidence.

property nor was entitled to possess it.<sup>17</sup> Wiley asked the DOE to specify which transactions were improper because, as an independent insurance agency, Wiley has both ownership and possessory rights over premium money from the time Wiley's clients pay him for the insurance premiums to the time Wiley pays Farmers. In Wiley's Motion for More Definite Statement and his Wells Submission Letter, Wiley indicated that the DOE had failed to assert that anyone else had possessory rights to the insurance premiums (PR 29-30, 1201-1210). Neither original panel nor the NAC panel ever cited any evidence establishing the possessory rights, or which possessory rights Wiley was violating, yet the panels determined that Wiley had no possessory rights and that his rights were "transitory" (PR 1087, 1590). The panels cited no evidence to support this conclusion. Instead, the main evidence the panels used in this disciplinary proceeding is listed below:

1. The one day deposit language in the ACA Manual and Agency Operations Guide and FINRA's conclusion that Wiley was required to deposit insurance premiums into the shared bank account within one day.<sup>18</sup>

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<sup>17</sup> See FINRA Sanction Guidelines 36 & n.2 (2013 ed.).

<sup>18</sup> This is a disputed fact. First, there is no plain language in the record that states that Wiley is required to adhere to every single term of the ACA Manual and Agency Guide. Second, the ACA Manual and ACA Guide allows for monthly pay plans (PR 990) which is plain language in the record which directly conflicts with FINRA's conclusion, and actually supports Wiley's end of the month deadline for paying balances owed to Farmers. Wiley has argued that the details of how he runs his business as an independent contractor cannot be micromanaged or controlled by Farmers, otherwise, Wiley would lose his status as an independent contractor status and actually a Farmers employee. Therefore, FINRA's interpretation of the Agency Agreement and the Farmers' Manuals is just plain wrong, it contradicts the basic legal principles of agency relationships and contradicts the only testimony of someone who has knowledge of the independent contractor relationship between agents and Farmers. Additionally, Mr. Edmonds states that the ACA Manual and Guide is available, not required. (PR 365). This supports Wiley's testimony that the ACA Manuals and Guide are suggestions on how to best run a practice in order to avoid legal problems. (PR 1000; 966, 968, 990, 991; 408; 473; 474; 153; 602; 628; 679). Mr. Edmonds also states that if payments are not deposited within one day, about a week or something after the day the deposit should have been made, a reminder email is sent to the agent. (PR 368). That's it. If it there was a one day requirement, shouldn't there should be more activity by Farmers when agents fail to make daily payments? Wiley's credit-debt relationship status his highly important because all that is required is that Wiley promptly deposit the amount of cash owed to Farmers. (PR 34). In fact, there is evidence that shows it is common in the industry for agents to delay payment to Farmers for more than one day. For instance, the fact that Farmers has an internal auditing system to monitor payments and only investigates balance discrepancies of \$3,000 or more by sending out a payment reminder email a week after the discrepancy is discovered illustrates how this one day payment rule is not hard and fast or even required by all agents. The system allows agents to deposit payments to balance the credit-debt owed to Farmers several days, even weeks after the agent actually receives the insurance premium payments. Further, Farmers investigates anywhere from 10 to 25 agents each month who have debt-credit discrepancies of \$3,000 or more (PR

2. The written statements prepared by Farmers' management and audit team, but signed by Wiley.<sup>19</sup> (RP 1027-1029).
3. Wiley's email where he explains his business decision to delay remitting money owed to Farmers due to cash flow constraints and his extenuating circumstances in order to best serve his business and his clients. (PR 1028-1029).
4. Wiley admits he was to write insurance policies and collect insurance premiums and remit payments to Farmers. (RP 481-482).
5. Wiley paid the outstanding balance he owed to Farmers before meeting with Farmers internal audit agency and admits that the payment was late. RP 118-119, 1078-1079, 1588-1589, 1025, 1430, 1027-1029, 377-379.
6. Farmers elected not to maintain registration for Wiley and indicated on Wiley's U5 that Wiley, "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."<sup>20</sup> (RP 943, 937)
7. The ACA Manual warned that the practice of commingling customer funds was prohibited and could trigger internal audits. RP 999, 1587.
8. Farmers' internal policies and procedures by which all of its insurance agents were to collect and deposit customer insurance premium policies. RP 131, 3358-362, 481-482, 953-1010, 1587.
9. Mr. Edmonds report which showed a negative balance during the month Wiley delayed payment. (PR 377).<sup>21</sup>
10. The language in the Agency Agreement which states that insurance policies should be written and submitted according to Farmers Rule and Manuals. (PR 45).

This list is merely a summary of the main conclusions FINRA found, most of which are unsupported by substantial evidence. Wiley objects to each of these "fact conclusions" as

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370). Therefore, there are many more accounts that have discrepancies less than \$3,000, but only 10 to 25 are actually monitored (PR 370). The fact that Farmers' monitoring system exists with reminder emails and the leniency given to the agents to remit payments in a prompt, sometimes monthly, manner, (PR 990), illustrates how the one day rule is not required or necessary. It is merely a suggestion for how to best run an agency in order to prevent issues.

<sup>19</sup> The Hearing Panel Dissent believes that Wiley was under duress when he signed the statement (PR 1094).

<sup>20</sup> Wiley believed that the reason for his termination was that Farmers did not want to pay a larger amount for Wiley's book of business and that this was standard business practice by Farmers (PR 1182). Although FINRA's Brief creates a new conclusion, that is not supported by evidence and not stated in the Decisions, that Farmers terminated Wiley because he misappropriated funds.

<sup>21</sup> This is not probative of whether Wiley was authorized to use the funds. All Mr. Edmonds did was make a chart of the deposits based on the bank statements and determine the exact amount of the discrepancy. He never reviewed Wiley's Agency Agreement or any material that would indicate whether Wiley was authorized to use those funds.

unsubstantiated by record evidence or not relevant to conversion.<sup>22</sup> Because of the page restrictions and page limits, Wiley cannot explain each and every misstatement by FINRA.<sup>23</sup>

Neither Panel cites to any probative evidence to show whether Wiley was authorized to take the money or exercise ownership over the funds. The Panels do not even describe which transaction that Wiley was not authorized to make. The Panels cite to no evidence of Wiley's contractual relationship terms between Wiley and his clients. There is no way the NAC or the Hearing Panel Majority knew what Wiley's possessory rights actually were after he received the insurance premiums from his clients. There is nothing in the Agency Agreement which discusses the possessory rights of insurance premiums paid to Agents (PR 45-47). The Panels arbitrarily found that Wiley had a transitory hold over the funds and that transitory hold violated FINRA Rules (PR 1087, 1590).

Contrary to FINRA assertions, the Agency Agreement actually states that the agents are to promptly remit *monies* due to Farmers (PR 45). The Agency Agreement specifically chose not to use the word "promptly remit *insurance premiums*"(PR 45). There is no requirement that Wiley deposit the premiums he received directly into the shared bank account with Farmers. Wiley also explained this is the normal way of doing business with Farmers (PR 1181). There was no controverting testimony. Therefore, in addition to the examples mentioned in Wiley's Application and the plain language found in the record, it is clear that Wiley was not required to directly deposit the insurance premiums into the co-bank account.<sup>24</sup>

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<sup>22</sup> There are too many conclusory or unsupported conclusions of law and fact to list in this Reply to FINRA's Brief.

<sup>23</sup> Wiley reserves the right to contest any and all misstated or unsupported factual or legal conclusions.

<sup>24</sup> FINRA acknowledges Wileys right to possess the insurance premiums, but concludes that this possessory right was only transitory. FINRA gives no probative evidence to support this "transitory" conclusion and there is no evidence in the record that Wiley has only transitory possessory rights to the insurance premiums. This transitory determination is conclusory and unsupported by any actual evidence in the record. (PR 1590).

Wiley's authority and right to possess the insurance premiums and/or exercise ownership over the funds complies with Texas and federal law, which generally states, money cannot be converted, especially in a debt-credit relationship.<sup>25</sup> Generally, the ownership of cash transfers to the holder of the cash.<sup>26</sup> When Wiley's clients transferred the premiums to Wiley, Wiley became the holder of the cash and acquired possessory rights and title to the money.<sup>27</sup> Therefore, applying the law, Wiley's use of the funds was permitted. The Panels determined that Wiley presented no evidence of Wiley's possessory and ownership rights in the customers' insurance premiums.<sup>28</sup> This statement is false. For ten years, Wiley accepted the insurance premiums in checks and cash, deposited them into his company account and wrote checks to Farmers. Farmers understood that Wiley had possessory rights, in contract and by law, which is why Farmers could only *suggest* a course of business rather than *require* the course of business. FINRA's failure to show whether Wiley had possessory rights does not transfer the burden to Wiley to that show he has possessory rights. Nevertheless, the Panels, without providing substantial evidence, just conclude that Wiley did not have possessory rights, because his possessory rights were "transitory" (PR 1590, 1087). This is an arbitrary conclusion.

Worse, FINRA does not discuss or deny Wiley's allegations of the Panels' arbitrary conclusions. The Decisions have many arbitrary conclusions of fact that are not supported by substantial evidence and some statements are contrary to the record evidence. For instance, without providing any supportive evidence, FINRA found that there were a "growing number of policyholders affected" and that "fifty-four customer policy holders were impacted". This is a

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<sup>25</sup> When there is no obligation to return the identical money, but only a relationship of debtor or creditor, an action for conversion of funds representing the indebtedness will not lie against the debtor. *Lyxell v. Vautrin*, 604 F.2d 18 (5th Cir.1979); A simple debt which can be discharged by the payment of money cannot generally form the basis of a claim for conversion or civil theft. *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2008)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> FINRA Reply Brief, page 21.

false conclusion. The Decisions state “no customers suffered harm.” (PR 1598, 1592). It is undisputed that no customers were harmed.

Without providing any supportive evidence, The Panel stated that Farmers terminated Wiley because of his misappropriation of customer funds.<sup>29</sup> Wiley’s U5 states that he was terminated for other reasons (PR 937-938). Misappropriation of funds is a serious criminal offense and Farmers did not make that conclusion.<sup>30</sup> FINRA states that Wiley “flip-flopped” on his story without providing any supportive evidence. Again, this statement is false. Wiley always admitted he used the funds in his business account and took full responsibility for his actions (PR 1093). The only evidence used to support this “flip flop” story accusation is one inconsistent word that has been completely taken out of context. The answer “no” was accompanied by a detailed explanation that the Hearing Panel did not find misleading which is explained in detail below (PR 1092, 1095). FINRA’s Brief also states that collecting insurance premiums and delivering them directly to Farmers pursuant to their procedures was routinely done in the past, but that Wiley altered his business activities during the time in question. Again, there is no evidence of this. Wiley acted according to the industry standards and deposited the money in his business account as recommended in the guidelines (PR 964, 608). Additionally, Farmers billed Wiley for premiums due. Wiley always paid his bill from his business account (608, 1025, 1430, 1588-1589). This was the normal practice (PR 608).

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<sup>29</sup> FINRA Brief, page 11.

<sup>30</sup> Wiley testified that Farmers had a practice to terminate agents before allowing an agent to contract with Farmers for more than 10 years, because after 10 years, the purchase price of an agent’s book of business increases dramatically. (PR 1088). This is an alternative reason, to the many reasons why Farmers terminated its contract with Wiley. However, there is no evidence that Farmers terminated Wiley for misappropriation of funds. The Dissent found that Farmers valued Wiley’s book of business and would not have paid for it if Wiley misappropriated funds (PR 1094).

FINRA states that Wiley admitted he was acting unethically and acknowledged that he misused the funds.<sup>31</sup> Again, FINRA misconstrues the actual language in the record. Wiley did not admit to misusing the funds. He admitted that making a late payment to Farmers may have been a questionable business decision, but it was necessary in order to keep his business afloat, to best serve his customers and to prevent any default (PR 641, 1027-1029). Additionally, FINRA and the Panels determined Wiley's behavior was egregious, but provide no substantive evidence to support this conclusion. One misinterpreted inconsistent word is not egregious, especially in light of Wiley's full cooperation and full disclosure throughout the FINRA proceeding. Finally, FINRA states "these facts are uncontested." This is a false statement. In fact, most of the facts in FINRA's Brief and the Decisions are contested because most of them are false, are not supported by evidence or are actually contrary to the evidence. There are hundreds of conclusions in this case that have absolutely no supportive evidence, but due to page limit constraints and FINRA Rules, it is impossible for Wiley go address them all.<sup>32</sup>

## **2. FINRA'S CONCLUSIONS REGARDING WILEY'S TRUTHFULNESS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

The only inconsistent statement made by Wiley, that the NAC found egregious, follows essentially:

Q: Did customer collections end up being used to pay for personal and business expenses?

A. No. And this is the statement that I have the most problem with in this. No, because I say the money was always there from the customers' payments that we collected. It was always there...Dan Edmonds looking at my statement and seeing a negative account assumed that because it went negative, then obviously I was using this money for personal use or for business use. But that's why in this he only took one account, did not

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<sup>31</sup> FINRA' Brief, page 10.

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take the whole picture and even after mentioning to him "I have other accounts. I take credit card payments that you all do not accept."

In this whole process he used this account that he had a check -- he had a copy of a check, one of these checks written out of. And so he just said, "Give me those three months I statements." And that's why we have these three months, March to May, that he used. But this statement here I disagree with, and I'll tell you why. It's because it does not accurately portray my business operations because he [was only looking at one account that showed a negative balance]... I feel like this statement is was very inaccurate and it did not give a portrayal of my business because if you say that that funds in my operation account, the one I make cash deposits in, I used for business expense... that's my business expense account. Between all the accounts, the funds were always there between some sort of transfer being made. That's something that he [Mr. Edmonds] did not collect. So, yeah, there was a personal business expense from that account being paid, from my WIA [business account]."

Wiley's response "No" first appears inconsistent to the written statements where Wiley admits to using funds for personal and business expenses.<sup>33</sup> However, Wiley immediately explains why he does not believe his use of the funds for personal and business expenses was improper, which is why he says "No" in response to whether he used customer premiums for business and personal expenses (PR 927-928). Wiley's explanation is consistent with his legal understanding of his debt-credit relationship with Farmers and how money cannot be converted. So long as his business had sufficient cash to cover the monthly debts owed to Farmers he was not improperly using funds in the manner that FINRA alleges, which is why Wiley said "no" (PR 927-928). Furthermore, Wiley never actually denied that he used insurance premium money because at the end of his explanation for why he said no, he states, "Yeah, there was a personal business expense from that account." (PR 928).

Based on one word "No," the Hearing Panel Majority found that Wiley gave inconsistent, and at times untruthful, explanations of his conduct (PR 1090). Then, the Hearing Panel found that Wiley's response was transparently false, but not misleading because it did not impede the

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<sup>33</sup> FINRA's Brief, like most of the fact conclusions, does not give an accurate portrayal of exactly What Wiley. Wiley never out right said no, he said, no, because... but yes, I did use the funds for personal and business expenses. Wiley still contests FINRA's determination that the statement is false. Wiley does not believe the statement is false or misleading.

investigation (PR 1092). The Hearing Panel also concluded that his denial was unpersuasive, but weighed against him for the purposes of sanctions because it reflects his refusal to accept responsibility (PR 1093). The Hearing Panel did not give any evidence to support its conclusion that the statement was false. Not all inconsistent statements are false and misleading. The Hearing Panel Dissent did not find Wiley's inconsistent statement misleading. (PR 1095).

Without providing any evidence to support its decision, the NAC determined that Wiley's statement was not just false, like the Hearing Panel Decision, but *egregious, deliberately* false and *misleading* and *integral* to FINRA's investigation (PR 1598). The NAC also found that Wiley blatantly denied using customer payments for business and personal use, which was the direct subject of his investigation. The NAC Decision also found that Wiley's untruthfulness of the premium payments is another example of Wiley's refusal to accept responsibility for his unethical conduct and reflects strongly to serve in the securities industry.<sup>34</sup> (PR 1599). The NAC's finding regarding Wiley's inconsistent statement is a complete departure from the Hearing Panel's conclusion, but the NAC cites to no evidence to support this departure (PR 1092-1095). Instead, the NAC repeats FINRA rules, disciplinary precedent and calls Wiley a "poor liar,"<sup>35</sup> none of which, is evidence.

### **III. THIS PROCEEDING AND THE DECISIONS RENDERED ARE ARBITRARY**

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<sup>34</sup> The Decisions' conclusion that Wiley's refusal to accept responsibility has no supportive evidence. Wiley never actually denied using monies collected from insurance premiums for personal and business expenses. The only evidence of Wiley's "refusal to accept responsibility" is his immediate response "No" to one question. Other than that one instance, Wiley admitted to everything, explained his case and was responsive and helpful during FINRA's investigation. The fact that FINRA finds his refusal to agree with FINRA's conclusions aggravating is very concerning. If the Respondent does not believe FINRA's conclusions are accurate and does not agree with FINRA's conclusions, why should Respondents be punished for standing up for themselves and asserting a defense. Additionally, Wiley admits that he would accept full responsibility for his actions. (1082). However, it cannot be accepted to require Wiley to admit to wrongdoings when no wrongdoing every occurred.

<sup>35</sup> FINRA Reply Brief, page 28.

The problem with this case is that FINRA made conclusions about it before Wiley was permitted to present evidence supporting his defense. In March of 2012, FINRA sent Wiley an unexecuted Letter of Acceptance, Waiver and Consent (“AWC”) which concluded that Wiley converted insurance premiums and violated FINRA Rule 2010 (PR 1183-1189). Wiley rejected the AWC on April 9, 2012. (PR 1190). On April 23, 2012, FINRA actually informed Wiley that it was investigating his insurance business practices (PR 1191, 1364). In September of 2012, Wiley informed FINRA’s enforcement staff that serious due process concerns were raised regarding the ability of Wiley to investigate and present evidence central to his defense (PR 1203, 213-218). FINRA filed its Complaint against him in February 2013 and complained of the exact same issues found in the AWC (PR 5).

FINRA’s AWC conclusions regarding Wiley’s insurance business activities were made before giving Wiley the opportunity to present evidence To support his defense. Worse, the evidence Wiley sought to introduce, such as testimony regarding industry standards, was deemed irrelevant and not admissible. Additionally, Wiley never had actual notice of what FINRA was alleging against him, especially regarding who had “a right immediate possession”. (PR 27-30). Wiley requested FINRA to provide a more detailed account of the alleged violations and describe why he was not entitled to possess the insurance premium funds. However, his request for a more definitive statement was denied (PR 105-108). However, the issue of who had the immediate right of possession was never established by FINRA even though this is a crucial element to find conversion.<sup>36</sup>

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<sup>36</sup> The NAC found that Wiley’s right was transitory which was not sufficient to avoid conversion liability. The NAC made this conclusion without providing any supportive evidence. (PR 1590).

Instead of being a neutral adjudicator, FINRA has relentlessly pursued this case, disregarded any evidence supporting Wiley's defense and made arbitrary conclusions that have escalated to the point of calling Wiley a "poor liar."<sup>37</sup>

Wiley never had an opportunity to properly defend himself before the DOE made its conclusions against him. (PR 1363-1364, 27-30, 1203, 105-106, 213-218). This pre-investigation determination unfairly biased and prejudiced Wiley throughout the proceeding. (PR 213-218, 1365-1364, 1201-1210). The DOE did not adequately investigate this case and this inadequate investigation is reflected in the Panels' lack of supportive evidence. (PR 1203, 105-106). Neither the Hearing Panel nor the NAC considered any of Wiley's evidence supporting his defense. Worse, the Decisions found it aggravating that Wiley does not accept the Decisions when he doesn't believe has done anything wrong and the DOE has not proven with substantial evidence, that his actions were improper (PR 1082). How can a respondent, who admits to everything, complies with every FINRA request, does not mislead FINRA, has not harmed anyone, or breached any contract, or lost any money be an aggravating respondent? The only misstep made by Wiley is the statement, "no", which was misconstrued and taken out of context like almost every fact conclusion that has been made in this proceeding. This has been a completely arbitrary and bias proceeding that has prejudiced Wiley and violated his due process rights to a fair proceeding (PR 1203; 213-218). The bias and prejudice is evidenced through FINRA's inability to even consider an alternative to their pre-investigation conclusion (PR 1593-1596).

#### **IV. CONCLUSION**

This case is truly an egregious action by the Panel Majority and the NAC because Wiley did nothing materially wrong. Wiley violated no law, no contract, no duty, no insurance industry

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<sup>37</sup> FINRA Reply Brief, page 28.

standard, no money was lost, no party was harmed, and no insurance premiums were affected by Wiley's actions. The only person harmed in this case is Wiley in this arbitrary proceeding. Wiley had sanctions imposed against him and was banned from the securities industry for 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 him.

Respectfully submitted,

THE SPENCER LAW FIRM



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Dawn R. Meade 13879750  
Ashley M. Spencer 24079374  
4635 Southwest Freeway, Suite 900  
Houston, Texas 77027  
Telephone: 713-961-7770  
Facsimile: 713-961-5336  
E-mail: dawnmeade@spencer-law.com

**CERTIFICATE OF SERVICE**

I certify that on this day, July 22, 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

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE, Third Floor  
Washington, D.C. 20549

*Via E-Mail: enf.appeals@finra.org*  
*Via Overnight Courier*  
*Via Facsimile (703) 813-9793*

FINRA  
Office of General Counsel  
Attn: Lisa Jones Toms  
Assistant General Counsel  
1735 K Street, NW  
Washington, DC 20006-1506

*Via Overnight Courier; and*  
*Via Facsimile: (202) 728-8264*



---

Ashley M. Spencer

FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	§	
	§	DISCIPLINARY PROCEEDING
COMPLAINANT,	§	NO. 2011028061001
	§	
v.	§	HEARING OFFICER - MC
	§	
KEILEN DIMONE WILEY	§	
(CRD No. 4259612),	§	
	§	
RESPONDENT.	§	

**MOTION FOR LEAVE TO SUPPLEMENT THE RECORD AND  
INTRODUCE ADDITIONAL EVIDENCE**

COMES NOW, RESPONDENT Keilen Dimone Wiley (“Wiley”) and timely files this Motion for Leave to Supplement the Record and to Introduce Additional Evidence pursuant to Rule 9346(b) of the FINRA Code of Procedure. Wiley respectfully requests that the National Adjudicatory Council (the “NAC”) permit the evidence to be introduced or remand the disciplinary proceeding for further proceedings or fact finding. In support thereof, Wiley respectfully shows as follows:

**I. SUMMARY OF REQUESTED RELIEF**

Respondent seeks to supplement the record with documents that, while not germane to the proceedings once the panel determined that it had the authority to consider the claims, are germane to Respondent’s appeals point that the panel had no authority to consider the claims. Respondent seeks to supplement the record with documents that reflect his position that FINRA lacked the authority to consider the DOE’s claims from the very beginning of the enforcement process. All of the documents sought to be supplemented are documents of which the DOE were aware, so there is no issue of surprise regarding the documents.

## II. PROPOSED SUPPLEMENTAL EVIDENCE

Respondent seeks to admit the following evidence, identified as Respondent's Supplemental Exhibits (RSE):

1. **RSE 1: November 17, 2011 correspondence from Keilen Wiley to Anne Rapson, Associate Principal Investigator for FINRA.** This correspondence was sent after FINRA's decision to refer Wiley to FINRA's Enforcement Department and requests that FINRA provide Wiley with additional information and explanation regarding Ms. Rapson's investigation and decision to refer Wiley to disciplinary proceedings.

2. **RSE 2: March 2, 2012 correspondence from David L. Fenimore, FINRA Department of Enforcement, to William R. Bates, Jr., prior counsel for Wiley.** This document encloses FINRA's proposed Acceptance, Waiver, and Consent.

3. **RSE 3: April 9, 2012 correspondence from David L. Augustus, prior counsel for Wiley, to David L. Fenimore.** This correspondence conveys Mr. Wiley's refusal to sign FINRA's proposed Letter of Acceptance, Waiver, and Consent.

4. **RSE 4: April 23, 2012 correspondence from David L. Fenimore, to David L. Augustus.** This document requests Wiley appear at the FINRA District Office in Dallas, Texas to testify under oath and undergo oral examination. This document also lists specific rules and policies related to such examinations.

5. **RSE 5: May 14, 2012 correspondence from David L. Fenimore to David L. Augustus.** This correspondence requests Wiley produce certain documents and information to FINRA's Department of Enforcement.

6. **RSE 6: June 4, 2012 correspondence from David L. Augustus to David L.**

**Fenimore.** This document is a cover letter detailing documents provided by Wiley in response to FINRA's May 14, 2012 request for same.

7. **RSE 7: August 20, 2012 correspondence from David L. Fenimore to David L. Augustus.** This correspondence memorializes FINRA's determination to recommend disciplinary action be taken against Wiley as well as memorializing FINRA's allegations against Wiley. This correspondence serves as FINRA's "Wells" Notice.

8. **RSE 8: September 11, 2012 correspondence from David L. Augustus to David L. Fenimore.** This document constitutes Wiley's "Wells" Submission.

### **III. GOOD CAUSE FOR FAILURE TO INTRODUCE EVIDENCE AT THE DISCIPLINARY HEARING**

Wiley currently argues, and has always argued, that the enforcement action, discipline hearing and sanctions were improper. Wiley argues that FINRA's Department of Enforcement ("DOE") was acting outside its scope of authority and the Hearing Panel exceeded FINRA's jurisdiction to hear the claims and matters asserted against Wiley. The evidence Wiley seeks to supplement the record reflects Wiley's "notice" to FINRA and the DOE that FINRA was exceeding its authority and acting outside its scope of jurisdiction.

For example, in Wiley's very first interaction with FINRA, on November 17, 2011, Wiley questions why his insurance related activity, that does not involve any securities matters, warrants an enforcement action. See Exhibit 1; paragraph 1. Additionally, that same document gives FINRA notice that Wiley's business practices comported with usual and customary insurance industry practices and that holding Wiley's insurance business practices to securities industry practices is inconsistent and unjust. See Exhibit 1. Additionally, Wiley informs FINRA that the matter was

resolved within Farmers and that he did nothing intentionally wrong. See Exhibit 1; paragraph 4.

Despite Wiley's arguments, FINRA sent its Letter of Acceptance, Waiver and Consent ("AWC") on March 2, 2012. Exhibit 2. The AWC essentially illustrates FINRA and the DOE's agenda for the enforcement action. Notably, the claims from this initial investigation did not waiver even after FINRA's investigation. Wiley rejected the AWC proposal because Wiley did nothing wrong. Exhibit 3. FINRA continued its investigation of the matter to determine whether violations of federal securities, or FINRA, NASD, NYSE or MSRB rules had occurred. See Exhibit 4.

During FINRA's investigation Wiley complied with all of FINRA's requests during the investigation. Along the way, Wiley also asserted his claims that the investigation was improper on its face. On June 4, 2012, Wiley reminded FINRA that the only issue at hand was an issue of timing and nothing related to any wrong doing or major infractions. Exhibit 6.

Wiley reminded FINRA of the undisputed fact that all of his client insurance premiums were paid, nothing was owed or misplaced and there were no damages. Exhibit 6. Wiley also reminded FINRA that his actions were governed by the independent contractor agreement between Wiley and Farmers, and the insurance industry practices. Exhibit 6. Despite his arguments, Wiley fully cooperated throughout the entire investigation.

On August 20, 2012, FINRA introduce a more formal rendition of its claims against Wiley. Exhibit 7. On September 11, 2012, Wiley submitted the wells submission letter, that outlined all of the issues about which FINRA already had knowledge. The Wells Submission states in part:

"FINRA enforcement staff has grossly overstepped the bounds of its rights and responsibilities in recommending disciplinary action against him based on the facts and circumstances surrounding his contractual relationship with various Farmers-related insurance companies. In addition, where, as here, FINRA enforcement staff recommends action with the potential result that an individual may

be barred for life from the securities industry, one would expect FINRA enforcement staff to conduct its investigation with a weight equal to the weight of the action they recommend. FINRA enforcement staff has chosen, however, not to conduct the serious investigation its recommendation demands...

As an initial matter, the "investigation" ... appears woefully inadequate to the purpose of determining whether any securities rules or regulations were violated... FINRA enforcement staff's attempt to apply securities-industry rules to insurance-industry business practices... The recommendation of FINRA enforcement staff inappropriately seeks to breach this wall of separation..."

This letter continues to discuss all of the issues that make up the foundation of Wiley's position at the time, and now on appeal, and put FINRA and the DOE on notice of Wiley's concerns that the issues involved with FINRA's enforcement investigation being outside its scope of authority and jurisdiction.

Since the panel determined that it had jurisdiction to hear the claims, no documents concerning FINRA's lack of jurisdiction and authority to hear the matter due to the inherently insurance related issues were introduced into the record. Therefore, the documents Wiley seeks to supplement are documents that illustrate Wiley's position regarding the right of FINRA to bring the enforcement action at all.

#### **IV. THE EVIDENCE IS MATERIAL**

The evidence Wiley seeks to introduce is material to this proceeding because the evidence is the foundation of the Opening Statement even though the evidence was not particularly relevant to the enforcement action at the time the DOE presented its case to the Hearing Panel. The evidence is very material to show how the DOE knew that the enforcement action should never have been initiated because doing so would exceed FINRA's scope of authority and jurisdiction because the matter was an inherently insurance industry issue.

The evidence also illustrates how the DOE knew of and completely disregarded Respondent's arguments that it was acting outside FINRA's scope of authority and jurisdiction and brought an improper matter before the Hearing Panel. Additionally, because of the DOE's improper actions, the Hearing Panel also exceeded its scope of authority and jurisdiction by hearing and ruling on inherently insurance related matters. Respondent's claims and assertions regarding the impropriety of FINRA's actions are in FINRA's file and were fully discussed, but were not included on the record.

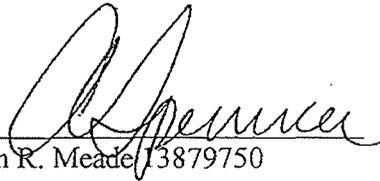
## **VI. CONCLUSION**

The evidence that Respondent requests to be supplemented into the Record shows that (1) Respondent raised the issue of the enforcement action being completely outside FINRA's scope of authority and jurisdiction, (2) the DOE knew of Wiley's position and (3) the panel knew about Wiley's position. Thus, there is no prejudice to allowing the supplementation of documents that are in FINRA's file but that once the Panel decided that it had jurisdiction to hear the allegations against Wiley, were not relevant to the defense of the substantive allegations.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests the NAC permit the evidence to be introduced or remand the disciplinary proceeding for further proceedings or fact finding.

Date: July 3, 2014

THE SPENCER LAW FIRM



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Ashley M. Spencer 24079374  
4635 Southwest Freeway, Suite 900  
Houston, Texas 77027  
Telephone: 713-961-7770  
Facsimile: 713-961-5336  
E-mail: dawnmeade@spencer-law.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Introduce Additional Evidence was served on the following parties via first class certified United States mail on July 3, 2014:

Leo F. Orenstein  
FINRA Department of Enforcement  
15200 Omega Drive, Third Floor  
Rockville, MD 20850

*Via Electronic Mail: enf.appeals@finra.org and  
Via CMRRR No. 70121640000121390960*

FINRA  
Office of General Counsel  
Attn: Lisa Jones Toms  
Assistant General Counsel  
1735 K Street, NW  
Washington, DC 20006-1506

*Via Facsimile: (202) 728-8264; and  
Via CMRRR No. 70121640000121390809*



Ashley M. Spencer

Keilen Wiley  
902 Rainy River Dr  
Houston, TX 77088

November 17, 2011

Anne Rapson  
Associate Principal Investigator  
FINRA  
14 Wall Street 19<sup>th</sup> Floor  
New York, NY 10005

Re: STAR #20110280610

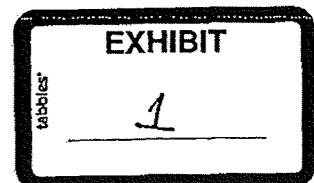
Dear Ms. Rapson

Thank you for your correspondence to me in regards to your investigation into to my securities license and my conduct with my previous broker dealer Farmers Financial Solutions. After your review of my case and since you have decided to refer my case to FINRA's Enforcement Department, then I am requesting the following information and explanations be provided to me.

1.) Since it was noted in my U-5 that **THE FIRM'S INTERNAL REVIEW CONCLUDED AFTER DETERMINING THE MATTER DID NOT INVOLVE ANY SECURITIES TRANSACTIONS, SECURITIES PRODUCTS, OR FIRM CUSTOMERS**, then please **explain the basis on which you find that I have incorrectly conducted my securities business** with my previous broker dealer Farmers Financial Solution as it warrants enforcement/disciplinary actions from FINRA.

2.) Can you please mail me an **official FINRA complaint form** so that I can file a complaint to FINRA on my previous broker dealer Farmers Financial Solutions and Farmers Insurance Exchange. I feel that Farmers Financial Solutions and Farmers Insurance Exchange bare a lot of responsibility in this matter because the contract they have for their agent sales force is as a self-employed 1099 insurance agent. If there is no employer-employee relationship (see copy of my contract with Farmers) with Farmers Insurance then why am I now in jeopardy of rule enforcement from FINRA for the way I conducted my property and casualty business which is considered "normal and expected"

3.) Why is my case considered "commingling of funds" on my U-5 when in all of the other 1099 contracts I have with other insurance providers deem this an acceptable way of doing business with agents for collection of customer's property and casualty premium? (i.e. other insurance carriers generally sweep their agent's checking account for customer premium collected. Is this commingling?) I am employed and appointed with other insurance carriers the same way I was with Farmers Insurance – a 1099 contract, and the way I collected premium has never been a problem with those carriers. In fact those carriers swept the customer's premium funds right from my business account AND it is expected that as self-employed small business owners we will also pay



our business expenses from this same account. What makes Farmers Insurance so different as to mandate that they are to receive customer payments directly into their ACA account? (Agent's do not own this ACA account of theirs). I content that the mandatory usage of this account violates the 1099 contract Farmers Insurance has with its property and casualty agent sales force, and further exposes these same agents who happen to be Series 6 and 63 licensed (like myself) to FINRA regulations for the "appearance" of commingling of funds of their property and casualty business. **Why this inconsistency? – Why I am being held to a FINRA standard that does not exist or is obviously not followed in the relationship other insurance carrier's have with their agents in Texas to do business with them for property and casualty premium collected from customers?**

3.) I feel that I did nothing intentionally wrong as it relates to my operation of my business as a property and casualty insurance agent, so since my case has been referred to FINRA's Enforcement Department, then I want to know in advance **the appropriate steps to appeal any decision regarding my securities licensing with FINRA.**

I personally feel that Farmers strategically planned to eliminate my agency as apart of their agent cuts here in Texas for the past 2 years and nothing else. They needed a reason to get rid of my agency and to give my 9 year "home grown" book of business to another agent (who ironically has a similar sounding name as mine) and to pay me as little as possible for my contract value based upon my "policies in force" count. So they used my premium collection method as their reason to terminate my contract with them in 15 days. Out of my 9 years of being an insurance agent in Texas and licensed with multiple insurance carriers, I have never known that this was an unacceptable practice for property and casualty premium collected.

As you can see I have a lot to say about this matter. If this boils down to a faulty contract Farmers has with it's agents then please state that in writing and exercise any enforcement you deem appropriate upon me, so that I can begin my appeals process to your decision and so I can legally pursue my grievances towards Farmers Financial Solution and Farmers Insurance Exchange. I anticipate a reply from you soon along with the complaint form or at least instructions on how to file my complaint against Farmers Financial Solutions and Farmers Insurance. I hope to have an open dialogue with the FINRA Investigation and Enforcement Department in regards to this matter soon, so that I may further contest any charges against me of any wrong doing as it relates to my business ethics and operations as a licensed property and casualty insurance salesman. Thank you for your time.

Sincerely,

Keilen D. Wiley



David L. Fenimore, Esq.  
Senior Counsel  
FINRA Enforcement

1801 K Street, N.W.,  
Suite 800  
Washington, D.C. 20006  
Telephone: 202.974.2909  
Facsimile: 202.721.8363  
david.fenimore@finra.org

**FINANCIAL INDUSTRY REGULATORY AUTHORITY ("FINRA")  
LETTER OF TRANSMITTAL OF AWC**

**First Class U.S. Mail and Electronic Mail** (rbates@batesandcoleman.com)

Date: March 2, 2012

Mr. William R. Bates, Jr.  
Bates & Coleman, P.C.  
1402 Alabama Street  
Houston, Texas 77004

Re: Transmittal of Letter of Acceptance, Waiver and Consent (Matter No. 2011028061001)

Dear Mr. Bates:

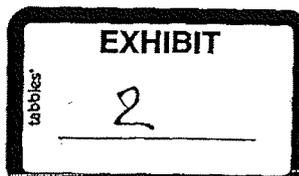
Please find enclosed an unexecuted Letter of Acceptance, Waiver and Consent ("AWC") for the resolution of the charges currently under consideration by FINRA's Department of Enforcement regarding your client, Keilen Dimone Wiley. The AWC must be accepted by the Department of Enforcement prior to submission to the Office of Disciplinary Affairs ("ODA") or the National Adjudicatory Council ("NAC") Review Subcommittee. The NAC, or ODA, on behalf of the NAC, must then approve the AWC before it becomes final.

The original, signed AWC should be submitted to the undersigned.

Your client may attach a Statement of Mitigating Circumstances for consideration by the Department of Enforcement, ODA, and/or the NAC in determining whether to accept the AWC.

Investor protection. Market integrity.

1801 K Street, NW t 202 974 2800  
8th Floor f 202 974 2805  
Washington, DC www.finra.org  
20006-1334



This Mitigation Statement will *not* be attached to the AWC. Your client may not deny the charges or make any statement that is inconsistent with the settlement of charges, or that suggests that the AWC is without factual basis, in the Mitigation Statement. Each Statement must include the following legend:

This Mitigation Statement is submitted by the Respondent. It does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA, or its staff.

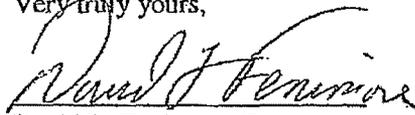
Further, please review FINRA Rule 8313 which sets forth FINRA's policy regarding the publication of disciplinary matters.

Please return the original, signed AWC to the undersigned by March 16, 2012.

Please advise your client to promptly notify FINRA in writing of any change of address.

If you have any questions regarding this matter, please contact the undersigned at 202.974.2909.

Very truly yours,



David L. Fenimore, Esq.

Enclosure: AWC

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2011028061001**

TO: Department of Enforcement  
Financial Industry Regulatory Authority ("FINRA")

RE: Keilen Dimone Wiley, Respondent  
Registered Representative  
CRD No. 4259612

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, I submit this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against me alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

- A. I hereby accept and consent, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

**BACKGROUND**

Keilen Dimone Wiley entered the securities industry in August 2000 when he became registered as an Investment Company and Variable Contracts Products Representative (Series 63) with a FINRA-regulated firm. Between April 2002 and June 7, 2011, the date of his termination, Wiley was registered as a Series 63 representative with Farmers Financial Solutions, LLC ("Farmers Finance"), a FINRA-regulated firm. While at Farmers Finance, Wiley was employed as an insurance agent by Farmers Insurance Group ("Farmers Insurance"), an affiliate of Farmers Finance. Wiley is not currently registered with any FINRA-regulated firm.

FINRA retains jurisdiction over Wiley pursuant to Article V, Section 4(a) of the FINRA By-Laws because the conduct that serves as the basis for this action commenced prior to his termination of registration from a FINRA-regulated firm

and this AWC has been filed within two years after the date of his termination of registration.

### OVERVIEW

During the period from approximately March 10, 2011 to May 9, 2011, Keilen Dimone Wiley improperly used funds from insurance customers and converted at least \$5,896 for his own use by collecting property and casualty insurance premiums, and, without authorization, using the payments for personal and business expenses. Such conduct by Wiley violated FINRA Rule 2010 (requiring adherence to high standards of commercial honor and just and equitable principles of trade in conducting business).

### FACTS AND VIOLATIVE CONDUCT

#### **Improper Use of Funds and Conversion—Violations of FINRA Rule 2010**

Wiley was required by his employment contract with Farmers Insurance and by Farmers Insurance's policies and procedures to promptly remit monies due Farmers Insurance. Specifically, Wiley was required to enter information about premium or other payments collected from insurance policy holders into an Agent's Credit Advice ("ACA") banking program and deposit within 24 hours the funds he collected into a co-banking account maintained by Farmers Insurance for such payments.

During the period from approximately March 10, 2011 to April 26, 2011, Wiley collected fifty-four insurance premium payments (over \$6,500) from forty-five insurance customers for forty-nine insurance policies. Rather than depositing the funds promptly into the bank account authorized by Farmers Insurance for such payments, Wiley deposited the payments into his own account and used at least \$5,896 for his personal and business expenses.

As a result of the foregoing conduct, Respondent Keilen Dimone Wiley violated FINRA Rule 2010.

\*\*\*

B. I also consent to the imposition of the following sanction:

A bar from associating with any FINRA member firm in any capacity.<sup>1</sup>  
Pursuant to FINRA Rule 8313(e), the bar shall become effective upon approval or acceptance of this AWC.

<sup>1</sup> Because Wiley made timely entries into the ACA banking program, no customer was penalized for late payments or otherwise suffered financial harm as a result of the delayed payments. Wiley remitted all premium payments to Farmers Insurance in May 2011. Accordingly, no restitution is due to Farmers Insurance or the customers.

I understand that if I am barred from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar (*see* FINRA Rules 8310 and 8311).

## II.

### WAIVER OF PROCEDURAL RIGHTS

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- B. To be notified of the Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, I specifically and voluntarily waive any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

I further specifically and voluntarily waive any right to claim that a person violated the *ex parte* prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

### III.

#### OTHER MATTERS

I understand that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
  - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
  - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about my disciplinary record;
  - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
  - 4. I may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

\_\_\_\_\_  
Date (mm/dd/yyyy)

\_\_\_\_\_  
Keilen Dimone Wiley, Respondent

Reviewed by:

---

William R. Bates, Jr.  
Bates & Coleman, P.C.  
1402 Alabama Street  
Houston, Texas 77004

Phone: 713.759.1500

Accepted by FINRA:

---

Date

Signed on behalf of the  
Director of ODA, by delegated authority

---

David L. Fenimore  
Senior Counsel  
FINRA Department of Enforcement  
1801 K Street, N.W.  
Suite 800  
Washington, D.C. 20006  
  
Phone: 202.974.2868  
Facsimile: 202.721.8316

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*Cathy M. Easterly (Accounting)*

*Regina S. Nervis (Legal Assistant)*

*Tomeko R. Samuel (Assistant)*

*M. Natalia Easterly (Assistant)*

April 9, 2012

David L. Fenimore  
FINRA Enforcement  
1801 K Street, N.W., Suite 800  
Washington, D.C. 20006

*Via Facsimile (202) 721-8363 &  
E-Mail: [david.fenimore@finra.org](mailto:david.fenimore@finra.org)*

*Re: Keilen Wiley, CRD No. 4259612  
FINRA Matter No. 2011028061001*

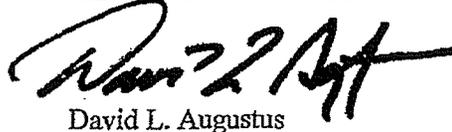
Dear Mr. Fenimore:

As you know, this firm and the undersigned counsel represent Keilen Wiley regarding the above-referenced matter. Thank you for the professional courtesy you have extended already in this matter in terms of affording my client additional time to respond to your correspondence of March 2, 2012.

I write to notify you that after considering the proposed Letter of Acceptance, Waiver, and Consent included with your correspondence, Mr. Wiley has decided not to execute the document at this time.

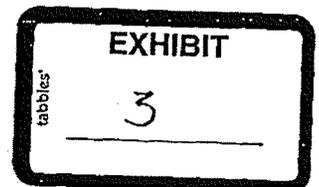
Very truly yours,

THE SPENCER LAW FIRM



David L. Augustus

CC: Client





**Certified U.S. Mail, Return Receipt Requested and Electronic Mail** (davidaugustus@spencer-law.com)

April 23, 2012

David L. Augustus, Esq.  
The Spencer Law Firm  
Suite 900  
4635 Southwest Freeway  
Houston, Texas 77027

**Re: Keilen Dimone Wiley (Matter No. 20110280610)**

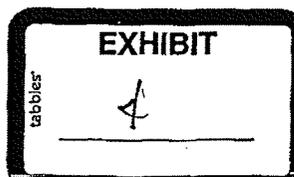
Dear Mr. Augustus:

As you know, FINRA's Enforcement Department is investigating this matter to determine whether violations of the federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred. In connection with our investigation, and pursuant to FINRA Rule 8210, we request that your client, Mr. Keilen Dimone Wiley, appear at the FINRA District Office located at 12801 North Central Expressway, Suite 1050, Dallas, TX 75243-1778 at 9:30 am on **Thursday, May 10, 2012** so that we may take his testimony under oath on oral examination.

Please advise your client the following:

- Under FINRA Rule 8210, Mr. Wiley is obligated to appear as requested and to answer our questions fully, accurately, and truthfully. If after testifying he becomes aware that any of his testimony was incomplete or inaccurate, he must contact us promptly to supplement or correct it. A failure on his part to satisfy these obligations could expose him to sanctions, including a permanent bar from the securities industry.
- Mr. Wiley may be accompanied and represented by counsel when we take his testimony.
- FINRA staff will consider assertions of common law testimonial privileges such as attorney-client privilege. Because FINRA is not a governmental agency, however, the Fifth Amendment privilege against self-incrimination does not apply in its investigations and proceedings. Refusing to answer a question based on an assertion of that privilege constitutes a violation of FINRA Rule 8210 and may expose Mr. Wiley to sanctions, including a permanent bar from the securities industry.

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8th Floor  
Washington, DC  
20006-1334

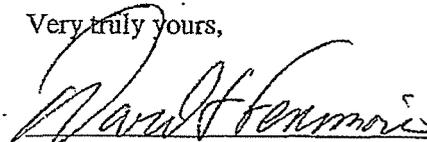
t 202 974 2800  
f 202 974 2805  
www.finra.org

- Mr. Wiley's testimony will be transcribed by a court reporter. FINRA staff will control the record and the reporter will not go off the record unless directed to do so by FINRA staff. Mr. Wiley may ask to go off the record, and the FINRA employee taking his testimony will determine whether or not to grant the request.
- Pursuant to FINRA Rule 8210(f), the court reporter will not release the transcript of Mr. Wiley's testimony to him or you without FINRA authorization. If he wishes to obtain the transcript, he may seek such authorization by sending a written request to the FINRA employee who took his testimony. FINRA Rule 8210(f) provides that for good cause the staff may deny his request to purchase a copy of the transcript. If his request is granted, he may then purchase the transcript from the court reporter. If his request is denied, he may still review the transcript at FINRA's offices. FINRA staff does not release copies of exhibits to testimony but they are available for review at FINRA's offices.
- As a matter of policy, FINRA conducts its investigations on a non-public basis. Nonetheless FINRA may sometimes provide access to its investigative files to other regulatory and law enforcement authorities, and, if subpoenaed, to litigants in civil actions. In addition, pursuant to FINRA's Code of Procedure, FINRA is required to produce documents and transcripts to respondents during discovery. We will not entertain requests for confidential treatment of the record of his testimony or give him or you notice of any subpoena or access request we receive that encompasses it.

\* \* \*

Finally, this request should not be construed as an indication that the Enforcement Department or its staff has determined that any violations of federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred. Please call me at at 202.974.2909 if you have any questions.

Very truly yours,



David L. Fenimore, Esq.  
Senior Counsel

Please note new address & telephone number, effective May 21, 2012

15200 Omega Drive | Suite 300 | Rockville, MD 20850  
Telephone: 301.258.8526



**Certified U.S. Mail, Return Receipt Requested and Electronic Mail** (davidaugustus@spencer-law.com)

May 14, 2012

David L. Augustus, Esq.  
The Spencer Law Firm  
Suite 900  
4635 Southwest Freeway  
Houston, Texas 77027

**Re: Keilen Dimone Wiley (Matter No. 20110280610)**

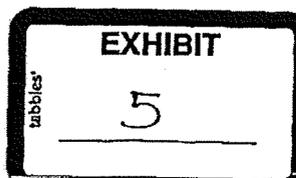
Dear Mr. Augustus:

As you know, FINRA's Enforcement Department is investigating this matter to determine whether violations of the federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred. In connection with our investigation, and pursuant to FINRA Rule 8210, FINRA's Enforcement Department requests that your client, ~~Keilen Dimone Wiley~~, produce the following documents and information to me at the below listed address **no later than Monday, June 4, 2012.**

By way of background, the Agent's Credit Advice ("ACA"): Summary of Closed Customer Payments for Agent 195426, indicates that Mr. Wiley collected—but did not deposit into the ACA Co/Banking account (ending in 0206)—fifty-four insurance premium payments for [REDACTED] from forty-five insurance customers for forty-nine insurance policies during the period March 10 through April 26, 2011 (the "Client Premiums"). Further, records indicate that Mr. Wiley made three deposits into the ACA Co/Banking Account with funds from the WIA & Associates account (ending in 2418): [REDACTED]

1. An analysis showing deposits of the Client Premiums into accounts controlled by Mr. Wiley, movement of Client Premium funds between accounts controlled by Mr. Wiley, and payment of the Client Premiums from Mr. Wiley's accounts into the ACA Co/Banking account. Provide supporting documents.
2. With respect to the WIA & Associates account:
  - a. Account statements from January 1, 2011 through May 31, 2011.
  - b. A copy of each check received or paid from March 10 through May 6, 2011.

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8th Floor  
Washington, DC  
20006-1334

t 202 974 2800  
f 202 974 2805  
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3. With respect to the "Merchant's Account" described by Mr. Wiley during testimony:
  - a. Account statements from January 1, 2011 through May 31, 2011.
  - b. A copy of each check received or paid from March 10 through May 6, 2011.
4. With respect to Mr. Wiley's personal accounts (including the account ending in 5420):
  - a. Account statements from January 1, 2011 through May 31, 2011.
  - b. A copy of each check received or paid from March 10 through May 6, 2011.
5. With respect to Mr. Wiley's line of credit, account statements (or other documents) from January 1, 2011 through May 31, reflecting the available line of credit, each advance and each repayment.

\* \* \*

When producing materials in response to this letter, please clearly indicate the item number (and sub-item number, if applicable) contained in this letter to which the materials are responsive.

In responding to this request, please advise your client of the following:

- **Under FINRA Rule 8210, Mr. Wiley is obligated to respond to this request fully, promptly, and without qualification.** He is also obligated to supplement or correct any ~~response that is later learned to have been incomplete or inaccurate. If he withholds any~~ responsive document or information, he must specifically identify what is withheld and state the basis for doing so. **Any failure on Mr. Wiley's part to satisfy these obligations could expose him to sanctions, including a permanent bar from the securities industry.**
- As used in this request, the term "document" means writings, drawings, graphs, charts, spreadsheets, photographs, microfilm, microfiche and any other data compilation or communication from which information can be obtained. "Document" specifically includes, without limitation, communications memorialized or stored in any storage medium, including mechanical or electronic form such as email and voicemail messages. "Document" also includes drafts and any non-identical copies. If any document responsive to this request consists of electronic data, please produce it on CD-ROM, DVD, or other electronic storage media in the native, electronic format as created and stored in the ordinary course of business. Facsimile reproductions such as TIFF, JPG, or other image files, PDF files, or productions that require proprietary software or viewers, including Concordance or Summation, are not acceptable unless that is how the records are kept in the ordinary course of business. If it is not feasible to do so, please call me to discuss alternative arrangements.
- If the information provided in response to this request is provided electronically on a portable media device ("PMD"), including but not limited to, hard drives, CD-ROMs, DVDs or other discs/diskettes, the PMD (or the files stored on the PMD) **must be encrypted** as required by Rule 8210. The access password must be provided in a separate communication to the undersigned.<sup>1</sup>

<sup>1</sup> Your attention is called to FINRA Regulatory Notice 10-59, *Encryption of Rule 8210 Information* (November 29, 2010).

Re: Keilen Dimone Wiley (Matter No. 20110280610)  
May 14, 2012

Page 3 of 3

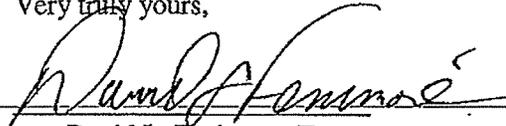
- As a matter of policy, FINRA conducts its investigations on a non-public basis. Nonetheless FINRA may sometimes provide access to its investigative files to other regulatory and law enforcement authorities, and, if subpoenaed, to litigants in civil actions. In addition, pursuant to FINRA's Code of Procedure, FINRA is required to produce documents and transcripts to respondents during discovery. We will not (1) entertain requests for confidential treatment of any information or documents Mr. Wiley provides in response to this request; (2) give you or Mr. Wiley notice of any subpoena or access request we receive that encompasses any such information or documents; or (3) undertake to return documents when this investigation is completed.

\* \* \*

This inquiry should not be construed as an indication that the Enforcement Department or its staff has determined that any violations of federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred.

If you have any questions regarding this request, please contact the undersigned at 202.974.2909.

Very truly yours,



David L. Fenimore, Esq.  
Senior Counsel

Please note new address & telephone number, effective May 21, 2012

15200 Omega Drive | Suite 300 | Rockville, MD 20850  
Telephone: 301.258.8526

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*Cathy M. Easterly (Accounting)*

*Regina S. Nervis (Legal Assistant)*

*Tomoko R. Samuel (Assistant)*

*M. Natalia Easterly (Assistant)*

June 4, 2012

David L. Fenimore  
FINRA Enforcement  
15200 Omega Drive, Suite 300  
Rockville, MD 20850

*Via e-mail: [david.fenimore@finra.org](mailto:david.fenimore@finra.org)*

*Re: Keilen Wiley, CRD No. 4259612*  
*FINRA Matter No. 2011028061001*

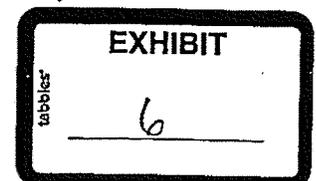
Dear David:

I write in response to your correspondence dated May 14, 2012.

Please find the following items enclosed:

- General banking ledger for WIA & Associates business banking account (4655)<sup>1</sup> for the period January 1, 2011 through May 31, 2011 produced in response to item 2a in your correspondence;
- Check ledger for WIA & Associates business banking account (4655) for the period January 1, 2011 through May 31, 2011 produced in response to item 2a in your correspondence;
- General banking ledger for WIA & Associates merchant banking account (5314) for the period January 1, 2011 through May 31, 2011 produced in response to item 3a in your correspondence;
- Check ledger for WIA & Associates merchant banking account (5314) for the period January 1, 2011 through May 31, 2011 produced in response to item 3a in your correspondence;
- General banking ledger for Mr. Wiley's personal banking account (5420) for the period January 1, 2011 through May 31, 2011 produced in response to item 4a in your correspondence;

<sup>1</sup> The number indicated represents the last four digits of the referenced account number. Please note that the account ending in 4655 is the same account discussed during Mr. Wiley's testimony as ending in 2418. Mr. Wiley's account security was compromised and a new account number was assigned to this account as a result.



- Check ledger for Mr. Wiley's personal banking account (5420) for the period December 14, 2010 through May 12, 2011 produced in response to item 4a in your correspondence;
- Mr. Wiley's PayDayMax loan history statement produced in response to item 4a in your correspondence; and
- Business credit statements for WIA & Associates account (8734) for the period February 2011 through June 2011 produced in response to item 5 in your correspondence.

A few comments are necessary. First, the ledgers are documents that Mr. Wiley was able to generate by accessing his bank's internet portal. Traditional account statements as well as copies of checks have been ordered and will be produced as a supplemental production. Mr. Wiley has been informed that the copies should be available to him this week. Thank you for your patience in this regard.

The second comment is more substantive. Your correspondence requests "[a]n analysis showing deposits of the Client Premiums into accounts controlled by Mr. Wiley, movement of Client Premium funds between accounts controlled by Mr. Wiley, and payment of the Client Premium from Mr. Wiley's accounts into the ACA Co/Banking account." Unfortunately, we believe such an analysis giving the location of all Client Premiums at all times is not possible given the information currently available to us.

The following information, unavailable to us, is necessary in order to paint such a picture:

- Records of Client Premiums paid to Mr. Wiley in cash (ACA receipts);
- Records of Client Premiums paid to Mr. Wiley via checks made payable to Farmers (ACA receipts, which still would not be definitive);
- Records of Client Premiums paid via Farmer's ACA credit card payment system (ACA receipts); and
- Itemization of Client Premiums paid to Mr. Wiley via credit card through this merchant account (as opposed to a single general "deposit" description for all such activity on a given day without regard to the sources that make up the deposit) (not available from bank records; ACA receipts would help).

What we do know is that all Client Premiums paid to Farmers through Mr. Wiley were in fact turned over to Farmers. There is no dispute that this is true. The issue is simply an issue of timing, and timing is an issue largely left to the discretion of Mr. Wiley as an independent contractor under his agreement with Farmers. No Farmer's customer who was a client of Mr. Wiley's ever had an issue regarding its insurance coverage on the basis that its funds were not actually received by Farmers.

David L. Fenimore

June 4, 2012

Page 3

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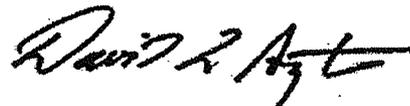
What we cannot know is the particular breakdown of Client Premiums that Mr. Wiley was supposed to have in his possession at any given time and, given the procedures for turning premiums over to Farmers explained by Mr. Wiley, how Mr. Wiley maintained these funds. Again, we simply know that Farmers received all the funds in question.

I will forward to you the remaining documents as soon as I receive them and will contact you to discuss how we might be able to move toward a mutually acceptable resolution of this matter in the near future.

In the mean time, please let me know of any questions or concerns you may have.

Very truly yours,

THE SPENCER LAW FIRM



David L. Augustus

CC: Client



RECEIVED  
BY: AUG 23 2011

David L. Fenimore, Esq.  
Senior Counsel  
Department of Enforcement, FINRA  
15200 Omega Drive (Suite 300)  
Rockville, MD 20850

Telephone: 301-258-8526  
Facsimile: 202.721.8363  
david.fenimore@finra.org

**Certified U.S. Mail, Return Receipt Requested and Electronic Mail** ([dauidaugustus@spencer-law.com](mailto:dauidaugustus@spencer-law.com))

August 20, 2012

David L. Augustus, Esq.  
The Spencer Law Firm  
Suite 900  
4635 Southwest Freeway  
Houston, Texas 77027

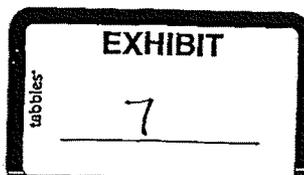
**Re: Keilen Dimone Wiley (Matter No. 20110280610)**

Dear Mr. Augustus:

On August 20, 2012, the staff advised you that it made a preliminary determination to recommend that disciplinary action be brought against client, Mr. Keilen Dimone Wiley. During that conversation, the staff also advised you of the nature of the potential violations. These are: (i) violation of FINRA Rule 2010 for misusing and converting customer insurance premium payments; and (ii) violation of FINRA Rules 8210 and 2010 for false and misleading testimony in connection with his use of insurance premiums and his bank accounts.

In particular, we alleged that during the period from approximately March 10, 2011 to May 9, 2011, Mr. Wiley, in his capacity as insurance agent, violated FINRA Rule 2010 by improperly using funds from insurance customers and converting (that is, misappropriating) [REDACTED] for his own use by collecting property and casualty insurance premiums, and, without authorization, using the payments for personal and business expenses rather than timely depositing the insurance premiums into the bank account authorized for such payments.

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Suite 300 f 301 208 8090  
Rockville, MD www.finra.org  
20850-3241

Further, we alleged that Mr. Wiley falsely and misleadingly denied during sworn testimony to FINRA on May 12, 2012 that he used any insurance premium payments for his business or personal expenses. Mr. Wiley also falsely and misleadingly claimed that his "Merchant Account" held the questioned insurance premium payments during the period in question, and that he had used the premium payments accumulated in the his WIA Business Account and Merchants Account to pay Farmers Insurance when he learned that his manager was going to visit his office.

Please notify Mr. Wiley that this letter should be treated as written notification that he is the subject of an investigation for purposes of triggering an obligation on his part to update his Form U4 (Uniform Application for Securities Industry Registration or Transfer).

I also advised you on this date that, in the event Mr. Wiley wishes to file a "Wells" submission indicating why an action should not be brought against him for some or all of the proposed alleged violations, it is due three weeks from this date (*i.e.*, by September 11, 2012) and must not exceed 35 pages. Wells submissions are *not* treated as settlement documents and any statements contained therein may be used against Mr. Wiley at, among other things, a FINRA disciplinary proceeding.

As I mentioned during our conversation, if you need further details about the matters described above, or you would like further clarification of the procedures, or have any other any questions regarding this matter, please contact the undersigned (301.258.8526).

Very truly yours,



David L. Fenimore, Esq.

**THE SPENCER LAW FIRM**

*Attorneys and Counselors at Law*

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4635 Southwest Freeway, Suite 900

Houston, Texas 77027

Telephone (713) 961-7770

Facsimile (713) 961-5336

Toll Free (888) 237-4LAW

E-Mail: [davidaugustus@spencer-law.com](mailto:davidaugustus@spencer-law.com)

Website: <http://www.spencer-law.com>

*Attorneys*

*Bonnie E. Spencer  
Dawn R. Meade  
David L. Augustus  
Gregory J. Finney  
Ashley M. Spencer*

*Assistants*

*Licea D. Sims (Paralegal)  
Kimberly A. Robards (Legal Assistant)  
Cathy M. Easterly (Accounting)  
Regina S. Nervis (Legal Assistant)  
Tomeko R. Samuel (Assistant)  
M. Natalia Easterly (Assistant)*

September 11, 2012

Independent Office of Disciplinary Affairs  
c/o David L. Fenimore  
FINRA Enforcement  
15200 Omega Drive, Suite 300  
Rockville, MD 20850

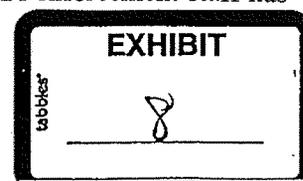
*Via e-mail: [david.fenimore@finra.org](mailto:david.fenimore@finra.org)  
& Certified Mail, Return Receipt Requested*

*Re: Keilen Wiley, CRD No. 4259612  
FINRA Matter No. 2011028061001*

Please accept this correspondence as Mr. Wiley's Wells Submission sent in response to the Wells Notice received from Mr. David Fenimore on August 20, 2012. As more fully set forth herein, the Independent Office of Disciplinary Affairs should decline to authorize the filing of a formal complaint against Mr. Wiley for at least the following reasons:

- Financial Industry Regulatory Authority ("FINRA") enforcement staff members failed to conduct an adequate and objective investigation and have made their recommendations without a proper basis for doing so;
- Mr. Wiley fully performed his Agent Appointment Agreement;
- No party was harmed by any actions taken by Mr. Wiley in the performance of his Agent Appointment Agreement; and
- The recommended action by these enforcement staff members inappropriately interferes in insurance industry practices.

Although FINRA possesses every right and responsibility to investigate its members and associated persons in appropriate situations for the purpose of protecting investors and the integrity of the financial industry, my client believes FINRA enforcement staff has grossly overstepped the bounds of its rights and responsibilities in recommending disciplinary action against him based on the facts and circumstances surrounding his contractual relationship with various Farmers-related *insurance companies*. In addition, where, as here, FINRA enforcement staff recommends action with the potential result that an individual may be barred for life from the securities industry, one would expect FINRA enforcement staff to conduct its investigation with a weight equal to the weight of the action they recommend. FINRA enforcement staff has



chosen, however, not to conduct the serious investigation its recommendation demands. This submission outlines a number of the reasons for these conclusions. It is also fundamentally important to recognize the undisputed fact that none of Mr. Wiley's customers, or any of the Farmers-related insurance companies, was harmed in any way by Mr. Wiley's actions.

As an initial matter, the "investigation" undertaken by FINRA enforcement staff giving rise to the recommendation appears woefully inadequate to the purpose of determining whether any securities rules or regulations were violated. At the heart of these inadequacies is FINRA enforcement staff's attempt to apply securities-industry rules to insurance-industry business practices. Unlike other financial regulation, since the 19<sup>th</sup> century most insurance regulation has been carried out by the states. In 1869 the United States Supreme Court declared insurance to be specifically subject to state regulation. Since then, several legal attempts to bring insurance regulation under the jurisdiction of the federal government pursuant to the Constitution's interstate commerce clause have failed. When the Supreme Court ruled in 1944 that the federal government could regulate the business of insurance under the authority of the commerce clause, Congress quickly responded in 1945 with the McCarran-Ferguson Act to vest in the states the primary power to regulate the insurance industry. This Congressionally-reinforced separation of power continues to exist today. The recommendation of FINRA enforcement staff inappropriately seeks to breach this wall of separation.

The dangers associated with FINRA enforcement staff reaching into the clear boundaries of the insurance industry have become manifest in its investigation of Mr. Wiley. It does not appear to us that FINRA enforcement staff made an adequate investigation, to the extent an investigation was even conducted at all, into the insurance industry's standards and practices in Texas relating to the activities of Mr. Wiley. FINRA enforcement policies charge enforcement staff with the responsibility to engage in an objective fact-finding process without bias for or against the parties involved. Yet, it does not appear that FINRA enforcement staff made any attempt to interview the former Farmers managers identified by Mr. Wiley in his on-the-record statement regarding the specific information provided to him concerning the practices at issue. In fact, it does not appear that FINRA enforcement staff made any attempt to verify what, if any, information Farmers representatives actually provided to Mr. Wiley concerning the practices at issue. More generally, it also does not appear that FINRA enforcement staff made any attempt to investigate or determine the insurance industry standards in Texas relating to the practices at issue.

For example, it does not appear that FINRA enforcement staff made any attempt to interview other individuals who operate insurance businesses in Texas similar to the one Mr. Wiley operated – i.e., a dual agency business as a contractual independent contractor to one or more insurers – to determine the insurance industry standards in this state relating to the operation of such a business. An insurance agent is not a monolithic position and, given the power reserved to the states to regulate insurance practices, insurance standards and practices cannot be assumed to be uniform across the states. Attention must be given to the particulars of the context of any individual agent in order to determine the appropriate standards by which to measure his or her actions. It seems wholly impossible for FINRA enforcement staff to fulfill

their investigative charge and to analyze the evidence and applicable law in order to make a preliminary determination of whether or not a violation of FINRA rules appears to have occurred when FINRA enforcement staff has failed even to identify necessary agent-specific evidence and the applicable law in Texas.

In this instance, according to the referenced Wells Notice, FINRA enforcement staff members have determined to recommend disciplinary action against Mr. Wiley for failing to “observe high standards of commercial honor and just and equitable principles of trade.” Yet, quite remarkably, these FINRA enforcement staff members have wholly failed to first determine what the applicable standards of commercial honor and just and equitable principles of trade even are. Given that all employees are subject to FINRA’s Code of Conduct and policies in order to ensure objectivity in these types of matters, it is notable that the approach to this investigation taken by FINRA enforcement staff members seems to itself violate the very rule invoked against Mr. Wiley. This investigation raises serious due process concerns that Mr. Wiley intends to present, highlight, and challenge at every stage of this process. Notice is hereby given that Mr. Wiley considers central to his defense the ability to investigate and present evidence concerning the actions and inactions of FINRA’s enforcement staff members in the course of their investigation of Mr. Wiley.

Another related failure of FINRA’s enforcement staff in the course of this investigation is their failure to take into account the proper significance of Mr. Wiley’s status as an independent contractor to the Farmers-related insurance companies and, more specifically, how that unique status under Texas law<sup>1</sup> should impact their consideration of Mr. Wiley’s actions. It cannot be disputed that Mr. Wiley’s Agent Appointment Agreement with the Farmers-related insurance companies unequivocally states that Mr. Wiley is “an independent contractor for all purposes” and that “[n]othing contained [in the agreement] is intended or shall be construed to create the relationship of employer and employee[.]” The significance of being an independent contractor and not an employee is that, unlike with an employee, one engaging an independent contractor is not legally able to control the means and methods of accomplishing the work to be performed by the independent contractor. To exercise such control over the person creates an employer-employee relationship and all of the various duties and responsibilities associated with such a relationship, such as payroll withholdings. As all the parties to the Agent Appointment Agreement expressly recognized, an employer-employee relationship did not exist between Mr. Wiley and these Farmers companies. Farmers not only recognized this by not withholding payroll deductions from Mr. Wiley’s commissions, but also by specifically including the following language in the Agent Appointment Agreement:

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<sup>1</sup> The Agent Appointment Agreement does not expressly choose the law to apply to it. Every choice-of-law principle, however, clearly indicates that Texas law is the law that applies to the contract and thus the relationship between Mr. Wiley and the Farmers companies. In a proper investigation into Mr. Wiley’s circumstances, one would expect to find a note to this effect created prior to the date of this correspondence and placed in the investigation file.

The Agent shall, as an independent contractor, exercise sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided only that the Agent conform to normal good practices, and to all State and Federal laws governing the conduct of the Companies and their Agents.

In other words, these Farmers companies expressly accepted their inability to control the means and methods of how Mr. Wiley performed the agreement in order to prevent them from having the duties and responsibilities employers owe to employees. As such, it is completely inappropriate for FINRA enforcement staff members to construe any of Farmer's "guidelines" and "recommendations" as standards or requirements governing Mr. Wiley's relationship with the companies. To do so would be to ignore the law relating to Mr. Wiley's independent contractor status and would appear to be an action which is simply outcome driven. To do so would also be to ignore the legal effect of the express contractual language that requires any "change, alteration, or modification" to the Agent Appointment Agreement to be "in writing and signed" by both Mr. Wiley and an authorized representative of the Farmers companies.

So, for example, when Mr. Wiley agrees in the Agent Appointment Agreement to "collect[] and promptly remit[] monies due to the Companies," these Farmers companies cannot control the means and methods of how Mr. Wiley performs that scope of work except to the extent Mr. Wiley fails to "conform to normal good business practices," again, as already noted above, a standard which FINRA's representatives failed to investigate in relation to Mr. Wiley. Under Texas law, unless a specific timeframe for performance is identified in a contract, and the language of the contract clearly makes the timeframe essential to the performance of the contract, reasonable performance is the implied standard. It is on its face impossible for FINRA enforcement staff members to objectively conclude that Mr. Wiley failed to timely remit monies to the Farmers companies without first investigating what is or is not a reasonable period for someone in Mr. Wiley's position. Again, as already noted, such a determination necessarily requires a significant fact-finding process that extends far beyond the Farmers companies' "guidelines" and "recommendations" to include the standards relevant to a dual agency insurance business operated in Texas as a contractual independent contractor. To do less is to fail to meet the standard required for an objective FINRA investigation.

On a related point, the Agent Appointment Agreement sets forth that Mr. Wiley's scope of work on behalf of the Farmers companies is to include "servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." In addition to many other things, this provision of the agreement means that Mr. Wiley is free to use his own business judgment to service Farmers' customers in a mutually beneficial way. One example of Mr. Wiley exercising his business judgment under the authority of this provision is his opening and maintaining a merchant banking account that allowed him to accept customers who sought to pay their insurance premiums using credit cards other than the limited few accepted by these Farmers companies. Both how Mr. Wiley collected insurance

premiums on behalf of the Farmers companies and what additional services Mr. Wiley chose to provide to these Farmers' customers were within Mr. Wiley's sole discretion. Not only are FINRA enforcement staff members condemning Mr. Wiley for actually performing his Agent Appointment Agreement, they are doing so without ever inquiring into whether Mr. Wiley's practices were also practices engaged in by other Texas dual agents conducting an insurance business as an independent contractor for one or more insurance companies.

Another set of facts FINRA enforcement staff members have obviously failed to consider in connection with their investigation into Mr. Wiley's operation of his insurance business is the set of facts relating to Farmers' own reports of its internal investigation of these same issues. On June 6, 2011, Farmers Financial Solutions, LLC filed a Form U5 relating to Mr. Wiley. This form was signed on behalf of Farmers Financial Solutions, LLC by Ms. Laura Zylak. Ms. Zylak holds FINRA registrations as a general securities principal, a municipal securities principal, a general securities representative, and an investment company and variable contracts product representative. She has been in the securities industry since 1998 and holds Series 6, 7, 24, 53, 63, and 65 licenses. In other words, Ms. Zylak appears very knowledgeable and qualified concerning the securities industries and its rules and regulations. This is important because, in signing this Form U5, Ms. Zylak expressly represented to FINRA that she had verified the information contained in the Form U5 and that the information was both accurate and complete. We are not aware that FINRA has challenged the veracity of the statements by Farmers Financial Solutions, LLC and Ms. Zylak in this Form U5 or that FINRA has initiated an inquiry into whether Farmers Financial Solutions, LLC and Ms. Zylak violated FINRA rules by making the statements and representations contained in the Form U5. We also are not aware of whether FINRA's representatives have even contacted Ms. Zylak to discuss the factual basis of her statements and representations in the Form U5.

All of this is vitally important because the statements and representations made to FINRA by Farmers Financial Solutions, LLC and Ms. Zylak in the Form U5 dated June 6, 2011 support the conclusion that Mr. Wiley adequately performed the Agent Appointment Agreement and did not violate FINRA rules and regulations. In other words, the stated conclusions of Farmers' internal investigation expressly contradicts the determination by FINRA enforcement staff members to recommend disciplinary action against Mr. Wiley. Specifically, the statements and representations made to FINRA by Farmers Financial Solutions, LLC and Ms. Zylak in the Form U5 dated June 6, 2011 include the following:

- Farmers Financial Solutions, LLC conducted an internal review of Mr. Wiley's activities to determine whether he had committed fraud, wrongfully took property, or violated investment-related statutes, regulations, rules or industry standards of conduct (Question 7B);
- Farmers Financial Solutions, LLC conducted its internal review of Mr. Wiley's activities from May 24, 2011 until June 6, 2011 (Disclosure Reporting Page);

- Farmers Financial Solutions, LLC's internal investigation concluded that the termination of Mr. Wiley registration with the firm was not as a result of his having committed fraud, wrongfully taking property, or violating investment-related statutes, regulations, rules or industry standards of conduct (Questions 3, 7F); and
- Farmers Financial Solutions, LLC also specifically concluded that "THE MATTER (involving Mr. Wiley) DID NOT INVOLVE ANY SECURITIES TRANSACTIONS, SECURITIES PRODUCTS, OR FIRM CUSTOMERS" (Disclosure Reporting Page).

These conclusions are also consistent with the fact that the Farmers companies paid Mr. Wiley "Contract Value" upon the termination of the Agent Appointment Agreement pursuant to the terms set forth therein. Specifically, the Agent Appointment Agreement sets out a formula that the Farmers companies are contractually required to pay Mr. Wiley upon the termination of the agreement, essentially to compensate him for policies and customers he would be leaving behind. Under the express terms of this provision, "[i]n the event termination [of the agreement] is because of embezzlement, there is no Contract Value." In other words, the fact that Farmers paid Mr. Wiley any Contract Value at all, which Mr. Wiley testified it did, is consistent with both the conclusions that: (i) Farmers insurance companies' internal investigation did not determine that Mr. Wiley embezzled any money owed to Farmers and (ii) Farmers Financial Solutions, LLC's internal investigation did not determine that Mr. Wiley committed fraud, wrongfully took property, or violated investment-related statutes, regulations, rules or industry standards of conduct. To make the contrary determination made by FINRA's enforcement staff members is to ignore these facts and to ignore the rational economic incentive of Farmers not to pay Contract Value to Mr. Wiley if none existed and the personal incentive of Ms. Zylak not to make false statements to FINRA in violation of FINRA rules and regulations.

It is important to reiterate for another reason the significance of the FINRA representatives' failure to determine the appropriate (or even "a") standard by which to evaluate whether Mr. Wiley violated Rule 2010's relative statement of ethics. It is significant that FINRA enforcement staff members recommend action only on the basis of Rule 2010 in relation to Mr. Wiley's handling of monies under the Agent Appointment Agreement. The primary significance is that this limited recommendation likely reflects the FINRA enforcement staff members' recognition that they cannot identify a specific securities-industry rule of conduct that Mr. Wiley violated that would enable FINRA to pursue an independent disciplinary action against Mr. Wiley. Instead, these FINRA enforcement staff members have sought to use the generalities of Rule 2010 to allege improper conduct they could not otherwise allege under any other FINRA rule. This demonstrates both a gross misuse of power and a lack of objectivity.

For example, as an agent of the Farmers companies, when insurance customers deliver policy payments to Mr. Wiley, those funds no longer belong to the customer under Texas law. Unlike a securities-industry customer who deposits its funds with a member, an insurance-industry customer is simply tendering payment to an agent of the insurance company, necessarily relinquishing a claim to ownership over the funds. As a result, FINRA's enforcement staff members could not recommend FINRA rule violations for converting, misusing, or misappropriating customer funds because, in the possession of Mr. Wiley, those funds are not

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customer funds. As between Mr. Wiley and the Farmers companies, how those funds are to be processed and turned over to Farmers is a matter of contract between Mr. Wiley and the Farmers companies, as the scope of agent responsibilities can under Texas law be modified by the parties through contract. The Securities and Exchange Commission has long recognized in relation to the application of the language of Rule 2010 (as codified in prior iterations of the rule) that it is not the SEC's or FINRA's function "to decide private contract rights between the parties." *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957).

In fact, given the ambiguous and relative nature of the language the Farmers companies choose to use when drafting their own contract (in order to maintain the argument that they do not control the agent and thus are not his or her employer), the only way in which FINRA enforcement staff members could even begin to investigate the nature of the private contractual rights between Mr. Wiley and the Farmers companies would be first to determine through proper methods of contract interpretation under Texas law what the ambiguous language in question even means. This necessarily would require the collection of the types of extrinsic evidence previously discussed, a consideration of how Mr. Wiley and the Farmers companies had operated under the terms of the agreement since 2002, and a determination by a proper finder of fact as to how that evidence indicates the language should be interpreted. It would also require a determination of the extent to which the interpretation should be construed against the Farmers companies as the drafters of the contract. It is easily apparent, then, why the S.E.C. has overturned disciplinary action that involves an SRO acting as an interpreter of private contracts. *See id.* And yet, despite all of this, the key issue FINRA's enforcement staff members want FINRA to decide is whether Mr. Wiley "timely deposit[ed] the insurance premiums into the bank accounts authorized for such payments." *Mr. Fenimore Correspondence Dated August 20, 2012.* Again, there is no dispute that Mr. Wiley remitted all relevant funds to the Farmers companies. The only issue is whether he did so timely, a clear question of contract interpretation.

Mr. Wiley is a resident of the State of Texas. Texas is where he conducted his business. Thus, to recommend that FINRA find Mr. Wiley to have violated Rule 2010 by converting/misusing funds belonging to the Farmers companies, the FINRA enforcement staff members are asking FINRA to determine under Texas law that Mr. Wiley wrongfully exercised dominion and control over Farmers' personal property in a manner inconsistent with Farmers rights. Not only does the recommendation of the FINRA enforcement staff members improperly ask FINRA to interpret a private contract, it then improperly asks FINRA to use a specific interpretation of that contract in order to act as a finder of fact in applying Texas law. The issue gets even more complicated given that Mr. Wiley acquired possession of the property in question pursuant to the terms of his agreement with the Farmers companies. Under Texas law, FINRA would have to make additional findings in order to conclude that Mr. Wiley converted Farmers' property given that he lawfully acquired the property in the first place.<sup>2</sup> In short, the attenuated

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<sup>2</sup> Even the general statement of the concept of conversion found in the FINRA Sanctions Guideline shows that in order for FINRA to determine whether Mr. Wiley violated Rule 2010 under these circumstances, FINRA would have "to decide private contract rights between the parties." It is also important to note that these guidelines address the specific situation where Rule 2150 is also involved, as can be seen by the conjunctive nature of the entry and the discussion in the sanctions section regarding the involvement of customer funds or securities.

nature of the argument advanced by FINRA enforcement staff again highlights the lack of objectivity brought to this investigation.

At the center of the FINRA enforcement staff members' argument that Mr. Wiley converted property belonging to the Farmers companies is the idea that Mr. Wiley used insurance premium payments for his own use. Again, it must be repeated over and over again that in no instance did Mr. Wiley fail to pay the Farmers companies the money they were owed for insurance premiums tendered to Mr. Wiley. Additionally, at no time did Mr. Wiley ever take the position that he was not required to turn these amounts over to the Farmers companies. His temporary possession of these amounts in whatever form they took simply was not an issue at the time.<sup>3</sup> In this respect, there exists no civil claim under Texas law for either breach of contract or conversion because the Farmers companies have not in any way been damaged. With very few exceptions, it is a fundamental principle of civil law that for a legal claim to exist, one must be damaged. In any event, the Agent Appointment Agreement is notably silent in regards to how the premium payments are to exist while in the custody of Mr. Wiley, and, as the final provision of the agreement indicates, no other written agreement between the parties governs this topic.<sup>4</sup> In short, the only contractual requirement for Mr. Wiley with regard to money is to collect and remit monies to the Farmers companies. So long as Mr. Wiley fulfills his obligations to collect and remit these monies, he fulfills his obligations under the contract. It is undisputed by the parties that Mr. Wiley collected and remitted all the monies owed to the Farmers companies. It simply does not follow, then, that Mr. Wiley failed to do what he was responsible for doing under the Agent Appointment Agreement, which is the argument the FINRA enforcement staff members make. One cannot say what is behind the argument of the FINRA enforcement staff members, but it certainly is not an objective look at all the relevant facts.

A response to the second set of alleged violations of FINRA rules relating to Mr. Wiley's testimony is difficult to make in light of the fact that no specific excerpt of testimony to support the claim has been identified or provided to Mr. Wiley. Again, the FINRA enforcement staff

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<sup>3</sup> As the totality of the information turned over to FINRA enforcement staff members clearly demonstrates, at no time during the relevant period did Mr. Wiley ever not have the ability to turn over the necessary amounts to the Farmers companies. At all times during this period, the funds available to Mr. Wiley through all of his available sources exceeded the insurance premium payments tendered by customers to Mr. Wiley. FINRA enforcement staff members simply and inappropriately ignore this fact. The most significant fact in this investigation is that the Farmers companies received from Mr. Wiley every penny to which it was entitled.

<sup>4</sup> Importantly, the entire ACA co-banking account system is outside the scope of Mr. Wiley's contractual relationship with the Farmers companies. This arrangement should be seen as nothing more than one element of consideration for interpreting the parties' actual contractual obligations. Another related element for such an interpretation would be the parties' longstanding course of conduct relative to the ACA co-banking account system. Mr. Wiley testified that the timing of his deposits to this account remained relatively unchanged for years prior to the time in question. To suggest Mr. Wiley's changed his practices in any material way during the given period of time without looking into his full course of conduct relative to this account reveals a complete lack of objectivity on the part of the FINRA enforcement staff that is both unjust and inequitable. A proper investigation by FINRA's enforcement staff would have looked into this pattern and practice of performance by the parties and allowed these important facts to inform its determination in a meaningful way.

members appear to want to deal in generalities instead of with specifics. Such an approach is representative of the general heavy-handed nature of the approach taken by FINRA's enforcement staff throughout its investigation. What must be understood, though, is that Mr. Wiley has been fully cooperative with FINRA's staff and has continued to provide information to FINRA's staff since June 2011.

Mr. Wiley has provided written statements responding to questions asked of him by FINRA staff members, bank account statements for the different business and personal accounts maintained by Mr. Wiley, line-of-credit account statements showing additional sources of funds available to Mr. Wiley, copies of checks written by Mr. Wiley, and various loan documents. Mr. Wiley also incurred substantial expense to travel out of town along with the undersigned counsel in order to provide oral testimony in response to questions from FINRA's enforcement staff. Simply to isolate one or a few statements made by Mr. Wiley, to remove them from their greater context, and to ignore how those statements are informed by the wealth of other information provided by Mr. Wiley in order to allege violations of Rule 2010 and 8210 is to yet again demonstrate the lack of objectivity that has guided this entire investigation.

It is particularly remarkable that the determinations of FINRA's enforcement staff have remained unchanged since it first attempted to persuade Mr. Wiley to enter into a Letter of Acceptance, Waiver and Consent proposed prior to requesting or receiving most all of the information requested and received during this investigation. Simply stated, FINRA's enforcement staff made a determination from the outset and never sincerely attempted to conduct an objective investigation. Rather, it appears FINRA's enforcement staff has simply sought information to buttress its decision without ever attempting to identify and gather the information necessary to consider this matter objectively. This is precisely the reason that a proper investigation failed to follow. This is precisely the reason FINRA's enforcement staff failed to make the proper inquiries, gather the proper information, and perform the proper analysis of how the facts apply to the law. One wonders why FINRA's enforcement staff has committed, and continues to commit, so many resources to a situation where no party has been injured in any way and where the individual being investigated is no longer even registered with a FINRA member firm.

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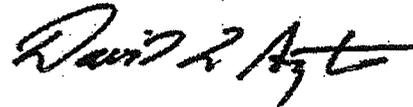
Independent Office of Disciplinary Affairs  
September 11, 2012  
Page 10

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For the foregoing reasons, Mr. Wiley again submits that the Independent Office of Disciplinary Affairs should decline to authorize the filing of a formal complaint against him. Mr. Wiley remains willing to continue with his cooperation in this matter. In the event FINRA staff requires anything further of Mr. Wiley, please do not hesitate to ask for it. Mr. Wiley strongly disagrees with the recommendation of FINRA's enforcement staff and cannot understand how, in light of all that is and has been going on in the securities industry that actually warrants FINRA's investment of time and resources, barring him from the industry and thereby blighting his and his young son's good name in any way furthers justice or protects the integrity of the industry. If anything, it raises more questions than it answers about these things.

Very truly yours,

THE SPENCER LAW FIRM



David L. Augustus

CC: Client

Wiley.001 09-11-12 CORR

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1. Article Addressed to:

Independent Office of Disciplinary  
Affairs  
c/o David Fenimore  
FINRA Enforcement  
15200 Omega Dr. Ste. 300  
Rockville MD 20850

2. Article Number

(Transfer from service label)

7008 2810 0000 4697 8381

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

*[Handwritten Signature]*

Agent

Addressee

B. Received by (Printed Name)

*Wiley Jackson*

C. Date of Delivery

*9-17-12*

D. Is delivery address different from item 1?

Yes

If YES, enter delivery address below:

No

3. Service Type

Certified Mail

Express Mail

Registered

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Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

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**Kim Robards**

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**From:** nac casefilings <nac.casefilings@finra.org>  
**Sent:** Thursday, July 03, 2014 1:55 PM  
**To:** Kim Robards  
**Subject:** NAC Case Filings

Your electronic filing has been received. If you have additional questions about the electronic filing process, please call the paralegal assigned to your case, as set forth in the appeal acknowledgement letter.

Confidentiality Notice: This email, including attachments, may include non-public, proprietary, confidential or legally privileged information. If you are not an intended recipient or an authorized agent of an intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained in or transmitted with this e-mail is unauthorized and strictly prohibited. If you have received this email in error, please notify the sender by replying to this message and permanently delete this e-mail, its attachments, and any copies of it immediately. You should not retain, copy or use this e-mail or any attachment for any purpose, nor disclose all or any part of the contents to any other person. Thank you

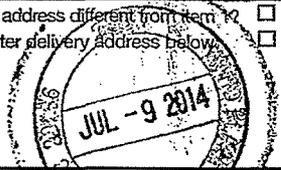
**Kim Robards**

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**From:** SBSFaxService@SPENCERPDC  
**Sent:** Thursday, July 03, 2014 3:19 PM  
**To:** Kim Robards  
**Subject:** Fax DOE v. Wiley; Disc. Proc. No. 2011028061001 was successfully sent to Lisa Jones Toms at 1-202-728-8264.  
**Attachments:** Fax.Tif

Fax DOE v. Wiley; Disc. Proc. No. 2011028061001 was successfully sent to Lisa Jones Toms at 1-202-728-8264.  
Fax submitted: 2:25:26 PM  
To server: SPENCERSBS2003  
Transmission started: 2:40:07 PM  
Transmission end: 3:19:27 PM  
Number of retries: 0  
Number of pages: 39

Kiley-DDI 2014-07-03 M41rav2 Supp Record

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"><li>■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li><li>■ Print your name and address on the reverse so that we can return the card to you.</li><li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul>	A. Signature 	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
1. Article Addressed to:  Lisa Jones Toms Office of General Counsel FINRA 1735 K St. NW Washington DC 20006	B. Received by (Printed Name) John Brown	C. Date of Delivery
2. Article Number (Transfer from service label)	D. Is delivery address different from item 1? If YES, enter delivery address below. 	
3. Service Type	<input checked="" type="checkbox"/> Certified Mail™ <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery	
4. Restricted Delivery? (Extra Fee)	<input type="checkbox"/> Yes	

2. Article Number  
(Transfer from service label)

7012 1640 0001 2139 0809

PS Form 3811, July 2013

Domestic Return Receipt

Wilem-201 2014-07-03 MY Leave 2 SOFF Record

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1. Article Addressed to:

Leo F. Orenstein  
FINRA Department of Enforcement  
15200 Omega Dr. Floor 3  
Rockville MD 20850

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
*[Signature]*  Addressee

B. Received by (Printed Name) *W. Orenstein* C. Date of Delivery *JUL 03 2014*

D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

3. Service Type  Certified Mail®  Priority Mail Express™  
 Registered  Return Receipt for Merchandise  
 Insured Mail  Collect on Delivery

4. Restricted Delivery? (Extra Fee)  Yes

2. Article Number (Transfer from service label) 7012 1640 0001 2139 0960

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*Tomeko R. Samuel (Assistant)*

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*Kimberly A. Robards (Law Clerk)*

August 1, 2014

Office of General Counsel

FINRA

1735 K Street NW

Washington DC 20006

*Via Electronic Mail: [nac.casefilings@finra.org](mailto:nac.casefilings@finra.org)*

*And Via First Class Mail*

**RECEIVED**

*Re: Keilen Wiley, CRD No. 4259612  
FINRA Matter No. 2011028061001*

AUG 6 2014

OFFICE OF GENERAL COUNSEL  
Regulatory/Appellate

Dear Representative,

Enclosed please find one original and three copies of the following items:

- Keilen Wiley's Response to the Department of Enforcement's Memorandum in Opposition of Respondent's Motion for Leave to Supplement the Record and Introduce Additional Evidence; and
- Response to Motion to Strike Opening Brief.

The original and two copies are for filing with your office. Please send the third copy, marked with your file-stamp, to me via the enclosed stamped, self-addressed envelope. This will allow my office to confirm the filing was received.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

THE SPENCER LAW FIRM

*K.A. Robards*

Kimberly A. Robards, Legal Assistant

RECEIVED

FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

AUG 6 2014

OFFICE OF GENERAL COUNSEL  
Regulatory/Appellate

DEPARTMENT OF ENFORCEMENT, §  
§  
COMPLAINANT, §  
§  
v. §  
§  
KEILEN DIMONE WILEY §  
(CRD No. 4259612), §  
§  
RESPONDENT. §

DISCIPLINARY PROCEEDING  
NO. 2011028061001

HEARING OFFICER - MC

**RESPONSE TO DEPARTMENT OF ENFORCEMENT'S MEMORANDUM IN  
OPPOSITION OF RESPONDENT'S MOTION FOR LEAVE TO INTRODUCE  
ADDITIONAL EVIDENCE**

COMES NOW, RESPONDENT Keilen Dimone Wiley ("Wiley") and timely files this Response to the Department of Enforcement's Memorandum in Opposition to Respondent's Motion to Introduce Additional Evidence filed on July 18, 2014. Again, Wiley respectfully requests that the National Adjudicatory Council (the "NAC") permit the evidence to be introduced into the record. Wiley's Motion for Leave to Introduce Additional Evidence is incorporated herein.

Contrary to the Department of Enforcement (the "DOE")'s assertion, Wiley's situation is an "extraordinary circumstance." There was good cause for failing to introduce the evidence and the evidence is material to the appeal. FINRA Rule 9346. The evidence shows the DOE and Panel's bias, prejudice, as well as how they ignored the law, FINRA rules, and the facts of the case throughout the entire proceeding. The DOE and Panel continued in their error despite Wiley's objections and pointing out contradictory factual evidence which ultimately prejudiced Wiley's case.

**A. THERE WAS GOOD CAUSE FOR NOT INTRODUCING THE EVIDENCE DURING THE DISCIPLINARY PROCEEDING.**

There was good cause for not introducing the evidence during the disciplinary proceeding because such evidence would not have been admitted. Settlement negotiations and materials generally are not relevant to a FINRA disciplinary proceeding. NASD Rule 9216(a)(4) (stating that a rejected Acceptance, Waiver and Consent “may not be introduced into evidence in connection with the determination of the issues set forth in any complaint”); NASD Rule 9270(h) (... rejected offers and proposed orders of acceptance do not constitute a part of the record in any proceeding against the [r]espondent making the offer); NASD 9270(j) (stating that rejected offers of settlement “may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint).

Knowing settlement documentation would not be permitted during the hearing, Wiley did not introduce the settlement documents into evidence. The Acceptance, Waiver and Consent (the “AWC”) and other documents Wiley seeks to supplement into the record illustrate matters not concerning the issues of the complaint but reflect the procedural issues that are now on appeal. Additionally, the Wells Submission Letter is not part of the settlement negotiations as the DOE clearly states, “Wells submissions are not treated as settlement documents and any statements contained therein may be used against Mr. Wiley at, among other things, a FINRA disciplinary proceeding.” See *Exhibit 7 of Respondents Motion for Leave to Supplement the Record; FINRA Letter to Wiley, August 20, 2012*. The Wells Submission Letter should have been included in the record from the beginning as it is not a settlement document. Additionally, these documents are already part of FIRNA’s record, thus there would be no surprise or prejudice in introducing business records and correspondence.

**B. THE EVIDENCE IS MATERIAL TO THIS PROCEEDING AS IT EVIDENCES THE PANEL'S BIAS AGAINST WILEY, WHICH IS ONE OF THE GROUNDS FOR WILEY'S APPEAL OF THE DECISION.**

One of the issues on appeal is whether bias and prejudice existed on behalf of the DOE and the Hearing Panel majority. Most of the documents show this bias and prejudice especially with regard to the DOE's complete disregard of the facts and that the DOE made clear misstatements and factual conclusions, knowing there was no supportive evidence for these prejudicial misstatements and conclusions. The documents Wiley seeks to supplement into the record are also material because they establish a timeline of events which shows that the DOE made incorrect factual conclusions before conducting an investigation and continued to make those misstatements of fact even after being apprised of the accurate factual renditions. Only after Wiley rejected the AWC did the DOE begin to investigate the details of the case and schedule an interview with Wiley. *See Exhibits 3, 4 and 5 to Respondents Motion for Leave to Supplement the Record.*

In order to justify its claims that Wiley violated Rule 2010, the DOE had to establish that Wiley violated something, like a law or a provision of any agreement or an employee rule, but did not know exactly what Wiley violated. Therefore, DOE sought a finding that Wiley violated Rule 2010 by arguing that he converted funds. Conversion is the wrongful exercise of dominion over the personal property of another. *DOE v. Paratore*, Complaint No. 2005002570601 at \*5 (NAC Mar 7, 2008). Under Wiley's independent contractor relationship status, according to the terms of his Agreement with Farmers and when applied to the facts of this case, conversion would be impossible. Categorizing Wiley as an employee was the only way the DOE could prove conversion. The DOE assumed Wiley was an employee before it made any investigation into the facts of the matter. Further, the DOE pursued in this mistaken assumption throughout

the disciplinary proceeding, which ultimately resulted in bias and prejudice on the part of the Panel majority.

Before investigating Wiley's case and without any supporting evidence, the DOE determined that Wiley violated a "mandatory rule" contained in his "employment agreement." This predetermination is illustrated in the AWC which states:

"Wiley was required by his *employment contract* with *Farmers Insurance and by Farmers Insurance's policies and procedures* to promptly remit monies due Farmer Insurance. Specifically, Wiley was required to enter information about premium or other payments collected from insurance policy holders into an Agent's Credit Advice ("ACA") banking program and deposit within 24 hours the funds he collected into a co-banking account maintained by Farmers Insurance for such payments."

*See Exhibit 2 of Respondents Motion for Leave to Supplement the Record; Letter of Acceptance Waiver and Consent, March 2, 2012* (emphasis added). Even more, Wiley's Agent Appointment Agreement ("Agreement") with Farmers which explicitly states, "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee, rather, the Agent is an independent contractor for all purposes." (R 47). Yet, despite this clear term in the Agreement, the DOE continued to categorize Wiley as an employee throughout the proceedings. "While at Farmers Finance, Wiley was employed as an insurance agent by Farmers Insurance Group, an affiliate of Farmers Finance." *See Exhibit 2 of Respondents Motion for Leave to Supplement the Record; Letter of Acceptance Waiver and Consent, March 2, 2012.*

Additionally, the DOE clearly ignores Wiley's attempt to establish his independent contractor status because the DOE would not even address the difference between an employee-employer relationship and an independent contractor relationship. (R53-56). The DOE merely reiterates how FINRA has broad jurisdiction that encompasses this case and does not clarify the factual mistake. (R 54). Again, in a pre-hearing conference, Ms. Perrell states that "Mr. Wiley... was registered with a broker-dealer by also employed by an affiliated insurance company with

that broker-dealer.” even though at this point, the DOE had clear knowledge and was fully aware of the fact that Wiley was an independent contractor insurance agent under the terms of the Agreement. (R. 81).

The distinction is imperative because Farmers’ employees are subject to different obligations and requirements than Farmers’ independent contractors. Farmers’ employees had clear guidelines and rules to follow, whereas independent contractors’ obligations are subject to private contractual terms. Thus, whether a party converted funds depends on those guidelines and rules. A certain fact scenario may be conversion according to Farmers’ employee standards or rules whereas those same facts may not be conversion under an independent contractor set of rules or standards. Determining what Wiley was permitted to do under his Agreement and correctly defining the relationship between Wiley and Farmers was paramount to determine whether a conversion occurred should have been the basis for determining whether there was conversion or not. Wiley was ultimately judged based on employee standards instead of independent contractor standards.<sup>1</sup>

Thus the evidence is material to the appeal because it shows the DOE’s complete disregard for the facts of the case which created bias with the Panel and the disciplinary proceedings and ultimately prejudiced Wiley’s case. For example, in Wiley’s first correspondence with the FINRA, Wiley informed the DOE that it was acting outside its scope of authority. Wiley asks why he is being held to a FINRA standard for insurance business practices. *See Exhibit 1 of Respondents Motion for Leave to Supplement the Record; Letter to Anne Rapson, FINRA Principal Investigator, November 17, 2011.* Wiley also states that he is an

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<sup>1</sup> Even in the DOE’s Objections to Respondent’s Witnesses and Exhibits, the DOE states that Respondent’s independent agent status has absolutely no bearing on the conversion charge given that conversion is considered unethical conduct and violated FIRNA Rule 2010 whether it involves an independent insurance agent or an employee-insurance agent. (R. 228).

“independent self-employed contractor, not an employee of Farmers” and that he is employed and appointed with other insurance carriers the same way he was with Farmers. *Id.* Wiley also explained that his independent contractor relationship gave him the option to exercise ownership and control over the insurance premiums as he saw appropriate in conducting his business. *Id.*

The DOE consistently argued for employee status even after receiving copies of the Agreement and communication from Wiley stating that he was an independent contractor subject to the terms of his Agreement with Farmers. *See Exhibits 3, 4 5, and 8 to Respondents Motion for Leave to Supplement the Record.* Alternately, the DOE argued that Wiley’s status as independent contractor versus employee was irrelevant. (R 228). This is incredibly important because it biased the court’s findings against Wiley from the start by downplaying the relevance of establishing Wiley’s duties and obligations.

The documents Wiley seeks to supplement into the record illustrate the DOE’s clear disregard of evidentiary fact contrary to its assumption that Wiley was an employee. The documents are also evidence that the DOE made presumptions prior to an investigation and made factual conclusions without any supporting evidence. There is no evidence Wiley was ever employed at Farmers Finance or at Farmers Insurance Group. There is only evidence that Wiley was an independent contractor and an associated person with Farmers Finance. Clearly, the documents Wiley seeks to supplement into the record evidence relevant facts that the DOE and the Panel majority ignored. The DOE and the Panel majority ignored this relevant evidence so that the Panel could find Wiley in violation of Rule 2010. The Panel’s failure to weigh any of the evidence that contradicted the DOE’s longtime, mistaken assumptions about Wiley’s business practices and relationships absolutely shows biased and prejudice against Wiley.

This bias is also illustrated in the Hearing Offer's refusal to allow Wiley to establish industry standards or discuss or establish exactly what his obligations were to Farmers. Wiley's testimony that would establish the standards of the insurance business and his duties was ignored because of this prejudice and many attempts to establish standard insurance business practices by parties other than Wiley were generally denied or thwarted. (R. 237-238, 295).

Finally, the Wells Submission Letter laid out the facts for the DOE and the issues Wiley had with the entire disciplinary proceeding, the same issues, which are now on Appeal. The Wells Submission Letter lays out the issues of the case, the problems with the DOE's lack of investigation, how insurance law governs the proceedings and that FINRA cannot determine the private contractual rights of the parties. The DOE ignored the Wells Submission Letter entirely and continued to move forward under its conclusion that Wiley was an employee who could commit conversion of funds. At this point, the DOE's conclusion was clearly incorrect. The reality is that Wiley was not an employee and could not have converted funds because he was entitled to possess them and did not have the intent required for conversion.

The DOE had ample opportunity to excuse itself from further investigation or stop further disciplinary proceedings by acknowledging that this case was really about interpreting the private rights of an Agreement between an independent insurance agent contractor and an insurance company. Despite the fact that Wiley clearly spells out for the DOE how insurance related matters and matters involving private contractual rights are not within FINRA's jurisdiction or authority to govern, the DOE continued its investigation without regard to Wiley's defenses and concerns. The DOE ignored any and all of Wiley's comments, suggestions and the facts supported by evidence as outlined in the Wells Submission and the other documents at issue in Respondent's Motion for Leave to Supplement the Record. The DOE's material

misrepresentations set the tone for the Hearing, prejudiced Wiley and ultimately created bias on the part of the Panel majority. (R. 431-435).

**C. WILEY'S COUNSEL NEVER WAIVED THIS LIMITED CHALLENGE TO FINRA'S JURISDICTION.**

The DOE's main argument for Wiley's lack of good cause for having failed to offer the documents below is that Wiley waived his challenge to jurisdiction. Again, the DOE misstates facts and materially misrepresents the situation. As an associated person and registered representative, Wiley conceded to FINRA's jurisdiction over him *vis a vis* the matters he consented to in his registration statement. However, a party cannot concede to matters not within the realm of the agreement. *Fiero v. FINRA*, 660 F.3d 569, 571 (2d. Cir.2011); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App. 2009). Therefore, since inherently insurance related business matters and disputes regarding the private contractual are not part of a FINRA's Agreement with Wiley when Wiley registered, then Wiley did not concede to FINRA having jurisdiction over those matters.

Wiley never conceded to FINRA's jurisdiction for matters not within FINRA's authority and jurisdiction, namely insurance business practices. Wiley's reservation of that specific aspect of his jurisdictional challenge is evident in the DOE's chosen quotation from the preliminary hearing. As the DOE notes in its opposition, Wiley's counsel clearly stated, "[t]here are no FINRA rules that apply to [Wiley's] conduct. In terms of how [Wiley] handles his insurance business, FINRA is not able to regulate that other than this sort of general rule of good faith business practices." See *Department of Enforcement's Memorandum in Opposition to Respondent's Motion to Introduce Additional Evidence* at p. 2.(emphasis added.) While the DOE represents this to be a concession of jurisdiction, counsel for Wiley clearly stated his position

that FINRA is unable to regulate Wiley's insurance business practices. Wiley never waived his objection to this particular aspect of FINRA's purported jurisdiction.

Contrary to the DOE's assertion, Wiley consistently brought up that the matters at issue before the DOE and how the Panel was acting outside FINRA's authority and jurisdiction.<sup>2</sup> In Wiley's request for a more definitive statement, which was denied, (R. 27-33 and 105-108), Wiley mentions that FINRA does not have jurisdiction to determine the private rights of parties, and that understanding the type of relationship involved is absolutely necessary to be the derivative legal analysis of the DOE's allegations that Mr. Wiley converted funds under Texas law. (R.28). Important in this regard, Wiley cites to the Securities and Exchange Commission's long recognition that it is not the SEC's or FINRA's function "to decide private contract rights between the parties." *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957). (R. 28-29).

Also, During the preliminary hearing, Mr. Augustus tried to explain to the Hearing Officer, how FINRA has jurisdiction over Wiley, but not for the subject matter of the case, which was never clarified by the DOE. Mr. Augustus explains:

MR. AUGUSTUS: It's a little hard for Mr. Wiley to respond because he doesn't understand the legal standard that is be applied to him. FINRA is charging him with taking certain actions and say that those actions he was prohibited from taking, and yet they provide no legal standard to back up the idea that he was prohibited from taking those actions. And fundamentally, this comes down to Mr. Wiley's status as an independent contractor.... There's no standard that FINRA can point to that says Mr. Wiley violated that standard. He conducted his business as he felt best, as he was authorized to according to his status as an independent contractor. And this fundamental issue in play with the more definite statement. He was not an employee. He was an independent contractor. There is no standard for conversion that FINRA has cited. So I don't even know how to respond to that because one of the big issues is did Mr. Wiley exert control over these funds in a way that was inconsistent with something that the law required him to do otherwise and otherwise there's no standard there.

MS. PHERRELL: As I understand it, Mr. Augustus is stating that FINRA may not have jurisdiction over Mr. Wiley by virtue of his independent agency status, with Farmers Insurance and our response for a more definite statement will address Mr. Wiley's

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<sup>2</sup> Mr. Wiley did not submit a prehearing brief because he did not have the funds to do so.

registration status that is the overriding factor that provides FINRA with jurisdiction over Mr. Wiley since he was registered with a broker-dealer, but also employed by an affiliated insurance company with that broker-dealer...

MR. AUGUSTUS: We are not challenging jurisdiction, so to the extent that is an issue that needs to be addressed in the response, I am just for the record, I'm stating we are not challenging jurisdiction. We recognize the jurisdiction of FINRA. The position is with no legal standards stated any kind of decision that would be based on an absence of a legal standard would sort of by definition by an arbitrary decision.... There are no FINRA rules that apply to his conduct. In terms of how he handles his insurance business, FINRA is not able to regulate that other than this sort of general rule of good faith business practices.

THE HEARING OFFICER: Well, and that is the rule under which he's charged in the first cause of action; am I correct?

MR. AGUSTUS: Right. Well, he's charged violating that rule by converting funds, and my issue is that there is no legal standard for conversion that is cited and to find that he violated that rule by converting funds with no legal standard for conversion is necessarily an arbitrary decision.

(R. 78 – 83). The Panel ultimately agreed with the DOE and denied Wiley's request for a more definite statement. (R. 107). Since the Hearing Officer determines what relevant evidence is and may exclude all evidence that is irrelevant, immaterial, unduly repetitious or unduly prejudicial,<sup>3</sup> the DOE and the Hearing Officer ignored Wiley's defenses and assumed jurisdiction claiming FINRA's authority is broad enough to encompass business related conduct that does not involve a security. (R. 55). Hence, the Decision merely mentions jurisdictions in one footnote. (R. 1087).

However, the issue of jurisdiction was still brought up throughout the hearing. The fact that FINRA does not have the legal standards, rules or authority to make a decision on the matter is constantly brought up. Since the Hearing Officer had already determined that FINRA did have jurisdiction over the matter, he also determined that all evidence relating to jurisdiction was irrelevant and immaterial and therefore it was not discussed in detail.

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<sup>3</sup> FINRA Rule 9263

**I. RESPONDENT REQUESTS LEAVE TO FILE AN AMENDED BRIEF.**

Respondent respectfully requests leave to file an amended Opening Brief subject to the NAC's determination of whether to supplement the record or not. If the NAC allows Respondent to supplement the record, Respondent would like to fully brief the additional evidence. If the NAC sustains the DOE's objections, Respondent will need to amend the brief in order to eliminate the preliminary discussion of this evidence and its incorporation into the brief. Respondent further asks the NAC to allow a period of thirty (30) days from the date of its ruling on Respondent's Motion for Leave to Supplement the Record within which to file the amended Opening Brief.

**VI. CONCLUSION**

The evidence that Respondent requests to be supplemented into the record shows how FINRA knew of Respondent's assertions that the enforcement action was completely outside FINRA's scope of authority and jurisdiction and how the DOE and the Panel completely disregarded Respondent's concerns, which caused impropriety, bias and prejudice. These are extraordinary measures and such action is required.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests the NAC permit the evidence to be introduced.

Date: August 1, 2014

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FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT  
COMPLAINANT,

v

KEILEN DIMONE WILEY  
(CRD No. 4259612),  
RESPONDENT.

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DISCIPLINARY PROCEEDING  
NO. 2011028061001

HEARING OFFICER - MC

REPLY BRIEF

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August 25, 2014

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FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT  
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V.

KEILEN DIMONE WILEY  
(CRD No. 4259612),  
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DISCIPLINARY PROCEEDING  
NO. 2011028061001

HEARING OFFICER - MC

REPLY BRIEF

COMES NOW RESPONDENT, Keilen Dimone Wiley ("Wiley") and submits this Reply Brief to the National Adjudicatory Council ("NAC"). Wiley respectfully requests the NAC vacate and dismiss the April 29, 2014 Decision (the "Decision") with prejudice, or reduce the sanctions and not permanently barred Wiley from associating with FINRA.

I. INTRODUCTION

The Decision must be vacated because the Hearing Panel Majority had no authority to hear insurance related disputes involving inherent insurance business matters in the disciplinary proceeding. The Hearing Panel Majority acted outside its scope of power by interpreting the private contractual rights between Wiley and Farmers Insurance ("Farmers") and by sanctioning an insurance business practice regarding inherently insurance related matters. Even if the Hearing Panel had the power to hear this case, the Decision must still be vacated because it is based on conclusions of fact unsupported by any evidence and contrary to the evidence presented in the record.

A. FINRA DOES NOT HAVE THE AUTHORITY TO DISCIPLINE WILEY OVER ISSUES REGARDING INHERENTLY INSURANCE RELATED BUSINESS MATTERS.

1. THE HEARING PANEL HEARD AND SANCTIONED WILEY FOR MATTERS OUTSIDE THE SCOPE OF FINRA'S AUTHORITY

When Wiley became a registered agent, he agreed to be subject to the disciplinary procedures according to the rules and regulations of the securities industry and FINRA. FINRA is a congressionally approved SRO and subject to SEC approved SRO arbitration rules, which include all of FINRA rules and FINRA's Code of Procedure. 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). FINRA and/or the SEC's final conclusions or decisions in disciplinary proceedings must still be approved by a court of law unless such decision is vacated, modified or corrected under the Federal Arbitration Act. 9 U.S.C. §§ 9-11 (West 2009). Therefore, when determining whether vacatur, modification or correction is warranted in a

FINRA or SEC disciplinary decision, federal case law and statutes apply. The DOE's arguments stating the fact that FINRA disciplinary proceedings are not subject to federal law and statutes is simply wrong. DOE Brief at 13.

The SEC must approve FINRA rules and the SEC can abrogate, add to, and delete from all of FINRA rules as it deems necessary. 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). If the SEC had determined that regulating inherent insurance business practices was necessary and/or within the SEC's jurisdiction, there would be a clear FINRA Rule or something to indicate such authority. However, there is nothing in the FINRA rules that explicitly clarifies this. However, there are other authorities and sources that indicate regulating inherent insurance business activities is outside the scope and realm of FINRA's authority. For instance, 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 any decisions based on such matters are not enforceable. *Thomas v. Westlake*, 204 Cal.App.4<sup>th</sup>, 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 (10<sup>th</sup> Cir. 2002). Case law explains this reasoning because "[t]he purposes of the exclusion are to keep arbitrators away from 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." See *Thomas v. Westlake*, 204 Cal.App.4<sup>th</sup> 605, 619 (2012). Additionally, FINRA regulatory agencies would not have the requisite knowledge and experience to understand the intricacies of the insurance agency. *IDS Life Ins. Co.*, 133 F.3d at 653.

In line with this case law, some of FINRA's rules show how FINRA has limited authority over insurance business practices. Several FINRA rules explicitly state that disputes involving insurance business activities of a member that is also an insurance company are exempt from FINRA's jurisdiction in FINRA arbitration proceedings. FINRA Rules 12200, 12201, 13200 and 10101. Even more, FINRA Rules "shall be interpreted in light of the purposes sought to be achieved by the Rules and to further FINRA's regulatory programs." FINRA Rule 0130. The purpose behind FINRA's regulatory programs is to regulate the securities industry in order to protect public interests and investors in the securities industry. 15 U.S.C. § 78s(e)(2); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). Therefore, when in doubt, FINRA should opt to interpret FINRA rules so that they continue to regulate and protect public interests and investors in the securities industry, not the insurance industry.

2. **THE DOE AND THE HEARING PANEL MAJORITY HAVE INAPPROPRIATELY EXPANDED THE SCOPE AND AUTHORITY OF RULE 2010**

The Decision found Wiley converted insurance premiums and therefore violated Rule 2010's requirement for commercial honor and just and equitable principles of trade without actually having found Wiley violated FINRA's specific conversion rules. FINRA Rule 2010; *see also, DOE v. Kapasi*, CRD No. 4259968 at \*2 (May 27, 2014). The Decision inappropriately found conversion because the DOE did not sufficiently prove that Wiley violated Rule 2010 because it did not prove conversion with sufficient supporting evidence, *infra*. Because there is no evidence to support a finding of conversion, the DOE and the Hearing Panel majority instead found Wiley violated the ambiguous, catch all rule, Rule 2010.<sup>1</sup>

A rule is ambiguous when it is "capable of being understood in two or more possible senses or ways." *DOE v. Charles Schwab & Company, Inc.*, Complaint No. 2011029760201 (April 24, 2014). When the language is ambiguous, a review of the rule making history and any other authorities is needed in order to discern the intent behind the particular rule in question. *DOE v. Charles Schwab & Company, Inc.*, 2011029760201 (April 24, 2014); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (The plainness or ambiguity of statutory language is used, and the broader context of the statute as a whole"). Therefore, a full examination of FINRA rules, securities laws and statutes is necessary to fully understand its applicability of Rule 2010. Placing a rule into context can help clarify ambiguous issues and as mentioned above, case law and other FINRA Rules show that Rule 2010 should not be applied to inherently insurance business disputes because ruling on such an issues is not within FINRA's authority.

However, as the DOE expressly argues, Rule 2010 is supposed to reach beyond ordinary legal requirements and encompasses a wide variety of conduct that may operate as an injustice to investors or other participants in the securities markets. *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at \*12 (NASD NAC June 2, 2000). FINRA's authority to pursue for violations of FINRA Rule 2010 is sufficiently broad to encompass any unethical, business-related misconduct, regardless of whether it involves a security. *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). The DOE uses this argument to assert FINRA's authority over this case, but fails to mention that *Daniel D. Manoff* clarifies that Rule 2110 applies when the misconduct reflects the associated person's ability to comply with the regulatory requirements of the securities business... *Daniel D.*

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<sup>1</sup> Conversion has a high standard and specific elements to prove. Rule 2010 is vague, ambiguous and amorphous. The DOE and the Hearing Panel Majority could not meet the burden to prove Conversion under the Guideline standards. FINRA Sanction Guidelines 38 (2007). In fact, the Decision does not present evidence to support a finding of conversion either. There is no evidence to show that Wiley intentionally and without authorization took and or exercised ownership over property when he neither owned it nor was entitled to possess it.

*Manoff*, 55 S.E.C. 1155, 1162 (2002); see also, DOE Brief at 9. Even though it is clear that Rule 2010 should have a very broad scope of authority, enforcement actions and the SEC have specifically noted that such a broad application should apply to securities industry matters. But despite the case law, enforcement actions, FINRA rules and federal statutes, the Decision and the DOE still found that Rule 2010 applies in this case.

The DOE's own interpretation of the securities laws and rules should not insulate it from inappropriate rulings or disciplinary proceedings and to hold otherwise would permit the DOE to interpret the laws and rules to its liking and would result in enormous inconsistency of enforcement and massive injustice. *Thomas R. Alton*, Exchange Act Release No. 36058, 52 SEC 380, 1995 SEC LEXIS 1975, at \*8 n.12 (Aug. 4, 1995). This is the situation in this case. The DOE and the Hearing Panel have used certain laws, rules and authorities to allow a sanctions on a dispute not within its authority and to render a sanction that is the equivalent of capital punishment in the securities industry, without express authority or sufficient evidence to support the Decision.

Because of the DOE and Hearing Panel's unexpected rendition of the law, FINRA rules and unsupported factual conclusions, Wiley had no sufficient notice in this case. FINRA rules must have some limitation and must be sufficiently clear so that associated persons have fair notice of what conduct is proscribed. *Jay Alan Ochanpaugh*, Exchange Act. Rel. No. 54363 (Aug. 25, 2006); see also, *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2nd Cir. 1999) (holding that regulations satisfy due process as long as a "reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what the regulations require."). In this case there is no way a reasonably prudent person, familiar with FINRA regulations, would have any idea that this disciplinary proceeding would ignore the separate and well established insurance and securities laws, independent contractor status, the elements of conversion and even some FINRA rules that explicitly limit FINRA's scope to not include insurance business practices. Wiley had no idea that FINRA would ultimately interpret FINRA Rules and the law, contrary to the plain language, in order to expand Rule 2010's authority and assert authority over this case.

Additionally, FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its financial industry members' compliance with federal securities laws, SEC regulations, and FINRA's own rules and regulations. 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). When FINRA proposes to enforce "a new theory or liability" of which it believes members of the industry "should have been aware," it runs the risk of apply "a novel interpretation" with "no prior notice... of the applicability of this new theory of liability... raising concerns sufficient to warrant dismissal of the charges."

*James W. Browne*, Exchanges Act. Rel. No. 58916 at \*29-31 (Nov. 7, 2008). Wiley had no idea that FINRA has authority to sanction him for conversion without actually ever proving conversion according to FINRA's Sanction Guidelines and without ever proffering sufficient evidence from the record. For these reasons, Wiley had no fair warning in this proceeding and his due process rights may also be in violation in addition to having received an oppressive and unfair sanction that departs from FINRA and securities precedent.

**3. FINRA DOES NOT HAVE THE AUTHORITY DETERMINE THE PRIVATE RIGHTS OF PARTIES**

Merely interpreting the private contractual rights between two independent insurance companies is outside the scope of FINRA's jurisdiction according to the law and FINRA Rules, even Rule 2010. *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957) (It is not the SEC or FINRA's function to decide the private rights between the parties). The DOE and the Hearing Panel Majority found that Wiley violated FINRA Rules 2010 and 8210.<sup>2</sup> The DOE and the Hearing Panel Majority determined Wiley violated FINRA Rule 2010 when he converted customer insurance premiums to his own use. Decision at 1. In order to reach that conclusion, the Hearing Panel must have interpreted individual clauses of Wiley's Agent Appointment Agreement with Farmers Insurance. This alone warrants vacatur of the Decision.

**B. THE DECISION AND THE DOE'S ARGUMENTS IN SUPPORT OF THEIR FINDINGS ARE BASED ON CONCLUSORY STATEMENTS NOT SUPPORTED BY EVIDENCE**

All of the statements in the DOE's Brief regarding Wiley's obligations and contractual rights are conclusory, not supported by any evidence and the Decision and the DOE have not offered any evidence to prove conversion. 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." Decision at 13. The Decision improperly concludes Wiley was not the "owner" of the premiums and his entitlement to possess the funds was transitory because he was obligated to deposit them into the co-bank account within a business day after receiving them and "[h]e had 'no right to exercise ownership over these funds or to use the premiums for his own benefit for more than a month.'" *Id.* However, the DOE and the Decision present no evidence to support these conclusions. The Decision provides no contractual terms to demonstrate who had the right to possess the funds or who could exercise ownership over the premiums. The DOE and the Decision present no evidence to show how

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<sup>2</sup> The third Panelist's dissent disagrees with the other two Panelists and would have dismissed both causes of action. The dissenting opinion states that the DOE did not prove that Wiley converted funds and believes the written statement upon which the DOE uses to assert its allegations of untruthful testimony was signed by Wiley under duress and therefore it should not have any weight.

Wiley was not authorized to take those funds and use them for his personal benefit. The DOE and the Decision cite to no evidence regarding any of the contractual terms between Wiley and the policy holders which would indicate whether Wiley had authority to possess, control and or own the funds once they were remitted to him. Even more, whether the possession was transitory or not is irrelevant in determining a violation of conversion.

Instead of proving up a conversion claim with sufficient evidence, the DOE and the Decision support their claims with gross misstatements of fact, conclusory statements unsupported by fact. For instance, the DOE states "Wiley was never the owner of money entrusted to him as Farmers' agent for the payment of insurance premiums." DOE Brief at 10. The DOE and the Decision provide no supporting evidence for this conclusion. Contrary to this assertion, there is evidence that Wiley was entitled to possess the premiums and/or assert ownership over the premiums. For instance, Daniel Edmonds stated that the agents deposit the cash and the checks into a bank account that was jointly owned by Farmers and the insurance agent. R. 364-365. Wiley had a joint bank account with Farmers and therefore had authority to possess the funds and use the funds. In fact, Daniel Edmonds does not know what the terms are for when agents may use the premiums for their own use or how many agents deposit premiums into their own accounts and use the money for personal use. R. 410-412. However, agents may use some of the money for their personal use. *Id.* Additionally, Wiley also testified that is industry standard because the agents are independent contractors and can establish their business practices and accounting methods in any manner according to their specific agreement with Farmers. R. 473-480.

Even more, the facts and the evidence are contrary to the Decision's assertion that Wiley did not have possessory or ownership rights to the insurance premiums. The Decision never presented any evidence regarding the contractual terms of Wiley's agreements with his clients and never presented any evidence to establish that Wiley's possession of the insurance premiums was not authorized according to Wiley's agreements with the policyholders and Farmers. Contrarily however, Wiley did establish that he had the right to possess the money, that Farmers Insurance had no control over how he collected the money, where he stored the money or how he remitted the money. R. 479. The DOE states that the "Agent Appointment Agreement required him to remit the payments 'promptly.'" *Id.* Being required to remit payments promptly to Farmers does not establish that Wiley did not have the authority to possess the funds. R. 45. Despite the DOE and the Decisions lack of evidence regarding the possessory and ownership rights of the funds, Wiley repeatedly testified that he had the requisite authority to possess and exert ownership over the funds. R. 470-490.

The DOE mischaracterizes Wiley's testimony when it states that Wiley acknowledged "he was obligated to collect premiums from customers and remit the payments to Farmers." DOE Brief at 10. Again, the DOE conveniently leaves out material context and the rest of Wiley's testimony which explains how he took the money, always noted each taking into the ACA system and remitted payment to Farmers, thus fulfilling his obligation to cure the debt with Farmers within a certain time frame. In fact, that statement the DOE used was clarified later in Wiley's testimony when the DOE determined that Wiley would serve "sort of the middle person when [collecting] the money from the customer, and then [Wiley] would remit the money to Farmers Insurance." R. 481-482. Mere knowledge of an obligation to collect payments and remit payments does not establish the rights of possession or ownership.

The DOE alleges that the Farmers' "published Rules and Manuals" required him to remit payments promptly on a daily basis as premium is received," yet provides no evidence to support this conclusion. DOE Brief at 10. Contrary to that assertion, Wiley's testimony shows that the Rules and Manuals are merely suggestions and recommendations on how to run an insurance agent's business and that the ACA system is not required, but recommended as a suggested method for keeping track of payment premiums and deposits. R. 304, 473-474, 601-602, 278, and 355. The plain text of the Rules and Manuals corroborate Wiley's testimony and indicate that they are guidelines and recommendations. R. 957, 965, 966, 968, 988, 990. For example, the Agency Operations Manual states, "To minimize handling of process errors, the following guidelines *should* apply." R. 966, 957, 965. The manual repeats many phrases similar to "we recommend," "it is best if you..." or "it is suggested." R. 966, 950, 965, 968, 974, 984, 988, 990, 991, 1000, 1001.<sup>3</sup> Even more, the ACA manual explicitly states, "As a recommended business practice, the ACA Summary should be printed and retained..." R. 984. In fact, the word recommend is mentioned more than a dozen times in reference to providing suggestions on how to structure the insurance agent's business model. However, not once in the manuals does it state that the suggestions are mandatory.<sup>4</sup> Even more, the

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<sup>3</sup> For further discussion regarding the ACA being a recommended program for Farmers Insurance Agents, please refer to Opening Brief 1, 8-10.

<sup>4</sup> The DOE argues that the Hearing Panel Majority reflects a faithful reading of the unambiguous contract language that calls for no interpretation does not mean that the Hearing panel Majority actually did a faithful reading or that the reading accurately found unambiguous language. Decision at 11. However, the Agent Appointment Agreement is only one and half pages long and does not mention anything regarding the possessory or ownership rights of insurance premiums. This absence of provisions to clarify the possessory rights and ownership rights of insurance premiums in the Agent Appointment Agreement makes the DOE's argument inappropriate. The Hearing Panel Majority cannot faithfully conclude, under the terms of the contract, who had a legal right to possess and or own the insurance premiums or how the transfer of ownership or possession would turn out. Therefore, interpretation of the

only time mandatory is even mentioned in the record is in Wiley's testimony stating that the Rules and Manuals are NOT mandatory, but guidelines and suggestions. R. 473. The clear language of the Manuals clearly shows that the ACA program is a suggested method for doing business and not a mandatory guideline.

Despite this evidence regarding the plain language of the contract terms, manuals and testimony, and without sufficient supporting evidence, the Decision merely concludes that Wiley was never entitled to possess the money because Wiley violated mandatory Rules and Manuals. DOE Brief at 10-11. This is just plain wrong.

**C. THE DOE AND THE DECISION HAVE NOT PROVEN CONVERSION**

The DOE and the Decision do not prove all of the elements to support a finding for conversion, "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." Decision at 13. As noted above, the DOE and the Decision have not presented sufficient evidence to show that the taking was unauthorized or that Wiley was not entitled to possess the premium payments. Merely asserting that there was an untimely deposit or that Wiley knew he was to remit money to Farmers does not prove conversion. Assertions of late deposits and allegations of improper use of premiums does not establish or determine the possessory and ownership rights in this case. The issue here is one of timing. A late deposit does not automatically establish conversion. Also, the Decision has not established that Wiley intended to improperly convert funds.

But even assuming that Wiley is chargeable with a breach of its contract, it does not necessarily follow that he violated Rule 2010, for "not every failure to perform a contract violates the NASD rule; it must also appear that such failure was unethical or dishonorable' or that the breach was committed 'without equitable excuse or justification.'" *Heath v. S.E.C.*, 586 F.3d 122, 134 (2d Cir. 2009). The DOE has not presented any evidence to show that Wiley's "breach" was unethical, dishonorable or that the breach was committed without equitable excuse of justification.

**D. THE DECISION DOES NOT CONSIDER ANY MITIGATING FACTORS AND THEREFORE THE SUBSEQUENT SANCTION IS EXCESSIVE OR OPPRESSIVE**

In reviewing a disciplinary sanction imposed by FINRA, the SEC must determine whether, with "due regard for the public interest and the protection of investors," that the sanction "is excessive or oppressive." *Saad v. S.E.C.*, 718 F.3d 904, 906 (D.C. Cir. 2013); 15 U.S.C. § 78s(e)(2). As part of that review, the SEC must carefully

---

Agreement is necessary and therefore room for error is possible. In this case, the Decision improperly interpreted the Agent Appointment Agreement.

consider whether there are any aggravating or mitigating factors that are relevant to the agency's determination of an appropriate sanction. *Id. see also, PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C.Cir.2007). This review is particularly important when the respondent faces a lifetime bar, which is "the securities industry equivalent of capital punishment." *Id.* Here, the Hearing Panel Majority abused its discretion by implementing a lifetime bar that is excessive and oppressive and does not promote protecting the public interest and investors in the securities industry. The Decision grossly misstates facts and rendered extremely harsh findings without sufficient reason or justification and based those findings on conclusory statements that are unsupported by evidence.

The Decision ignores important considerations and mitigating factors. First, that Wiley was under extreme personal and professional stress at the time of his transgressions, there were no damages or injuries, and except for FINRA's allegations, there were no other claims of wrongdoing against Wiley. No client was injured, no money was unaccounted for, no viable cause of action would occur in a court of law. Nothing materially wrong happened in this case. Additionally, Wiley's contract with Farmers was terminated before FINRA ignited the disciplinary proceeding. This consideration is particularly significant because it is specifically listed in FINRA's Sanction Guidelines as a potential mitigating factor. Sanction Guidelines 7 (2011) available at [www.finra.org](http://www.finra.org). This sanction does not serve the public interest in securities regulation because of its severe and harsh punishment of an insurance agent held to securities standards, but instead puts a chilling factor on insurance business and trade and perhaps in other industries. Wiley has an otherwise unblemished disciplinary history. Failing to adequately address all of the potentially mitigating factors that should have been considered when determining the appropriate sanction is an abuse of discretion. *Saad v. S.E.C.*, 718 F.3d 904, 907 (D.C. Cir. 2013). The Decision to bar Wiley from associating with FINRA is also excessive and oppressive. 15 U.S.C. § 78s(e)(2). Furthermore, the Guidelines are not intended to be absolute and merely provide a starting point in the determination of remedial sanctions. Sanction Guidelines 1; see also, *Hattier, Sanford & Reynoir*, S.E.C. Release No. 39543, 1998 WL 7454, at \*4 n. 17 (Jan. 13, 1998)), *aff'd*, 163 F.3d 1356 (5th Cir.1998).

In a situation where a an employee, among other things, caused a member organization to violate the Securities Exchange Act, inaccurately computed and reported financial and made a material misstatement during the DOE's investigation was only barred from the industry for two years. *Mitchell Edmond Levine*, Exchange Hearing Panel Decision 92-137, 1992 WL 319402 (Aug. 25, 1992). The Hearing Panel Majority should have considered the aforementioned mitigating factors, along with the fact that Rule 2010 does not provide sufficient notice and that

Wiley was operating according to insurance industry standards and should have mitigated the lifetime bar, if not dismissed the DOE's claims entirely.

**F. THE DOE AND THE HEARING PANEL MAJORITY'S DECISION ILLUSTRATES IMPROPER BIAS AND PREJUDICE THAT RESULTED IN AN UNFAIR AND IMPARTIAL DECISION**

The Securities Exchange Act of 1934 requires that a self-regulatory organization "provide a fair procedure" for the disciplining of its membership. 15 U.S.C.S. §78o-3(b)(8) (2006). *In the Matter of Dep't of Enforcement v. John Brigandi Greenvale*, Complaint No. C10040025, (Jan. 17, 2007). The DOE and the Decision's mere conclusory statements to support the sanction illustrates the DOE and the Hearing Panel Majority's disregard of the facts, the plain language of the Agent Appointment Agreement, witness testimony and FINRA rules and federal law. This is because the DOE pre-determined Wiley had converted funds or violated something even before an investigation occurred. The DOE submitted to the Hearing Panel the exact same conclusions it had prior to the investigation and not surprisingly, the Hearing Panel Majority found for the exact same conclusions the DOE found prior to the DOE's investigation. This is indicative of the Hearing Panel Majority's bias to give more deferential weight to the DOE regardless of the facts and legal circumstance.

**II. CONCLUSION**

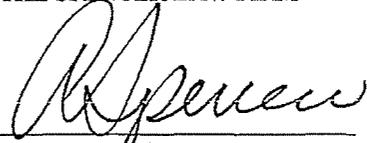
Based on the acquiescence of FINRA's Code of Procedure, the explicit provisions in similar FINRA Rules, established case law and statute, the Hearing Panel did not have the authority to render sanctions against Wiley for conversion in matters involving inherently insurance business issues. Even more, the Hearing Panel did not have the authority to determine the private contractual rights between two insurance companies and worse, blatantly misinterpreted the plain language of the contractual terms between Wiley and Farmers. The Hearing Panel's Decision lacks sufficient evidence to support a finding for conversion but supports its findings with only conclusory statements that are contrary to the facts on the record. Even more, the Decision did not implement any mitigating circumstances in order to reduce the sanction. Because of these instances, Wiley was not provided a fair procedure or adequate notice for the proceeding. Therefore, the Decision should be dismissed entirely with prejudice.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully requests the NAC:

- A. Upon hearing the evidence in this matter hold that the Hearing Panel exceeded its scope of authority and jurisdiction; and
- B. VACATE AND DISMISS the Decision with prejudice, or
- C. AMEND the Decision and Sanctions against Wiley so that he is not permanently barred associating with FINRA; and
- D. GRANT any and all such further relief that Wiley may be entitled to.

Date: August 25, 2014

THE SPENCER LAW FIRM

A handwritten signature in black ink, appearing to read "D. Meade", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Opening Brief was served on the following parties via first class certified United States mail on August 25, 2014:

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Ashley M. Spencer

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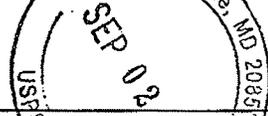
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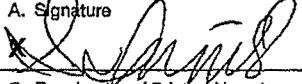
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 Attn: Lisa Jones Torres  
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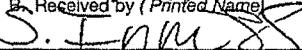
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 Insured Mail  C.O.D.

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FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

OFFICE OF GENERAL COUNSEL  
Regulatory/Appellate

DEPARTMENT OF ENFORCEMENT  
COMPLAINANT,

DISCIPLINARY PROCEEDING  
NO. 2011028061001

v

KEILEN DIMONE WILEY  
(CRD No. 4259612),  
RESPONDENT.

HEARING OFFICER - MC

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OPENING BRIEF

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FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

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COMPLAINANT,	§	NO. 2011028061001
V.	§	
	§	
KEILEN DIMONE WILEY	§	HEARING OFFICER - MC
(CRD No. 4259612),	§	
RESPONDENT.	§	
	§	

OPENING BRIEF

COMES NOW RESPONDENT, Keilen Dimone Wiley (“Wiley”) and submits this Opening Brief to the National Adjudicatory Council (“NAC”). Wiley respectfully requests the NAC vacate and dismiss with prejudice the April 29, 2014 Decision (the “Decision”), or reduce the sanctions so Wiley is not permanently barred from the securities industry.

I. INTRODUCTION

The majority of the Hearing Panel (the “Panel”) found Wiley violated FINRA’s Rule 2110 for conversion of insurance premiums and permanently barred him from associating with any FINRA member in any capacity. (FINRA 001075-001096). The Panel minority issued a dissenting opinion supporting Wiley’s defenses and suggesting all claims against Wiley be dismissed. (FINRA 001093-96). The Panel exceeded its disciplinary authority in many ways that, collectively or individually, warrant vacatur under the Federal Arbitration Act (“FAA”), Texas General Arbitration Act (“TAA”), and/or common law. For the reasons set forth herein, Wiley respectfully requests the NAC vacate and dismiss with prejudice the Decision and the sanctions entirely or, at the very least, reduce the sanctions so as to not permanently bar Wiley.<sup>1</sup> Wiley requests a hearing on this Opening Brief and to stay this case pending a resolution of this appeal. FINRA Rules 9221 and 9351. Wiley moved to supplement the record with documents germane to this appeal; however, at the time of this filing that motion had not been granted. FINRA Rule 9346(b).

II. FACTS

<sup>1</sup> Wiley moves to vacate the Decision on all applicable grounds available under the FAA, TAA, and/or Federal and state common law, as stated herein. Without waiving any other grounds, this brief focuses on the most obvious grounds for vacatur - that the Panel exceeded its powers, was not impartial, and refused to hear material evidence which substantially prejudiced Wiley’s rights.

Wiley was a FINRA registered insurance agent doing business as Wiley Insurance Agency and Associates (“WIA”). Wiley held an independent agency contract with Farmers Insurance Group (“Farmers”) from July 2002 until June 2011, which was governed by the Agent Appointment Agreement (the “Agreement”). (FINRA 000034-36 and 000054). The Agreement set out the parties’ obligations, duties, roles and terms of the independent contractor relationship. (FINRA 000034-36). Even though Wiley was not practicing in the securities business, Wiley was required to register with Farmers Financial Solutions, LLC, a FINRA member firm. Therefore, Wiley became an associated person and subject to FINRA’s rules and regulations. (FINRA 000113; 000933-947). There is no dispute that FINRA had jurisdiction over Wiley for matters within FINRA’s scope of disciplinary authority during the relevant timeframe. (FINRA 00018).

Wiley had total control over the operations of WIA’s insurance business practices and operated WIA according to the good business practices of the insurance industry. (FINRA 00036, 000601). Even though Farmers’ agents have total control over their agency businesses, Farmers offers guidelines and programs to assist the agents, especially with their accounting and financial affairs. (FINRA 000602). These “guidelines” are not mandatory and were not mandatory under Wiley’s Agreement with Farmers. (FINRA 000034-36; 000473-474). The Agents Credit Advice (“ACA”) program is one recommended program. *Id.* The ACA program essentially operates as follows: once an agent receives an insurance premium payment from a client, that agent enters the payment amount into the ACA program and later deposits the premium payment into a co/bank account with Farmers. That co/bank account is connected with the ACA program so that the program can automatically keep track of the receipts entered into the ACA program and the co/account balances at the end of each day. (FINRA 001094). When the entered ACA receipts differ from c/o account balance, an automatic email notifies the agent of the shortage or surplus. (FINRA 000476). If the co/account balance continues to differ from the amount entered into the ACA program, subsequent notifications are sent to the agent reminding them they need to reconcile the account. (FINRA 000368). If the co/account continues to differ from the ACA program entry, eventually Farmers’ internal auditing department is notified. (FINRA 000370). About 10 to 25 agents a month are reported to Farmers’ internal auditing department for different ACA receipt and co/account balances. (FINRA 000370). Farmers’ internal audit department generally only investigates accounts with at least a \$3,000.00 dollar discrepancy. (FINRA 000370). The auditing department will initiate an internal review and resolve the issue. (FINRA 000370-371). This is what happened in this case. (FINRA 000371). WIA missed a payment owed to Farmers, received the notifications, an internal investigation was initiated,

WIA paid all debts owed to Farmers, and the balance was restored resolving all the issues between Farmers and WIA. (FINRA 000370-378). This is the whole purpose behind monitoring the ACA system, to assist agents in maintaining timely payments according to insurance business industry standards, and it worked. Farmers found Wiley committed no material violations according to insurance industry standards and did not participate in the securities industry. (FINRA 000601, 000938). Shortly after the internal audit, Farmers purchased WIA's book of business for the amount designated in the Agreement. (FINRA 001095 and 000034-36).

### III. ARGUMENT AND AUTHORITIES

#### A. THE DISCIPLINARY PROCEEDINGS WARRANT VACATUR UNDER FEDERAL, STATE AND/OR COMMON LAW.

Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances. *SSP Holdings Ltd. P'ship v Lopez*, 04-13-00712-CV, 2014 WL 1688112 (Tex. App. Apr. 30, 2014). An arbitration award must be confirmed through a court of law, unless it is vacated, modified, or corrected under one of the limited grounds set forth in Sections 10 and 11 of the FAA. 9 U.S.C. §§ 9-11 (West 2009). A court may vacate an arbitration decision upon the application of any party to the arbitration where, *inter alia*, there was evident partiality, the arbitrators were guilty of refusing to hear evidence pertinent and material to the controversy, the arbitrators exceeded their powers, or so imperfectly executed their powers that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a) (West 2009).

"The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of a different scope is arguable." *Ancor Holdings, LLC v Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App. 2009). This case involves disputes about governing law. The Panel took the position that Texas law did not apply when interpreting the Agreement (FINRA 001087). Thus, analyzing vacatur under the TAA may be applicable. The TAA permits courts to confirm an arbitrator's award upon application of a party unless grounds are offered for vacating, modifying or correcting an award. TEX. CIV. PRAC. & REM. CODE ANN. § 171.087. Like the FAA, the TAA provides specific grounds for vacating an award that include, *inter alia*, evident partiality, misconduct or willful misbehavior by an arbitrator, exceeding their powers or refusing to hear material evidence or otherwise conducting the hearing contrary to the provisions of the Act so as to prejudice substantially the rights of a party. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088.

An arbitration award may be set aside under common law if it was rendered in “manifest disregard of the law.” See *Humitech Dev. Corp. v Perlman*, 424 S.W.3d 782, 791 (Tex. App.—Dallas 2014, no pet.); *Pheng Invs., Inc. v. Rodriguez*, 196 S.W.3d 322, 331 (Tex. App.—Fort Worth 2006, no pet.) The circuit courts disagree about common law vacatur for arbitration awards, and the Fifth Circuit no longer recognizes the manifest disregard standard as ground for vacatur under federal law. However, the weight of authority continues to indicate that it is still a recognized ground for vacature under Texas law. *Campbell Harrison & Dagley, LLP v. Hill*, No. 3:12-CV-4599-L, 2014 U.S. Dist. LEXIS 72684, at \*24–25 (N.D. Tex. May 28, 2014) (contrasting federal law with Texas law and concluding Texas continues to recognize common-law grounds, including manifest disregard); *Humitech Dev. Corp.*, 424 S.W.3d at 791 (similar); and *Bob Bennett & Assocs. v. Land*, No. 01-12-00795-CV, 2013 Tex. App. LEXIS 6800, at \*14–16 (Tex. App.—Houston [1st Dist.] June 4, 2013, pet. denied) (similar).

**1. THE HEARING PANEL EXCEEDED ITS POWERS BY ARBITRATING AMATTER THAT IS NOT WITHIN THE REALM OF FINRA RULES**

Under the FAA and TAA, a reviewing court must confirm an arbitration award unless grounds exist to vacate, modify, or correct its terms. 9 U.S.C. § 9; Tex. Civ. Prac. & Rem.Code § 171.087. In this case, the FAA governs the FINRA arbitration proceeding. The FAA provides that an arbitration award may be vacated when “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a) (4). Similarly, the TAA allows the court to vacate an arbitration award when an arbitrator “exceeded [his] powers.” Tex. Civ. Prac. & Rem.Code § 171.088(a)(3)(A). An arbitrator’s authority is limited to disposition of matters expressly covered by the agreement or implied by necessity.” *Ancor Holdings, LLC*, 294 S.W.3d at 829. Arbitrators, therefore, exceed their powers when they decide matters not properly before them. *Id.*; see also, *Gulf Oil Corp. v. Guidry*, 160 Tex. 139, 327 S.W.2d 406, 408 (1959). The Section 10(a)(4) inquiry is whether the arbitrators had the authority, based on the arbitration clause and the parties’ submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue. *Ancor Holdings*, 294 S.W.3d at 829; citing, *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314 (5th Cir.1994).

In determining whether an arbitrator exceeded his authority as a basis for vacatur under the FAA, the Fifth Circuit applies the essence test. *Baylor Health Care Sys. v Equitable Plan Servs., Inc.*, 955 F.Supp.2d 678, 693-94 (N.D. Tex. 2013). Under the essence test, if the arbitrator’s decision draws its essence from the contract at issue, the court must accord strong deference toward and sustain the arbitrator’s interpretation of the contract, even if the court disagrees with the arbitrator’s interpretation of the underlying contract, “as long as the arbitrator is even arguably

construing or applying the contract and acting within the scope of his authority.” *Resolution Performance Prod., LLC v. Paper*, 480 F.3d 760, 765 (5th Cir.2007) (internal quotation marks omitted); *Executone Info. Sys., Inc.*, 26 F.3d at 1320. The award must be derived in some way from the wording and purpose of the agreement, and we look to the result reached to determine whether the award is rationally inferable from the contract. *Ancor Holdings*, 294 S.W.3d at 829; citing, *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 n. 3 (5th Cir.1990); see also, *Resolution Performance Prod., LLC*, 480 F.3d at 765 (internal quotation marks omitted); *Executone Info. Sys., Inc.*, 26 F.3d at 320. As long as the arbitrator's award draws its essence from the parties' agreement and is not merely “his own brand of industrial justice,” the award is legitimate. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

The Exchange Act does not grant FINRA the authority to govern and determine issues inherent to the insurance industry and there is no express language that would indicate otherwise. 15 USCA §78; see also, *Fiero v. Fin. Indus. Regulatory Auth. Inc.*, 660 F.3d 569 (2d Cir. 2011). This omission constitutes significant evidence that Congress did not intend to authorize FINRA to regulate and sanction insurance industry participants for issues involving intrinsically insurance matters. *Id.* This is because the regulatory scheme “carefully particularizes an array of available remedies,” for securities related violations. *Fiero*, 660 F.3d at 574. Therefore, “[m]atters involving disputes arising out of insurance business activities are expressly excluded from FINRA arbitration and arbitration decisions on the basis of this exception are not enforceable.” See *Thomas v. Westlake*, 204 Cal.App.4<sup>th</sup> 605, 619, 139 Cal. Rptr.3d 114, 125 (2012).

Unfortunately, the Panel exceeded its disciplinary authority by rendering a decision that is not of the essence of FINRA Rules. *Baylor Health Care Sys.*, 955 F. Supp. at 693-94. The Panel arbitrated a case that was expressly outside the scope of the Panel's disciplinary authority and rendered its own brand of justice that did not follow FINRA Sanction guidelines. As the DOE stated, the purpose of the proceedings was to determine whether there had been any violation of federal securities laws, or NASD, NYSE, MSRB or FINRA Rules. (FINRA 01916). The DOE and the Hearing Panel focused on and evaluated Wiley's accounting and finance methods, his reserves, reinsurance, actuarial calculations, rates, coverage, and mandatory terms of the Agreement, all of which are issues expressly outside the scope of FINRA's disciplinary authority. *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 652 (7<sup>th</sup> 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).

2. **THE PANEL EXCEEDED ITS POWER BY ACTING CONTRARY TO THE EXPRESS TERMS OF FINRA RULES.**

Arbitration is a matter of contract and parties have the right to arbitration according to the terms for which they contracted. *SSP Holdings Ltd. P'ship*, 04-13-00712-CV, 2014 WL 1688112; citing *Western Emp'rs Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 261 (9th Cir.1992). Arbitrators exceed their powers when they decide matters not properly before them. *Forged Components, Inc. v. Guzman*, 409 S.W.3d 91, 104 (Tex. App.—Houston [1st Dist.] 2013, reh'g overruled Aug. 2, 2013) (hereinafter, "*Guzman*"); citing, *Ancor Holdings, LLC* 294 S.W.3d at 829. "To determine whether an arbitrator exceeded his powers, [the court] must examine the language in the arbitration agreement." *Guzman*, 409 S.W.3d at 104; citing, *Allstyle Coil Co., L.P. v. Carreon*, 295 S.W.3d 42, 44 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (quoting *Glover v. IBP, Inc.*, 334 F.3d 471, 474 (5th Cir.2003)); see also, *Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701 (Tex.App.-Houston [1st Dist.] 2009, no pet.) (arbitrator exceeded his powers in issuing award against party not subject to arbitration). Some circuit courts have recognized FINRA arbitration rules themselves constitute an "agreement in writing" under the FAA. *Wash Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4<sup>th</sup> Cir. 2004); *Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863-64 (2d Cir. 1994).

Limitations on an arbitrator's authority must be plain and unambiguous. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469 (5th Cir.2012). The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences v. Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) see also, *Davey v. First Command Fin. Servs., Inc.*, 3:11-CV-1510-G, 2012 WL 277968 (N.D. Tex. Jan. 31, 2012); *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n. 1 (5th Cir.2002) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration.") But "[i]t is only when the arbitrator departs from the agreement, and, in effect, dispenses his own idea of justice that the award may be unenforceable." *Guzman*, 409 S.W.3d at 104; citing, *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 684 (Tex.App.-Dallas 2010, pet. denied) (award may be unenforceable if arbitrator departs from agreement);

(citing *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 1728, 149 L.Ed.2d 740 (2001)).

Therefore, the scope of the Panel's disciplinary authority is determined by the express terms of FINRA's Arbitration Rules. *Guzman*, 409 S.W.3d at 104. FINRA membership constitutes an agreement to adhere to FINRA's arbitration rules and relevant arbitration provisions contained therein. *In the Matter of Dep't of Enforcement v Charles Schwab & Company, Inc.*, Complaint No. 2011029760201 at \*16 (April 24, 2014). FINRA disciplinary proceedings are a type of arbitration crafted specifically to handle securities related matters and are subject to the FAA. *Id.* at \*3. FINRA disciplinary proceeding awards are binding except under very limited circumstances. *Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012). FINRA's arbitration rules govern the scope of the Panel's disciplinary authority. *Wash Square Sec., Inc.*, 385 F.3d at 435; *Kidder, Peabody & Co.*, 41 F.3d at 863-64.

Several provisions of FINRA's Arbitration Code clearly state that, "disputes involving the insurance business activities of a member that is also an insurance company" are exempted from FINRA arbitration. Rule 13200 of FINRA's Code of Arbitration for Industry Disputes ("Industry Code"); Rule 12200 and 12201 of FINRA's Code of Arbitration for Customer Disputes ("Customer Code") and Rule 10101 of FINRA's Code of Arbitration Procedure. Under FINRA Rule 12200's exception for disputes that are, "insurance-only" or even 'intrinsically insurance' fall beyond the scope of arbitration." *Thomas*, 204 Cal.App.4<sup>th</sup> at 629, citing *In re Prudential Ins. Co. of America Litigation*, 133 F.3d at 232. "The purposes of the exclusion are to keep arbitrators away from 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." *Id.*; see also, *IDS Life Ins. Co.*, 266 F.3d at 652.

The Panel exceeded its powers by acting contrary to the express terms of FINRA's Arbitration Code and other FINRA Rules. FINRA Rules expressly state that disputes involving insurance business activities of a member that is also an insurance company are exempt from FINRA's disciplinary jurisdiction. FINRA Rules 12200, 12201, 13200 and 10101.<sup>2</sup> Wiley is a member who is also an insurance company. (FINRA 00477). Wiley's testimony reads as follows;

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<sup>2</sup> See FINRA Industrial Professionals Website. [www.finra.org/Industry/Regulation/FINRARules](http://www.finra.org/Industry/Regulation/FINRARules).

- “Q: ‘You conducted your insurance business through what’s known as a d/b/a, a doing business entity; is that correct?’  
A: ‘That’s correct.’  
Q: ‘And that d/b/a in which you conducted your insurance business was known at Wiley Insurance Agency and Associates; is that correct?’  
A: ‘Short for WIA, yes.’”

(FINRA 0047). Because this case involves insurance business activities of a member, Wiley, who is also an insurance company, WIA, under the express terms of FINRA’s Arbitration Code the Panel should never have allowed this case to be arbitrated. The Panel assumed authority and allowed this case to be arbitrated contrary to express contractual provisions and therefore have exceeded their powers. *Rain CII Carbon, LLC*, 674 F.3d at 472; *see also, Western Emp’rs Ins. Co.* 958 F.2d at 261. Therefore, the Panel in this case exceeded its powers within the meaning of 9 USC § 10(a)(4), which is grounds for vacatur.

**3. THE HEARING PANEL EXCEEDED ITS POWERS BY DECIDING THE PRIVATE RIGHTS OF THE AGREEMENT.**

The SEC has long recognized that in relation to the application of the language of Rule 2010 (as codified in prior iterations of the rule) it is not the SEC’s or FINRA’s function “to decide private contract rights between the parties.” *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957). This is because Texas law governs contractual interpretation between two private parties.<sup>3</sup> An arbitration award may also be vacated if it is “in manifest disregard of the terms of the parties’ relevant agreement.” *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) (internal quotation marks and alteration omitted).

**4. THE HEARING PANEL EXCEEDED ITS AUTHORITY BY FINDING FACTS NOT SUPPORTED BY EVIDENCE, PREJUDICING WILEY’S RIGHTS.**

The Panel majority fundamentally based its allegations of Rule 2010 violations against Wiley on the basis of its interpretation of the Agreement and Farmers’ agent guides and manuals. (FINRA 001075-1095). The Panel majority’s fact findings regarding the duties and obligations Wiley owed to Farmers is plainly misrepresented, misstated and departs from the actual language of the Agreement. (FINRA 00034-36 and 001075-1095). This Agreement, known to the DOE since it began this investigation, expressly states that Wiley is “an independent contractor for all purposes” and that Wiley has the “sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided that the Agent conform to normal good business practice, and

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<sup>3</sup> Please refer to section B for more detailed explanation of how the Hearing Panel decided the private rights of Wiley and Farmers’ Agreement.

to all State and Federal laws governing the conduct of the Companies and their Agents.” (FINRA 000036). Wiley has even repeatedly testified that he has total control over his business practices and that Farmers does not control his insurance business affairs but offers guidelines and programs as a means for convenience. (FINRA 000600-602, 619). In fact, his statement that the manuals and guidelines are recommendations and not mandatory rules is corroborated with other testimony. Mr. Edmonds’ testimony indicates that the manuals are what Farmers expect the agency to do, yet Mr. Edmonds has not had any training on the extent to which you can hold independent contractors’ conduct to conformity with these manuals. (FINRA 000421). Other than this testimony, the only evidence from which the Panel could have derived its finding that the manuals are mandatory is the actual rendition of the manuals themselves. However, the Panel grossly misstates what the manuals say in attempt to construe the manuals as dictating mandatory rules Farmers imposed onto the independent contractor agents. The Hearing Panel majority states,

“During the relevant period, Farmers Insurance Group required its agents to utilize a computer program called Agents Credit Advice (“ACA”) to process insurance premiums. Farmers Insurance Group manuals explicitly instructed agents on how to use the program. One manual directed that all insured remittances will be processed through the ACA system. Another stated that agents were to ‘Submit an ACA... on a daily basis as [a] premium is received.’ When an agent submitted an ACA report recording customer premium payments, Farmers Insurance Group credited the policies and actives or renewed them as appropriate. Farmers Insurance Group required the agent, within one business day, to deposit the premiums into a special account Farmers Insurance Group characterized as a co-bank account, from which the company collected premiums...The manuals clearly delineated the requirement to deposit premiums promptly into the co-bank account.”

(FINRA 001077-1078). There is no evidence to support the Panel majority’s finding. The page of the ACA Manual regarding Agent Responsibilities that the Panel majority uses as support for its position that the ACA program is mandatory actually states:

1. Submit an ACA through the Agency Dashboard system, or the paper form on a daily basis as premium is received.
2. It 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.  
Use of the ACA Co/Banking program necessitates that the money to cover each ACA be available in the Co/Banking Account on the business day after the ACA is transmitted. The good business practice of depositing collections daily is now essential.
3. Each agent is ultimately responsible for premium or Prematic (Farmers Easy Pay) payments personally collected. If you receive premium from another agent's insured, it is your responsibility to report that receipt on your ACA and to have the funds available in the Co/Banking Account to cover that receipt. See the following "Working with the ACA System" page for more information.
4. Use one ACA for each day's receipts. Do not open a new ACA for each receipt.
5. Receipts must always bear the exact date and time when premium funds were collected. If a claim occurs, it may be necessary to determine when an insured was legally covered by verifying the date and time of the receipt. For policy payments received through the mail or left at the

agency, issue a receipt indicating the day and time the payment is physically received by the agency. Mail a copy of the receipt to the insured.

6. You must close an ACA in order for the insured to be credited for premium payments. Until the ACA is closed and transmitted, the insured will not be credited.

7. Assigned Risk and JUA payment premiums are not reported through the ACA system and are not to be deposited in the Co/Banking account. These monies are to be forwarded to the appropriate agency or company directly and do not come under Farmers premium collection procedures.

8. Postdated checks cannot be accepted with the ACA program.

9. If, for any reason you are unable to key in your ACAs from your computer terminal (due to fire, system problem, theft, office move, etc), the Home Office Co/Banking department can key them for you. In these cases, use form #31-1092, available on the Agency Dashboard, to submit your ACAs to the Co/Banking department until your computer problem is solved. It is recommended that form #31-1092 be used in cases of emergency (e.g., after three consecutive days of system unavailability).

(FINRA 001000). Clearly the Hearing Panel majority ignores the language that is contrary to its position that the ACA program is mandatory and specifically did not cite to the word recommendation in the second sentence.

(FINRA 001077 and 001000). In fact, the Panel's rendition cuts out most of the first sentence because it shows how other options for remitting payment to Farmers can be used, i.e., by way of paper form or the Agency Dashboard system. (FINRA 001000). Even more, the rest of the page has language reflecting multiple methods for remitting payment, keeping track of money, collecting money and suggestions on how to implement premium collection procedures that work for the agent. (FINRA 001000).

Even more there are repeated statements throughout the ACA Manuals such as, "[i]t has always been the *recommendation* of [Farmers] that agents open and close ACA's and deposit premiums each day..." and, "ACA... is now *available* to all agents on the Agency Dashboard." (FINRA 0010000; 000974) (italics added). The ACA Guide also provides many different options to the agents, illustrating how variable and non-mandatory the program is. (FINRA 000998). For instance, there are many ways to process payments, such as EasyPay, over the phone, by cash or credit card. *Id.* Other insurance companies, like Texas Windstorm has similar preferences and offer different programs that agents can chose depending on what works best and is convenient for them. (FINRA 000614). If an agent uses the ACA system, as part of "good business practices" it is recommended that once an agent receives an insurance premium payment, he or she enters that payment into the system and then deposits that amount into the co/bank account the agent has with Farmers within one day. (FINRA 001094). However, Farmers allows about a thirty day window from the date the agent enters the premiums into the ACA program to when the agent must deposit the premiums because the agent has discretion regarding when he deposits the premiums. *Id.* In this case the Panel majority provided no evidence to support its interpretation of the Agreement.

The Panel's gross misstatements of the written evidence is pervasive throughout the Decision. (FINRA 001075). The Panel majority merely picks and chooses snippets of evidence in order to create the appearance of supportive evidence for whatever position it makes, even though the snippets are taken completely out of context. When placed in context the snippets clearly have completely different meanings. (FINRA 0001078). For instance, in footnote 10 of the Decision, the Panel majority uses the phrase,

“Deposit all cash collections, which balance to the ACA, within one business day’ and defined ‘cash’ to include currency, checks, and credit cards. Id. at 2. The ACA Manual stated ‘All monies received by you must appear on you ACA... any agent submitting an ACA must deposit all checks and cash reported... within one business day after that ACA is closed,’ as evidence to support its fact finding that ‘[t]he manuals clearly delineated the requirement to deposit premiums promptly into the co-bank account.’”

(FINRA 001077-001078). This is yet another gross misstatement of fact and written record evidence. The Panel majority does not even discuss that this citation is from the Agents guide on how to resolve the issue of when ACA receipts do not balance the deposits despite the fact Farmers does give alternate recommendations on how to reconcile balance differences. (FINRA 000967-968). Contrary to the Panel majority's interpretation, the page of the Agents Guide cited in footnote 10 of the Decision is actually a table that gives guidelines and suggestions to agents when their ACA receipts do not balance the co/bank account. (FINRA 000967-968).

What is most concerning about the Panel majority's interpretation of this page is that the Panel fails to acknowledge the fact that balance discrepancies are a common issue that can be resolved with cash deposits. Farmers provides suggestions to illustrate how some deposits don't have to go through the ACA system when rectifying the discrepancy. (FINRA 000967-968) Therefore, this page actually shows how discrepancies in account balances and the ACA system can be resolved with cash deposits, and this evidence is contradictory to the Panel majority's main argument for conversion of funds. Farmers actually recommends cash deposits into the co/bank account to pay the debts owed to Farmers. This practice cannot constitute conversion when clearly this is company policy or a common problem, so much that the Agency Operations manual recommends this type of payment to resolve the balance discrepancies. (FINRA 000967-968). This is exactly in line with Wiley's defense.

Thus, the Panel majority's gross misstatement of fact with no supporting evidence gives rise to the veracity and authority of the Decision's findings supporting the conversion claims. The Panel majority's factual findings supporting the conversion claims are based entirely on the Panel majority's interpretations tends to be a gross misstatement of fact usually unsupported by evidence questions the Panel's interpretation of the Agreement and the rights and duties the Panel determined are the express contracted rights and duties. Therefore a careful analysis of

the fact findings is important to ensure there is no obvious bias against Wiley and to ensure that the Panel majority has at least some evidence supporting their conclusions. If not, the Decision should be vacated and dismissed for evident partiality. *SSP Holdings*, 2013 WL 1688112.

First, the Hearing officer determined that those gross misstatements that are unsupported by fact and evidence actually support Wiley's testimony, yet are the basis for the conversion claims and sanctions that were awarded against Wiley. This is simply a manifest injustice and prejudice against Wiley.

**5. THE HEARING PANEL REFUSED TO ADMIT MATERIAL EVIDENCE GREATLY PREJUDICING WILEY'S RIGHTS.**

The DOE and Hearing Panel did not admit evidence during the hearing that demonstrated the insurance industry's standards and practices in Texas relating to Wiley's scrutinized insurance business activities. These are the same activities which he would ultimately be sanctioned for and which related to insurance business practices in general. The Panel did not allow Wiley to produce witnesses who were former Farmers managers identified by Wiley in his on-the-record statement. These managers provided specific information to Mr. Wiley concerning the practices at issue. (FINRA 00437). The Panel did not even allow discussion of other agents' practices. (FINRA 00437). Section 15A(b)(8) of the Exchange Act provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. *Scott Epstein*, Exchange Act Release No. 59328 at \*53 (Jan. 30, 2009, *aff'd*, 416 F.App'x 142 (3d Cir. 2010.)

The Panel refused to hear material evidence that ultimately substantially prejudiced Wiley's rights to a fair arbitration. The Panel essentially did not allow evidence that would establish the insurance industry business standards which was necessary in order for the Panel to objectively evaluate Wiley's insurance business practices. The Panel and the DOE would not allow evidence to demonstrate or establish insurance industry business standards. (FINRA 437). The Hearing Officer stated, "I'm going to sustain the objection because the way you're going about it is to inquire as to this witness's knowledge as to the other practices of other agents." *Id.* Other agents' insurance business practices is precisely what should have been introduced as evidence in order to show the standards by which to properly evaluate Wiley's business practices as an insurance agent.

In attempt to establish some insurance industry standards, the Panel allowed testimony of Daniel Edmonds, who knew nothing about independent contractor agency agreements. (FINRA 000420-421). Mr. Edmonds had never even had any specific training on independent contractor relationships and even stated, "I know the independent contractor relationship at a high level. I don't know the details. I don't know what [Farmers] can have an

independent contractor do or not do.” (FINRA 000420). He did not have any training on how, or whether, Farmers held independent contractor agents responsible for conforming with the manuals. (FINRA 000421). How can someone who does not know what an independent contractor can do or not do be able to establish the standards of what an independent contractor can or cannot do? Despite Mr. Edmonds’ ignorance of independent contractor agreements, his testimony was the basis for the Hearing Panel’s decision for evaluating Wiley’s insurance business practices. (FINRA 0001075-001095). This is inherently biased, incomplete, inaccurate, unfair and against the law. *IDS Life Insurance*, 266 F.3d at 652; see also, *Thomas*, 204 Cal. App. 4th at 619.

FINRA Rule 9263(a) gives the Hearing Officer authority to “exclude all evidence that is irrelevant, immaterial, unduly repetitious or unduly prejudicial.” The Hearing Officer allowed a FINRA’s “Principal Investigator” to testify regarding the authenticity of the exhibits and the DOE’s collection and analysis of information as statement of facts without having any firsthand knowledge of the case but is able to speak with such authority that his word has more authority than Wiley’s testimony. The Principal Investigator put together some documents to show how Wiley always had a negative balance. (FINRA 001088). However, because the Principal Investigator does not have firsthand knowledge of how the insurance business operates, he did not include Wiley’s line of credit, and other available financial sources that Wiley could draw upon if needed. FINRA 001088. This is yet another example where the Investigator’s limited knowledge of the facts and the insurance industry was used as authority by the Panel to make fact findings that are either unsupported by evidence or totally prejudicial. No one really knew the extent of Wiley’s financial situation, the money he had, and the money he could draw on. FINRA 000920). This is unduly prejudicial against Wiley because the Principal Investigator had no firsthand knowledge of the situation outside of the FINRA investigation. Additionally, the DOE did not timely file a motion for leave to designate an expert witness and did not provide the witnesses’ qualifications, including other proceedings in which the witness had testified, a list of publications, and copies of publications not readily available. FINRA 9242(a)(5). Additionally, the Hearing Panel determined that establishing the exact type of relationship Farmers and Wiley and how the monies were transferred is absolutely crucial in order to make a proper analysis of whether Wiley converted funds or not. However, the Panel it is not necessary to establish that there a distinction between Farmer’s customers and WIA’s customers. (FINRA 439). The Panel also did not think it was necessary to allow evidence that would establish who had the immediate right to possession of the funds in question or who had ownership over the funds. And FINRA never established what comprises ownership, who had the right to own and possess the funds, nothing

of the sort was ever established. In fact, the Order denying Wiley's request for a more definitive stated that Wiley has sufficient notice and that there is no need for evidentiary details. (FINRA 00107). While the Panel may think that no evidentiary details are relevant, (FINRA 000432-000435), it certainly is important when evaluating a conversion claim, especially when money is transferred through many accounts, hands and possessors. Establishing who has the right to the money will illustrate if there actually was even conversion. The DOE and the Panel never established the standard for conversion, the rights of the possessors, when monies could be transferred and from where nor any of the elements to support a conversion claim. Just stating that conversion violates 2010 is not sufficient evidence.

#### B. MANIFEST DISREGARD OF LAW AND FACT

Manifest disregard of the law occurs when an arbitrator: (1) knows the law; (2) recognizes that the law requires a particular result; and (3) simply disregards the law. *Humitech Dev. Corp.*, 424 S.W.3d at 795; *Pheng Invs., Inc.*, 196 S.W.3d at 332; see also, *Brabham v A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 381–82 & n.5 (5th Cir. 2004). The disregard of the law is “manifest” if it was “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.” *Humitech Dev. Corp.*, 424 S.W.3d at 795. Other circuit courts have similar findings. A party seeking vacatur for manifest disregard of the law must show not only that “the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,” but also that “the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.” *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n. 1 (2d Cir.2011). Common law arbitration and statutory arbitration coexist in Texas, it is irrelevant whether the parties intended a statutory or common law arbitration if the proceeding can be upheld under either system. *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977); citing *Forshey v. H&H R.R. Co.*, 16 Tex. 516, 538 (1856).

The Panel majority disregarded Wiley's contention that Texas law controls in this case, especially when interpreting insurance business related matters and when interpreting private contractual rights. (FINRA 001087). Throughout the investigation Wiley continually reminded the DOE that contract interpretation are governed by the State of Texas and not FINRA rules. (FINRA 000028). Wiley cited to *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113,116 (1957) and informed the DOE that it is not the SEC or FINRA's function “to decided contract rights between parties.” (FINRA 000029). The Panel majority states, “FINRA Rules, not Texas law, governed Wiley's obligations.” *Id.* The Panel majority supported its rejection that Texas law controls in this case by stating that “Texas criminal law is not relevant because ‘FINRA proceedings are not criminal matters’ and ‘standards from state

criminal law conversion statutes are not applicable' to a conversion charge alleging violation of the high ethical standards mandated by NASD RULE 2110... to the extent that Texas law, civil or criminal, may conflict with FINRA rules, 'SRO Rules approved by the Commission... preempt state law when the two are in conflict.'" (*Id.* at n. 58). Again, just as the Panel majority picked and chose snippets of evidence to support its finding of facts, the Panel majority did not give an accurate rendition of the law it cited to support its decision to disregard Texas law in this case. Therefore, the arbitrator knew about the existence of the governing legal principle and decided to ignore it or pay no attention to it.

Since 1869, federal and state regulatory laws have specifically segregated insurance regulation from securities regulation and mandated that insurance regulation be specifically subject to state regulation. *Paul v. Virginia*, 75 U.S. 168, 183 (1869). The McCarran-Ferguson Act, (the "MFA") vested in the states the primary power to regulate the insurance industry. 15 U.S.C.S. § 1012. The MFA states, in relevant part, 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." *Fredericksburg Care Co., L.P.*, 407 S.W.3d at 814-15; 15 U.S.C. § 1012(b); *see also*, *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500-01, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993); *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir.1998). Texas has enacted specific laws for the purpose of regulating the insurance industry which have been codified in the Texas Insurance Code. The Exchange Act and other securities federal laws have not been enacted for the purpose of regulating the business of insurance and are not in conflict with the Texas Insurance Code. FINRA Arbitration rules limit FINRA's authority to exclude matters that involve disputes regarding insurance business activities of a member that is also an insurance company. FINRA Rules 12200, 12201, 13200 and 10101.

This same reasoning comports with contract law. Contract law being regulated by state law has been well established for more than a century. The SEC has long recognized that in relation to the application of the language of Rule 2010 (as codified in prior iterations of the rule) it is not the SEC's or FINRA's function "to decide private contract rights between the parties." *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957). The Panel majority should not have disregarded Texas law for this case, nor, as discussed in detail above, should the Panel have been interpreting the private rights of Wiley and Farmers under the Agreement.

However, under Texas common law, a trial court can invalidate an award only if the arbitrator, in making the decision, committed fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an

honest judgment. *Nuno v. Pulido*, 946 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1997, no writ). A mere mistake of fact or law is insufficient under the common law to set aside an arbitration award. *Id.* Only those errors of fact or law that result in a fraud or some great and manifest wrong and injustice warrant setting aside an arbitration award. *Id.*

Even if the Panel majority merely made this legal conclusion without misconduct or wrongful intentions, this mistake has caused great manifest wrong and injustice to Wiley. Because of the Panel's decision not to abide by Texas law, the Panel erroneously held Wiley's insurance business practices to the standards of the securities industry and ultimately barred him from ever participating in the securities industry. Had the Panel not disregarded Texas law's applicability to these issues, this case would not be arbitrable under FINRA rules and Wiley would not have been sanctioned and barred from the securities industry for life for operating within the legal realms of the insurance industry.

**C. THE DOE AND HEARING PANEL HAD NOTICE OF WILEY'S CONCERNS REGARDING FINRA'S SCOPE OF DISCIPLINARY AUTHORITY.**

Throughout the disciplinary proceeding and investigation, Wiley indicated to FINRA the fact that the DOE and the Panel were acting outside their scope of authority and jurisdiction. On June 4, 2012, Wiley reminded FINRA that the only issue at hand was an issue of timing that nothing related to any wrongdoing or illegal activity, there were no damages, nothing was owed or misplaced and that he was an independent contractor in the insurance business subject to the laws of Texas and the Agreement. Exhibit 1, *Letter from David Augustus to David L. Fenimore, June 4, 2012*. A true and correct copy is attached hereto and incorporated herein. On September 11, 2012, Wiley submitted the Wells Submission letter which outlined all of Wiley's concerns about FINRA's authority and jurisdiction over the case. Exhibit 2, *The Wells Submission Letter, September 11, 2012*. A true and correct copy is attached hereto and incorporated herein. The Wells Submission states in part:

"FINRA enforcement staff has grossly overstepped the bounds of its rights and responsibilities in recommending disciplinary action against him based on the facts and circumstances surrounding his contractual relationship with various Farmers-related insurance companies. In addition, where, as here, FINRA enforcement staff recommends action with the potential result that an individual may be barred for life from the securities industry, one would expect FINRA enforcement staff to conduct its investigation with a weight equal to the weight of the action they recommend... the 'investigation' ... appears woefully inadequate to the purpose of determining whether any securities rules or regulations were violated. At the heart of the inadequacies is FINRA enforcement staff's attempt to apply securities-industry rules to insurance-industry business practices. Unlike other financial regulation, since the 19<sup>th</sup> century most insurance regulation has been carried out by the states... The recommendation of FINRA enforcement staff inappropriately seeks to breach this wall of separation... The dangers associated

with FINRA enforcement staff reaching into the clear boundaries of the insurance industry have become manifest in its investigation”

See Exhibit 2. The Wells Submission letter continues to discuss all of the issues that make up the foundation of Wiley’s position at the time and essentially the same issues brought up in the Wells Submission Letter are the same issues on appeal. *Id.* Wiley’s assertions that FINRA’s enforcement staff was exceeding its authority were completely ignored. The DOE and the Panel assumed jurisdiction and inappropriately arbitrated the matter.

**D. THE HEARING PANEL DID NOT CONSIDER MITIGATING CIRCUMSTANCES**

Wiley clarified the alleged misstatements, provided all information upon request, and was always cooperative with FINRA’s investigation despite believing FINRA had no authority to request information regarding this matter. Exhibit 1. Wiley’s actions were nothing but professional. (FINRA 000383). Wiley never concealed any facts or hindered FINRA’s investigation. (FINRA 001093-1095).

Grievances of similar situations, or even more harmful situations, have received fewer sanctions. *Dep’t of Enforcement v. Allen Wayne St. Amour*, No. 2011028324101, (December 15, 2013) (respondent was only suspended for four months); *Dep’t of Enforcement v. Douglas A. Troszak*, No. 2011028502101, (May 16, 2014) (respondents were suspended for about a year and a half); *Dep’t of Enforcement v. Jeffrey Geraci*, No. 2010023044101, (January 18, 2013) (respondent was only suspended for two business days). A registered representative who concealed seven annuity switches, falsified firm records, intentionally misrepresented facts and concealed facts during an investigation was only barred for six months. *Dep’t of Enforcement v. Jeffrey B. Pierce Waltham, MA*, No. 2007010902501, (Oct. 1, 2013). Parties that failed to timely file transactions, implement supervisory activities, structure cash deposits and commingled customer funds with non-customer funds were sanctioned and banned from the industry for only six months. *Dep’t of Enforcement v. Highland Financial, Ltd. and Gordon Smith*, No. 2011025591601, (Sept. 27, 2013).

The Decision cites to other enforcement proceedings regarding conversion of insurance premiums where the circumstances are way more egregious or have completely different factual scenarios. The DOE cites to an example where an insurance agent kept the money for five months, lied to his client, and failed to purchase the insurance for his client despite collecting the premiums. *Dep’t of Enforcement v. Thomas*, 2004 WL 3202334, \*2 (N.A.S.D.R. June 30, 2004). In the other example, the premiums were never repaid and the agent never responded to NASD investigation requests. *Dep’t of Enforcement v. Grimes*, 2002 WL 31230999, \*3 (N.A.S.D.R. March 2, 2002). The third example is not relevant because it discusses sanctions for unsuitable recommendations in securities

and mutual funds. *Dep't of Enforcement v. Raghavan Sathianathan*, 2004 WL 3202340 (N.A.S.D.R. November 30, 2004). In this case, there was no material wrongdoing and no damages, the only issues were timing, premium ownership, and possessory rights.

#### IV. CONCLUSION

FINRA has the power to initiate disciplinary proceedings against members and associated persons for violating FINRA rules, SEC regulations, or statutory provisions and can "appropriately discipline" their members with regard to securities rules and regulation violations. 15 U.S.C. §78s(h)(3); see also, *Fiero*, 660 F.3d 569 (2011). The Panel majority never should have allowed this case to be arbitrated because clear law and express FINRA Arbitration rules limit FINRA's disciplinary authority over disputes involving the insurance business activities of a member that is also an insurance company, which was the case here. FINRA Rules 12200, 12201, 13200 and 10101.

The Hearing Panel exceeded its powers because the Panel majority made fact findings and legal conclusions that grossly misstate the evidence and law, determined the private contractual terms of the Agreement, and refused to hear material evidence that severely prejudiced Wiley's rights. All of these actions collectively or alone, give sufficient grounds for vacatur under the FAA and TAA. The DOE and Panel majority were grossly negligent in their factual and legal findings, and were ignorant or indifferent towards the law and the limitations of FINRA's disciplinary authority. The Panel majority found Wiley failed to observe high standards of commercial honor and just and equitable principles of trade. FINRA Rule 2010. Yet, quite remarkably, the Panel majority and the DOE never established or determined what the applicable standards of commercial honor and just and equitable principles of trade even are, especially as they pertain to Wiley's insurance business practices. Moreover, the Hearing Panel would not even allow material evidence illustrating insurance industry standards to be introduced during the hearing.

Because of the DOE and Panel majority's impropriety, gross negligence and improper extension of disciplinary authority, Wiley now faces a lifetime bar from the securities industry despite the fact he never even participated in the securities industry. Wiley did nothing materially wrong, violated no law, rule or regulation, but instead complied with standard insurance practices and always conducted himself and his business activities with the utmost professionalism and good character. The authority granted to the SEC and the purpose of FINRA's arbitration is not to allow punishment for lawful behavior under the guise that "the punishment was to deter future behavior in attempt to protect the securities industry." *Wright v. Sec. & Exch. Comm'n*, 112 F.2d 89, 94 (2d Cir.

1940). Unfortunately, this is exactly what the disciplinary proceeding has done here. This entire disciplinary proceeding has been a great tragedy, expense, hardship and major injustice to Wiley. There are not many egregious situations like this case, which clearly creates grounds for vacatur. Therefore, Wiley respectfully requests this case be vacated and the Decision to be dismissed with prejudice.

**V. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Wiley respectfully requests the NAC:

A. Upon hearing the evidence in this matter hold that the Hearing Panel exceeded its scope of authority and jurisdiction; and

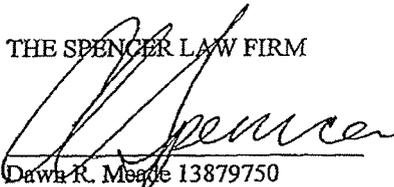
B. Vacate and dismiss the Department of Enforcement Hearing Panel's Decision and Sanctions against Wiley with prejudice,

C. At the very least, amend the Decision and Sanctions held against Wiley and not be permanently prohibit him from practicing in the securities industry or permanently barred him from participating or associating with FINRA members and associated persons; and

D. Any and all such further relief Wiley may be entitled to.

Date: July 17, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opening Brief was served on the following parties via first class certified United States mail on July 17, 2014:

Leo F. Orenstein  
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Rockville, MD 20850

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*Via CMRRR No. 70132250000102323038*

FINRA  
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Attn: Lisa Jones Toms  
Assistant General Counsel  
1735 K Street, NW  
Washington, DC 20006-1506

*Via CMRRR No. 70132250000102323021; and*  
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June 4, 2012

David L. Fenimore  
FINRA Enforcement  
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Rockville, MD 20850

*Via e-mail: [david.fenimore@finra.org](mailto:david.fenimore@finra.org)*

*Re: Keilen Wiley, CRD No. 4259612  
FINRA Matter No. 2011028061001*

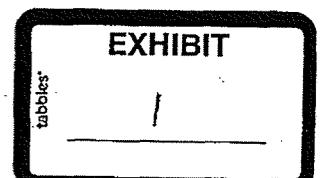
Dear David:

I write in response to your correspondence dated May 14, 2012.

Please find the following items enclosed:

- General banking ledger for WIA & Associates business banking account (4655)<sup>1</sup> for the period January 1, 2011 through May 31, 2011 produced in response to item 2a in your correspondence;
- Check ledger for WIA & Associates business banking account (4655) for the period January 1, 2011 through May 31, 2011 produced in response to item 2a in your correspondence;
- General banking ledger for WIA & Associates merchant banking account (5314) for the period January 1, 2011 through May 31, 2011 produced in response to item 3a in your correspondence;
- Check ledger for WIA & Associates merchant banking account (5314) for the period January 1, 2011 through May 31, 2011 produced in response to item 3a in your correspondence;
- General banking ledger for Mr. Wiley's personal banking account (5420) for the period January 1, 2011 through May 31, 2011 produced in response to item 4a in your correspondence;

<sup>1</sup> The number indicated represents the last four digits of the referenced account number. Please note that the account ending in 4655 is the same account discussed during Mr. Wiley's testimony as ending in 2418. Mr. Wiley's account security was compromised and a new account number was assigned to this account as a result.



- Check ledger for Mr. Wiley's personal banking account (5420) for the period December 14, 2010 through May 12, 2011 produced in response to item 4a in your correspondence;
- Mr. Wiley's PayDayMax loan history statement produced in response to item 4a in your correspondence; and
- Business credit statements for WIA & Associates account (8734) for the period February 2011 through June 2011 produced in response to item 5 in your correspondence.

A few comments are necessary. First, the ledgers are documents that Mr. Wiley was able to generate by accessing his bank's internet portal. Traditional account statements as well as copies of checks have been ordered and will be produced as a supplemental production. Mr. Wiley has been informed that the copies should be available to him this week. Thank you for your patience in this regard.

The second comment is more substantive. Your correspondence requests "[a]n analysis showing deposits of the Client Premiums into accounts controlled by Mr. Wiley, movement of Client Premium funds between accounts controlled by Mr. Wiley, and payment of the Client Premium from Mr. Wiley's accounts into the ACA Co/Banking account." Unfortunately, we believe such an analysis giving the location of all Client Premiums at all times is not possible given the information currently available to us.

The following is information, unavailable to us, is necessary in order to paint such a picture:

- Records of Client Premiums paid to Mr. Wiley in cash (ACA receipts);
- Records of Client Premiums paid to Mr. Wiley via checks made payable to Farmers (ACA receipts, which still would not be definitive);
- Records of Client Premiums paid via Farmer's ACA credit card payment system (ACA receipts); and
- Itemization of Client Premiums paid to Mr. Wiley via credit card through this merchant account (as opposed to a single general "deposit" description for all such activity on a given day without regard to the sources that make up the deposit) (not available from bank records; ACA receipts would help).

What we do know is that all Client Premiums paid to Farmers through Mr. Wiley were in fact turned over to Farmers. There is no dispute that this is true. The issue is simply an issue of timing, and timing is an issue largely left to the discretion of Mr. Wiley as an independent contractor under his agreement with Farmers. No Farmer's customer who was a client of Mr. Wiley's ever had an issue regarding its insurance coverage on the basis that its funds were not actually received by Farmers.

David L. Fenimore  
June 4, 2012  
Page 3

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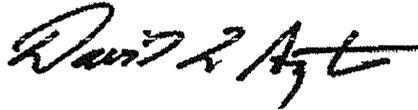
What we cannot know is the particular breakdown of Client Premiums that Mr. Wiley was supposed to have in his possession at any given time and, given the procedures for turning premiums over to Farmers explained by Mr. Wiley, how Mr. Wiley maintained these funds. Again, we simply know that Farmers received all the funds in question.

I will forward to you the remaining documents as soon as I receive them and will contact you to discuss how we might be able to move toward a mutually acceptable resolution of this matter in the near future.

In the mean time, please let me know of any questions or concerns you may have.

Very truly yours,

THE SPENCER LAW FIRM

A handwritten signature in black ink, appearing to read "David L. Augustus", written in a cursive style.

David L. Augustus

CC: Client

Wiley.001 09.11.12 cover

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Independent Office of Disciplinary  
Affairs  
c/o David Kenmore  
FINRA Enforcement  
15200 Omega Dr. Ste. 300  
Rockville MD 20850

2. Article Number

(Transfer from service label)

7008 2810 0000 4697 8381

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September 11, 2012

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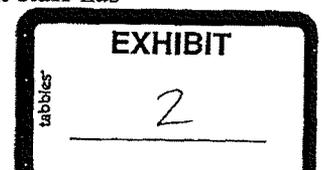
*Via e-mail: [david.fenimore@finra.org](mailto:david.fenimore@finra.org)  
& Certified Mail, Return Receipt Requested*

*Re: Keilen Wiley, CRD No. 4259612  
FINRA Matter No. 2011028061001*

Please accept this correspondence as Mr. Wiley's Wells Submission sent in response to the Wells Notice received from Mr. David Fenimore on August 20, 2012. As more fully set forth herein, the Independent Office of Disciplinary Affairs should decline to authorize the filing of a formal complaint against Mr. Wiley for at least the following reasons:

- Financial Industry Regulatory Authority ("FINRA") enforcement staff members failed to conduct an adequate and objective investigation and have made their recommendations without a proper basis for doing so;
- Mr. Wiley fully performed his Agent Appointment Agreement;
- No party was harmed by any actions taken by Mr. Wiley in the performance of his Agent Appointment Agreement; and
- The recommended action by these enforcement staff members inappropriately interferes in insurance industry practices.

Although FINRA possesses every right and responsibility to investigate its members and associated persons in appropriate situations for the purpose of protecting investors and the integrity of the financial industry, my client believes FINRA enforcement staff has grossly overstepped the bounds of its rights and responsibilities in recommending disciplinary action against him based on the facts and circumstances surrounding his contractual relationship with various Farmers-related *insurance companies*. In addition, where, as here, FINRA enforcement staff recommends action with the potential result that an individual may be barred for life from the securities industry, one would expect FINRA enforcement staff to conduct its investigation with a weight equal to the weight of the action they recommend. FINRA enforcement staff has



chosen, however, not to conduct the serious investigation its recommendation demands. This submission outlines a number of the reasons for these conclusions. It is also fundamentally important to recognize the undisputed fact that none of Mr. Wiley's customers, or any of the Farmers-related insurance companies, was harmed in any way by Mr. Wiley's actions.

As an initial matter, the "investigation" undertaken by FINRA enforcement staff giving rise to the recommendation appears woefully inadequate to the purpose of determining whether any securities rules or regulations were violated. At the heart of these inadequacies is FINRA enforcement staff's attempt to apply securities-industry rules to insurance-industry business practices. Unlike other financial regulation, since the 19<sup>th</sup> century most insurance regulation has been carried out by the states. In 1869 the United States Supreme Court declared insurance to be specifically subject to state regulation. Since then, several legal attempts to bring insurance regulation under the jurisdiction of the federal government pursuant to the Constitution's interstate commerce clause have failed. When the Supreme Court ruled in 1944 that the federal government could regulate the business of insurance under the authority of the commerce clause, Congress quickly responded in 1945 with the McCarran-Ferguson Act to vest in the states the primary power to regulate the insurance industry. This Congressionally-reinforced separation of power continues to exist today. The recommendation of FINRA enforcement staff inappropriately seeks to breach this wall of separation.

The dangers associated with FINRA enforcement staff reaching into the clear boundaries of the insurance industry have become manifest in its investigation of Mr. Wiley. It does not appear to us that FINRA enforcement staff made an adequate investigation, to the extent an investigation was even conducted at all, into the insurance industry's standards and practices in Texas relating to the activities of Mr. Wiley. FINRA enforcement policies charge enforcement staff with the responsibility to engage in an objective fact-finding process without bias for or against the parties involved. Yet, it does not appear that FINRA enforcement staff made any attempt to interview the former Farmers managers identified by Mr. Wiley in his on-the-record statement regarding the specific information provided to him concerning the practices at issue. In fact, it does not appear that FINRA enforcement staff made any attempt to verify what, if any, information Farmers representatives actually provided to Mr. Wiley concerning the practices at issue. More generally, it also does not appear that FINRA enforcement staff made any attempt to investigate or determine the insurance industry standards in Texas relating to the practices at issue.

For example, it does not appear that FINRA enforcement staff made any attempt to interview other individuals who operate insurance businesses in Texas similar to the one Mr. Wiley operated – i.e., a dual agency business as a contractual independent contractor to one or more insurers – to determine the insurance industry standards in this state relating to the operation of such a business. An insurance agent is not a monolithic position and, given the power reserved to the states to regulate insurance practices, insurance standards and practices cannot be assumed to be uniform across the states. Attention must be given to the particulars of the context of any individual agent in order to determine the appropriate standards by which to measure his or her actions. It seems wholly impossible for FINRA enforcement staff to fulfill

their investigative charge and to analyze the evidence and applicable law in order to make a preliminary determination of whether or not a violation of FINRA rules appears to have occurred when FINRA enforcement staff has failed even to identify necessary agent-specific evidence and the applicable law in Texas.

In this instance, according to the referenced Wells Notice, FINRA enforcement staff members have determined to recommend disciplinary action against Mr. Wiley for failing to "observe high standards of commercial honor and just and equitable principles of trade." Yet, quite remarkably, these FINRA enforcement staff members have wholly failed to first determine what the applicable standards of commercial honor and just and equitable principles of trade even are. Given that all employees are subject to FINRA's Code of Conduct and policies in order to ensure objectivity in these types of matters, it is notable that the approach to this investigation taken by FINRA enforcement staff members seems to itself violate the very rule invoked against Mr. Wiley. This investigation raises serious due process concerns that Mr. Wiley intends to present, highlight, and challenge at every stage of this process. Notice is hereby given that Mr. Wiley considers central to his defense the ability to investigate and present evidence concerning the actions and inactions of FINRA's enforcement staff members in the course of their investigation of Mr. Wiley.

Another related failure of FINRA's enforcement staff in the course of this investigation is their failure to take into account the proper significance of Mr. Wiley's status as an independent contractor to the Farmers-related insurance companies and, more specifically, how that unique status under Texas law<sup>1</sup> should impact their consideration of Mr. Wiley's actions. It cannot be disputed that Mr. Wiley's Agent Appointment Agreement with the Farmers-related insurance companies unequivocally states that Mr. Wiley is "an independent contractor for all purposes" and that "[n]othing contained [in the agreement] is intended or shall be construed to create the relationship of employer and employee[.]" The significance of being an independent contractor and not an employee is that, unlike with an employee, one engaging an independent contractor is not legally able to control the means and methods of accomplishing the work to be performed by the independent contractor. To exercise such control over the person creates an employer-employee relationship and all of the various duties and responsibilities associated with such a relationship, such as payroll withholdings. As all the parties to the Agent Appointment Agreement expressly recognized, an employer-employee relationship did not exist between Mr. Wiley and these Farmers companies. Farmers not only recognized this by not withholding payroll deductions from Mr. Wiley's commissions, but also by specifically including the following language in the Agent Appointment Agreement:

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<sup>1</sup> The Agent Appointment Agreement does not expressly choose the law to apply to it. Every choice-of-law principle, however, clearly indicates that Texas law is the law that applies to the contract and thus the relationship between Mr. Wiley and the Farmers companies. In a proper investigation into Mr. Wiley's circumstances, one would expect to find a note to this effect created prior to the date of this correspondence and placed in the investigation file.

The Agent shall, as an independent contractor, exercise sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided only that the Agent conform to normal good practices, and to all State and Federal laws governing the conduct of the Companies and their Agents.

In other words, these Farmers companies expressly accepted their inability to control the means and methods of how Mr. Wiley performed the agreement in order to prevent them from having the duties and responsibilities employers owe to employees. As such, it is completely inappropriate for FINRA enforcement staff members to construe any of Farmer's "guidelines" and "recommendations" as standards or requirements governing Mr. Wiley's relationship with the companies. To do so would be to ignore the law relating to Mr. Wiley's independent contractor status and would appear to be an action which is simply outcome driven. To do so would also be to ignore the legal effect of the express contractual language that requires any "change, alteration, or modification" to the Agent Appointment Agreement to be "in writing and signed" by both Mr. Wiley and an authorized representative of the Farmers companies.

So, for example, when Mr. Wiley agrees in the Agent Appointment Agreement to "collect[] and promptly remit[] monies due to the Companies," these Farmers companies cannot control the means and methods of how Mr. Wiley performs that scope of work except to the extent Mr. Wiley fails to "conform to normal good business practices," again, as already noted above, a standard which FINRA's representatives failed to investigate in relation to Mr. Wiley. Under Texas law, unless a specific timeframe for performance is identified in a contract, and the language of the contract clearly makes the timeframe essential to the performance of the contract, reasonable performance is the implied standard. It is on its face impossible for FINRA enforcement staff members to objectively conclude that Mr. Wiley failed to timely remit monies to the Farmers companies without first investigating what is or is not a reasonable period for someone in Mr. Wiley's position. Again, as already noted, such a determination necessarily requires a significant fact-finding process that extends far beyond the Farmers companies' "guidelines" and "recommendations" to include the standards relevant to a dual agency insurance business operated in Texas as a contractual independent contractor. To do less is to fail to meet the standard required for an objective FINRA investigation.

On a related point, the Agent Appointment Agreement sets forth that Mr. Wiley's scope of work on behalf of the Farmers companies is to include "servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent and the Companies." In addition to many other things, this provision of the agreement means that Mr. Wiley is free to use his own business judgment to service Farmers' customers in a mutually beneficial way. One example of Mr. Wiley exercising his business judgment under the authority of this provision is his opening and maintaining a merchant banking account that allowed him to accept customers who sought to pay their insurance premiums using credit cards other than the limited few accepted by these Farmers companies. Both how Mr. Wiley collected insurance

premiums on behalf of the Farmers companies and what additional services Mr. Wiley chose to provide to these Farmers' customers were within Mr. Wiley's sole discretion. Not only are FINRA enforcement staff members condemning Mr. Wiley for actually performing his Agent Appointment Agreement, they are doing so without ever inquiring into whether Mr. Wiley's practices were also practices engaged in by other Texas dual agents conducting an insurance business as an independent contractor for one or more insurance companies.

Another set of facts FINRA enforcement staff members have obviously failed to consider in connection with their investigation into Mr. Wiley's operation of his insurance business is the set of facts relating to Farmers' own reports of its internal investigation of these same issues. On June 6, 2011, Farmers Financial Solutions, LLC filed a Form U5 relating to Mr. Wiley. This form was signed on behalf of Farmers Financial Solutions, LLC by Ms. Laura Zylak. Ms. Zylak holds FINRA registrations as a general securities principal, a municipal securities principal, a general securities representative, and an investment company and variable contracts product representative. She has been in the securities industry since 1998 and holds Series 6, 7, 24, 53, 63, and 65 licenses. In other words, Ms. Zylak appears very knowledgeable and qualified concerning the securities industries and its rules and regulations. This is important because, in signing this Form U5, Ms. Zylak expressly represented to FINRA that she had verified the information contained in the Form U5 and that the information was both accurate and complete. We are not aware that FINRA has challenged the veracity of the statements by Farmers Financial Solutions, LLC and Ms. Zylak in this Form U5 or that FINRA has initiated an inquiry into whether Farmers Financial Solutions, LLC and Ms. Zylak violated FINRA rules by making the statements and representations contained in the Form U5. We also are not aware of whether FINRA's representatives have even contacted Ms. Zylak to discuss the factual basis of her statements and representations in the Form U5.

All of this is vitally important because the statements and representations made to FINRA by Farmers Financial Solutions, LLC and Ms. Zylak in the Form U5 dated June 6, 2011 support the conclusion that Mr. Wiley adequately performed the Agent Appointment Agreement and did not violate FINRA rules and regulations. In other words, the stated conclusions of Farmers' internal investigation expressly contradicts the determination by FINRA enforcement staff members to recommend disciplinary action against Mr. Wiley. Specifically, the statements and representations made to FINRA by Farmers Financial Solutions, LLC and Ms. Zylak in the Form U5 dated June 6, 2011 include the following:

- Farmers Financial Solutions, LLC conducted an internal review of Mr. Wiley's activities to determine whether he had committed fraud, wrongfully took property, or violated investment-related statutes, regulations, rules or industry standards of conduct (Question 7B);
- Farmers Financial Solutions, LLC conducted its internal review of Mr. Wiley's activities from May 24, 2011 until June 6, 2011 (Disclosure Reporting Page);

- Farmers Financial Solutions, LLC's internal investigation concluded that the termination of Mr. Wiley registration with the firm was not as a result of his having committed fraud, wrongfully taking property, or violating investment-related statutes, regulations, rules or industry standards of conduct (Questions 3, 7F); and
- Farmers Financial Solutions, LLC also specifically concluded that "THE MATTER (involving Mr. Wiley) DID NOT INVOLVE ANY SECURITIES TRANSACTIONS, SECURITIES PRODUCTS, OR FIRM CUSTOMERS" (Disclosure Reporting Page).

These conclusions are also consistent with the fact that the Farmers companies paid Mr. Wiley "Contract Value" upon the termination of the Agent Appointment Agreement pursuant to the terms set forth therein. Specifically, the Agent Appointment Agreement sets out a formula that the Farmers companies are contractually required to pay Mr. Wiley upon the termination of the agreement, essentially to compensate him for policies and customers he would be leaving behind. Under the express terms of this provision, "[i]n the event termination [of the agreement] is because of embezzlement, there is no Contract Value." In other words, the fact that Farmers paid Mr. Wiley any Contract Value at all, which Mr. Wiley testified it did, is consistent with both the conclusions that: (i) Farmers insurance companies' internal investigation did not determine that Mr. Wiley embezzled any money owed to Farmers and (ii) Farmers Financial Solutions, LLC's internal investigation did not determine that Mr. Wiley committed fraud, wrongfully took property, or violated investment-related statutes, regulations, rules or industry standards of conduct. To make the contrary determination made by FINRA's enforcement staff members is to ignore these facts and to ignore the rational economic incentive of Farmers not to pay Contract Value to Mr. Wiley if none existed and the personal incentive of Ms. Zylak not to make false statements to FINRA in violation of FINRA rules and regulations.

It is important to reiterate for another reason the significance of the FINRA representatives' failure to determine the appropriate (or even "a") standard by which to evaluate whether Mr. Wiley violated Rule 2010's relative statement of ethics. It is significant that FINRA enforcement staff members recommend action only on the basis of Rule 2010 in relation to Mr. Wiley's handling of monies under the Agent Appointment Agreement. The primary significance is that this limited recommendation likely reflects the FINRA enforcement staff members' recognition that they cannot identify a specific securities-industry rule of conduct that Mr. Wiley violated that would enable FINRA to pursue an independent disciplinary action against Mr. Wiley. Instead, these FINRA enforcement staff members have sought to use the generalities of Rule 2010 to allege improper conduct they could not otherwise allege under any other FINRA rule. This demonstrates both a gross misuse of power and a lack of objectivity.

For example, as an agent of the Farmers companies, when insurance customers deliver policy payments to Mr. Wiley, those funds no longer belong to the customer under Texas law. Unlike a securities-industry customer who deposits its funds with a member, an insurance-industry customer is simply tendering payment to an agent of the insurance company, necessarily relinquishing a claim to ownership over the funds. As a result, FINRA's enforcement staff members could not recommend FINRA rule violations for converting, misusing, or misappropriating customer funds because, in the possession of Mr. Wiley, those funds are not

customer funds. As between Mr. Wiley and the Farmers companies, how those funds are to be processed and turned over to Farmers is a matter of contract between Mr. Wiley and the Farmers companies, as the scope of agent responsibilities can under Texas law be modified by the parties through contract. The Securities and Exchange Commission has long recognized in relation to the application of the language of Rule 2010 (as codified in prior iterations of the rule) that it is not the SEC's or FINRA's function "to decide private contract rights between the parties." *In re Samuel B. Franklin & Co.*, 38 S.E.C. 113, 116 (1957).

In fact, given the ambiguous and relative nature of the language the Farmers companies choose to use when drafting their own contract (in order to maintain the argument that they do not control the agent and thus are not his or her employer), the only way in which FINRA enforcement staff members could even begin to investigate the nature of the private contractual rights between Mr. Wiley and the Farmers companies would be first to determine through proper methods of contract interpretation under Texas law what the ambiguous language in question even means. This necessarily would require the collection of the types of extrinsic evidence previously discussed, a consideration of how Mr. Wiley and the Farmers companies had operated under the terms of the agreement since 2002, and a determination by a proper finder of fact as to how that evidence indicates the language should be interpreted. It would also require a determination of the extent to which the interpretation should be construed against the Farmers companies as the drafters of the contract. It is easily apparent, then, why the S.E.C. has overturned disciplinary action that involves an SRO acting as an interpreter of private contracts. *See id.* And yet, despite all of this, the key issue FINRA's enforcement staff members want FINRA to decide is whether Mr. Wiley "timely deposit[ed] the insurance premiums into the bank accounts authorized for such payments." *Mr. Fenimore Correspondence Dated August 20, 2012.* Again, there is no dispute that Mr. Wiley remitted all relevant funds to the Farmers companies. The only issue is whether he did so timely, a clear question of contract interpretation.

Mr. Wiley is a resident of the State of Texas. Texas is where he conducted his business. Thus, to recommend that FINRA find Mr. Wiley to have violated Rule 2010 by converting/misusing funds belonging to the Farmers companies, the FINRA enforcement staff members are asking FINRA to determine under Texas law that Mr. Wiley wrongfully exercised dominion and control over Farmers' personal property in a manner inconsistent with Farmers rights. Not only does the recommendation of the FINRA enforcement staff members improperly ask FINRA to interpret a private contract, it then improperly asks FINRA to use a specific interpretation of that contract in order to act as a finder of fact in applying Texas law. The issue gets even more complicated given that Mr. Wiley acquired possession of the property in question pursuant to the terms of his agreement with the Farmers companies. Under Texas law, FINRA would have to make additional findings in order to conclude that Mr. Wiley converted Farmers' property given that he lawfully acquired the property in the first place.<sup>2</sup> In short, the attenuated

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<sup>2</sup> Even the general statement of the concept of conversion found in the FINRA Sanctions Guideline shows that in order for FINRA to determine whether Mr. Wiley violated Rule 2010 under these circumstances, FINRA would have "to decide private contract rights between the parties." It is also important to note that these guidelines address the specific situation where Rule 2150 is also involved, as can be seen by the conjunctive nature of the entry and the discussion in the sanctions section regarding the involvement of customer funds or securities.

nature of the argument advanced by FINRA enforcement staff again highlights the lack of objectivity brought to this investigation.

At the center of the FINRA enforcement staff members' argument that Mr. Wiley converted property belonging to the Farmers companies is the idea that Mr. Wiley used insurance premium payments for his own use. Again, it must be repeated over and over again that in no instance did Mr. Wiley fail to pay the Farmers companies the money they were owed for insurance premiums tendered to Mr. Wiley. Additionally, at no time did Mr. Wiley ever take the position that he was not required to turn these amounts over to the Farmers companies. His temporary possession of these amounts in whatever form they took simply was not an issue at the time.<sup>3</sup> In this respect, there exists no civil claim under Texas law for either breach of contract or conversion because the Farmers companies have not in any way been damaged. With very few exceptions, it is a fundamental principle of civil law that for a legal claim to exist, one must be damaged. In any event, the Agent Appointment Agreement is notably silent in regards to how the premium payments are to exist while in the custody of Mr. Wiley, and, as the final provision of the agreement indicates, no other written agreement between the parties governs this topic.<sup>4</sup> In short, the only contractual requirement for Mr. Wiley with regard to money is to collect and remit monies to the Farmers companies. So long as Mr. Wiley fulfills his obligations to collect and remit these monies, he fulfills his obligations under the contract. It is undisputed by the parties that Mr. Wiley collected and remitted all the monies owed to the Farmers companies. It simply does not follow, then, that Mr. Wiley failed to do what he was responsible for doing under the Agent Appointment Agreement, which is the argument the FINRA enforcement staff members make. One cannot say what is behind the argument of the FINRA enforcement staff members, but it certainly is not an objective look at all the relevant facts.

A response to the second set of alleged violations of FINRA rules relating to Mr. Wiley's testimony is difficult to make in light of the fact that no specific excerpt of testimony to support the claim has been identified or provided to Mr. Wiley. Again, the FINRA enforcement staff

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<sup>3</sup> As the totality of the information turned over to FINRA enforcement staff members clearly demonstrates, at no time during the relevant period did Mr. Wiley ever not have the ability to turn over the necessary amounts to the Farmers companies. At all times during this period, the funds available to Mr. Wiley through all of his available sources exceeded the insurance premium payments tendered by customers to Mr. Wiley. FINRA enforcement staff members simply and inappropriately ignore this fact. The most significant fact in this investigation is that the Farmers companies received from Mr. Wiley every penny to which it was entitled.

<sup>4</sup> Importantly, the entire ACA co-banking account system is outside the scope of Mr. Wiley's contractual relationship with the Farmers companies. This arrangement should be seen as nothing more than one element of consideration for interpreting the parties' actual contractual obligations. Another related element for such an interpretation would be the parties' longstanding course of conduct relative to the ACA co-banking account system. Mr. Wiley testified that the timing of his deposits to this account remained relatively unchanged for years prior to the time in question. To suggest Mr. Wiley's changed his practices in any material way during the given period of time without looking into his full course of conduct relative to this account reveals a complete lack of objectivity on the part of the FINRA enforcement staff that is both unjust and inequitable. A proper investigation by FINRA's enforcement staff would have looked into this pattern and practice of performance by the parties and allowed these important facts to inform its determination in a meaningful way.

members appear to want to deal in generalities instead of with specifics. Such an approach is representative of the general heavy-handed nature of the approach taken by FINRA's enforcement staff throughout its investigation. What must be understood, though, is that Mr. Wiley has been fully cooperative with FINRA's staff and has continued to provide information to FINRA's staff since June 2011.

Mr. Wiley has provided written statements responding to questions asked of him by FINRA staff members, bank account statements for the different business and personal accounts maintained by Mr. Wiley, line-of-credit account statements showing additional sources of funds available to Mr. Wiley, copies of checks written by Mr. Wiley, and various loan documents. Mr. Wiley also incurred substantial expense to travel out of town along with the undersigned counsel in order to provide oral testimony in response to questions from FINRA's enforcement staff. Simply to isolate one or a few statements made by Mr. Wiley, to remove them from their greater context, and to ignore how those statements are informed by the wealth of other information provided by Mr. Wiley in order to allege violations of Rule 2010 and 8210 is to yet again demonstrate the lack of objectivity that has guided this entire investigation.

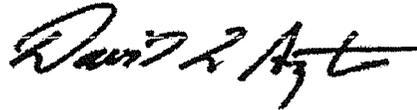
It is particularly remarkable that the determinations of FINRA's enforcement staff have remained unchanged since it first attempted to persuade Mr. Wiley to enter into a Letter of Acceptance, Waiver and Consent proposed prior to requesting or receiving most all of the information requested and received during this investigation. Simply stated, FINRA's enforcement staff made a determination from the outset and never sincerely attempted to conduct an objective investigation. Rather, it appears FINRA's enforcement staff has simply sought information to buttress its decision without ever attempting to identify and gather the information necessary to consider this matter objectively. This is precisely the reason that a proper investigation failed to follow. This is precisely the reason FINRA's enforcement staff failed to make the proper inquiries, gather the proper information, and perform the proper analysis of how the facts apply to the law. One wonders why FINRA's enforcement staff has committed, and continues to commit, so many resources to a situation where no party has been injured in any way and where the individual being investigated is no longer even registered with a FINRA member firm.

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For the foregoing reasons, Mr. Wiley again submits that the Independent Office of Disciplinary Affairs should decline to authorize the filing of a formal complaint against him. Mr. Wiley remains willing to continue with his cooperation in this matter. In the event FINRA staff requires anything further of Mr. Wiley, please do not hesitate to ask for it. Mr. Wiley strongly disagrees with the recommendation of FINRA's enforcement staff and cannot understand how, in light of all that is and has been going on in the securities industry that actually warrants FINRA's investment of time and resources, barring him from the industry and thereby blighting his and his young son's good name in any way furthers justice or protects the integrity of the industry. If anything, it raises more questions than it answers about these things.

Very truly yours,

THE SPENCER LAW FIRM

A handwritten signature in black ink, appearing to read "David L. Augustus", written in a cursive style.

David L. Augustus

CC: Client

RECEIVED

AUG 6 2014

FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

OFFICE OF GENERAL COUNSEL  
Regulatory/Appellate

DEPARTMENT OF ENFORCEMENT, §

COMPLAINANT, §

v. §

KEILEN DIMONE WILEY  
(CRD No. 4259612), §

RESPONDENT. §

DISCIPLINARY PROCEEDING  
NO. 2011028061001

HEARING OFFICER - MC

**RESPONSE TO MOTION TO STRIKE OPENING BRIEF**

COMES NOW, RESPONDENT, Keilen Dimone Wiley, ("Wiley") and respectfully requests that the National Adjudicatory Council (the "NAC") deny the Department of Enforcement's Motion to Strike Respondent's Opening Brief with Instructions to Refile and respectfully shows the following:

**A. RESPONDENT REQUESTS LEAVE TO FILE AN AMENDED BRIEF**

Wiley respectfully requests leave to file an amended Opening Brief subject to the NAC's determination of Wiley's Motion for Leave to Supplement the Record. If the NAC allows Respondent to supplement the record, Respondent would like to fully brief the additional evidence. If the NAC sustains the DOE's objections to the proposed supplement, Respondent will need to amend the brief in order to eliminate the preliminary discussion of this evidence and its incorporation into the brief. Respondent further asks the NAC to allow a period of thirty (30) days from the date of its ruling on Respondent's Motion for Leave to Supplement the Record within which to file the amended Opening Brief.

B. THE MOTION TO STRIKE SHOULD BE DENIED.

The NAC should deny the DOE's Motion to Strike for several reasons. First, the extra-record documents are documents that are cited within the Opening Brief are already part of FINRA's record and should have been included in the record. The crux of the Opening Brief is that the enforcement action, discipline hearing and sanctions were improper because FINRA's Department of Enforcement ("DOE") and the Hearing Panel (the "Panel") exceeded FINRA's jurisdiction and authority to investigate and hear the claims asserted against Wiley's inherently insurance business activities. The DOE contends that the Opening brief contravenes FINRA Rule 9346 and 9267 because it cites and incorporates two documents not reflected in the record. However, Rule 9267 states the record shall consist of;

“[T]he complaint, answers, each notice of hearing, pre-hearing order, and any amendments thereto; (2) each application, motion, submission, and other paper, and any amendments, motions, objections and exceptions to or regarding them”

The evidence Wiley seeks to be introduced into the record is evidence FINRA already has and should have been included into record for the NAC, since the documents sought to be introduced are “submissions and other paper[s]” regarding the complaint and answers.<sup>1</sup> Additionally, the Wells Submission Letter is not part of the settlement negotiations as the DOE clearly states, “Wells submissions are not treated as settlement documents and any statements contained therein may be used against Mr. Wiley at, among other things, a FINRA disciplinary proceeding.” See *Exhibit 7 of Respondents Motion for Leave to Supplement the Record; FINRA Letter to Wiley, August 20, 2012*. The Wells Submission Letter should have been included in the record from the beginning as it is not a settlement document. These documents are already part of FIRNA's record and the Hearing Officer was knowledgeable of the issues prior to the hearing, so there would be no surprise or prejudice in introducing business records and correspondence.

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<sup>1</sup> FINRA Rule 9267.

The evidence Wiley seeks to introduce into the record is crucial to his appeal because the evidence shows that, in addition to exceeding its scope of jurisdiction and authority, the DOE and the Hearing Panel were prejudiced and made conclusions not supported by fact.<sup>2</sup>

C. WILEY'S BRIEF IS FULLY COMPLIANT WITH FINRA RULE 9347.

Second, The brief has not exceeded its 25 double-spaced page limit by referencing the incorporated exhibits. Wiley filed the brief in accordance with FINRA Rules by filing a 19 page double spaced brief.<sup>3</sup> FINRA Rule 9347 states that opening briefs are to be filed in accordance with Rule 9136. Wiley submitted a brief on unglazed white paper measuring 8 ½ x 11 inches, typewritten in 10 point typeface, double spaced, paginated, single spaced footnotes and single spaced indented quotations, included the appropriate header, with the names of the parties and the number assigned to the proceeding, was stapled, signed and dated as instructed under Rule 9347. The DOE cites to case law for inferring that the Opening Brief does not follow Rule 9347. However, case law regarding controversies for court filings is not applicable here. FINRA rules govern FINRA filings.

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<sup>2</sup> See Response to Department of Enforcement's Memorandum in Opposition of Respondent's Motion for Leave to Introduce Additional Evidence.

<sup>3</sup> FINRA Rule 9136 states:

"Papers filed in connection with any proceeding under the Rule 9200 Series and the Rule 9300 Series shall:

(a) Specifications:

- (1) be on unglazed white paper measuring 8 ½ x 11 inches, but to the extent that the reduction of a larger document would render it illegible, such document may be filed on larger paper;
- (2) be typewritten or printed in either 10 or 12 point typeface or otherwise reproduced by a process that produces a permanent and plainly legible copy;
- (3) include at the head of the paper, or on a title page, the title of the proceeding, the names of the Parties, the subject of the particular paper or pleading, and the number assigned to the proceeding;
- (4) be paginated at the bottom of the page and with all margins at least one inch wide;
- (5) be double-spaced, with single-spaced footnotes and single-spaced indented quotations; and
- (6) be stapled, clipped, or otherwise fastened in the upper left corner, but not bound.

(b) Signature Required. All papers shall be signed and dated pursuant to Rule 9137.

(c) Number of Copies. A signed original and one copy of all papers shall be filed with the Adjudicator unless otherwise ordered.

(d) Form of Briefs. A brief containing more than ten pages shall include a table of contents, and an alphabetized table of cases, statutes, and other authorities cited, with references to the pages of the brief wherein they are cited.

D. WILEY'S RESERVATION IS PROPER.

Wiley requested to reserve arguments not mentioned in his brief because Wiley envisioned requesting leave to file an amended brief after receiving a ruling on the Motion for Leave to Supplement. Filing his brief without knowing whether the record will be supplemented was a position that Wiley attempted to navigate as gracefully as possible.

Second, Wiley cannot foresee the response and rebuttal arguments he will need to make in order to respond to the DOE's Reply Brief due to the vast uncertainties of FINRA disciplinary proceedings, especially when record supplementation requests are still pending approval. It is especially important for Wiley to protect his ability to reply and/or rebut the DOE's arguments because this particular FINRA's disciplinary proceeding has sometimes been governed by FINRA rules, sometimes governed by law and sometimes decided upon facts not supported by evidence. In the Decision, The Panel majority stated that FINRA rules, not Texas law, governed Wiley's obligations in his independent insurance business contract with Farmers. This finding was in contravention to FINRA Rules which explicitly show how FINRA does not have jurisdiction or authority to govern insurance business practices of members who are also insurance companies.<sup>4</sup> The Panel majority's findings were also in violation of specific, clear and well established Federal and Texas law that govern insurance business activity.<sup>5</sup> However, in support of its Motion to Strike Wiley's brief, the DOE mostly cites to case law as support for its request. There is no way of knowing what standard will be cited, what FINRA Rule will be followed, what law will be applied, what evidence is material or relevant to the DOE's position,

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<sup>4</sup> FINRA Rules 12200, 12201, 13200 and 10101. ("Parties must arbitrate under [FINRA Rules] if: ... the dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.").

<sup>5</sup> 15 USCA § 78; see also, *Fiero v. Fin. Indus. Regulatory Auth. Inc.*, 660 F.3d 569 (2d Cir. 2011) ([t]he Exchange Act does not grant FINRA the authority to govern and determine issues inherent to the insurance industry and there is no express language that would indicate otherwise). *Thomas v. Westlake*, 204 Cal.App.4<sup>th</sup> 605, 619, 139 Cal. Rptr.3d 114, 125 (2012) ("[m]atters involving disputes arising out of insurance business activities are expressly excluded from FINRA arbitration and arbitration decisions on the basis of this exception are not enforceable.").

what evidence is in the record and if conclusions will even be supported by fact. Because of this, Wiley respectfully reserves any arguments not made in its brief as well as the opportunity to address the supplement to the record, if supplementation is granted.

## VI. CONCLUSION

Respondent respectfully requests that the NAC deny the DOE's Motion to Strike his Opening Brief and grant him leave to file an amended brief. Respondent further asks the NAC to allow a period of thirty (30) days from the date of its ruling on Respondent's Motion for Leave to Supplement the Record within which to file an amended Opening Brief.

Date: August 1, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following parties via first class certified United States mail on August 1, 2014:

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Ashley M. Spencer

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