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SECURITIES EXCHANGE COMMISSION
DEPARTMENT OF ENFORCEMENT

DEPARTMENT OF ENFORCEMENT,

Complainant,

v. Admin. Proc. File No. 3-15811

BLAIR ALEXANDER WEST,

Respondent.

BLAIR ALEXANDER WEST'S
INITIAL BRIEF

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BLAIR A. WEST'S INITIAL BRIEF

Blair Alexander West ("**Respondent**") hereby submits his Initial Brief in his appeal of (a) the July 26, 2012 FINRA Hearing Panel Decision and (b) the February 20, 2014 NAC Affirmation of the Panel Decision.

Summary of Argument

The FINRA Panel's findings and the NAC's Affirmation of the Panel Decision were erroneous because they were based on (a) incorrect assumptions derived from a non-customer complaint made for nefarious purposes and (b) nothing more than surmise, conjecture, speculation and inference that were unsupported and unsubstantiated by competent substantial evidence or even a fair and proper investigation. Accordingly, the permanent bar that has been imposed is inappropriate under any reasonable reading or extrapolation of the facts adduced at the hearing and is grossly disproportionate to the actions attributed to Respondent.

The FINRA Panel and the NAC failed to consider or simply misconstrued the weight to be afforded to directly relevant and highly significant evidence of independent trustworthiness that validated and substantiated Respondent's position that his use of the funds *was authorized* by the terms of his engagement and other agreement to identify and structure a commercial loan

opportunity for his client, AmeriChip International, Inc. ("ACII"), a public company.[1] Further, uncontroverted evidence showed that the time it took for Respondent to disburse the subject funds in full was in part a function of Respondent's appropriate concern that a precipitous termination of the then-pending commercial loan transaction would be unjustifiably detrimental to Respondent's client, ACII. Unfortunately, after taking the time to recognize and analyze the incongruous situation, Respondent came to the realization that, no matter what Respondent believed was in ACII's best interest, Drew Mouton ("**Mr. Mouton**"), (who, unbeknownst to Respondent at the time, had filed a complaint with FINRA) had another personal agenda that left no room to consider the best interests of the client, ACII.

There was and is no evidence of intentional or untoward misconduct by Respondent. Any reasoned unbiased review of record evidence points to an entirely *contrary* conclusion. The Panel and the NAC declined to consider any mitigating factors, choosing instead to consider only aggravating factors or what the FINRA Panel and the NAC considered to be aggravating factors. The failure to base its findings on a fair reading of all the evidence and the failure to consider fairly all the evidence in light of the totality of the circumstances led to the wrong result. Under the circumstances presented – when no financial loss was suffered by a customer or by a member of the public[2] - a permanent bar from association with a FINRA member for the rest of his life is inappropriate.

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[1] ACII engaged Respondent's broker dealer, Crusader Securities, LLC ("**Crusader**"), pursuant to an engagement letter dated October 22, 2008 [RX-2].

[2] The subject funds came to Respondent in late December 2008 from ACII [RX-22]. The funds were returned by Respondent on April 29, 2009 [Stipulation #9, Bates No. 000299]. The funds were returned at the specific instruction of Mr. Mr. Mouton to Summit Group Holdings, LLC [CX-48], a company subsequently determined to be separately-owned by Mr. Mr. Mouton alone.

In demanding a permanent bar of Respondent from association forever with a FINRA member firm, the Panel and the NAC have overreached. The absence of an upfront *written* agreement led the Panel and the NAC to create their own *assumption* that became the cornerstone of the Panel's decision; but, the deployment of that *assumption* crafted out of whole cloth cannot alone reasonably justify the imposition of the harshest available sanction.

A. No Customer Complaint

The person whose claim of impropriety brought this matter to FINRA was ***not*** a customer or client of Respondent in any sense of the word at any time. Instead, Mr. Mouton was merely a short-term employee of Respondent's client, ACII. All of Respondent's dealings with Mr. Mouton were in Mr. Mouton's capacity as an agent for his disclosed principal, ACII. The subject funds were not Mr. Mouton's property – they belonged to his employer and Respondent's client, ACII - and were not within Mr. Mouton's rightful control.[3] Mr. Mouton was merely an employee of ACII for less than five months starting in January 2009 and leaving in early May 2009 (less than two weeks after Mr. Mouton successfully procured for himself his

[3] Mr. Mr. Mouton alleged that the funds at issue were the proceeds of a loan made by Mr. Mr. Mouton to ACII. FINRA Panel Hearing, pages 230-233 [Bates No. 000311]. FINRA did absolutely nothing to verify independently that Mr. Mr. Mouton actually made a loan to ACII and instead relied solely on Mr. Mouton's self-serving and untested statements. FINRA Panel Hearing, page 329 [Bates No. 000311]. Even if Mr. Mouton did in fact make a loan to ACII, the funds no longer belonged to him personally and Mr. Mouton would have been merely an unsecured creditor of ACII, along with all other creditors, vendors, employees, etc., and Mr. Mouton's right to be repaid the loaned amount would have been governed strictly and exclusively by a promissory note that would have been issued by ACII to Mr. Mouton as part of the alleged loan transaction. However, there is absolutely no record evidence, such as loan documents and/or ACII board resolutions (or even the SEC filings of the public company, ACII, which would have presumably been required to disclose such an insider loan transaction because Mr. Mouton was allegedly an officer and director of the public company at the time) to substantiate the claim that the subject funds were the proceeds of any loan from Mr. Mouton to ACII. The Panel and the NAC merely accepted Mr. Mouton's unsubstantiated and uncorroborated contention and actually took it even a step further by assuming that, because the funds at issue were allegedly sourced from a loan made by Mr. Mouton to his employer, Mr. Mouton still had ample authority or entitlement after exchanging his money for a promise to pay to control or to direct disposition of such funds. This assumption was created despite clear and uncontroverted evidence that shutting down the effort to obtain the commercial equipment loan (which would be the result of the disbursement of the funds) would be detrimental to the interests of the actual owner of the subject funds; ACII.

employer's funds by causing commotion and making threats). This misappropriation (i.e., self-appropriation of his employer's funds to himself) was disguised as a request that the funds be returned "*from whence they came*"[4], which further investigation proved to be untrue.

Mr. Mouton was never a client or customer of Respondent. There was never a complaint made against Respondent by a client or customer (or at any time in Respondent's long and exemplary career). Mr. Mouton, while still an employee of ACII, filed the complaint with FINRA in his own name[5] (not on behalf of his employer, ACII, the undisputed client and rightful owner of the funds) claiming the funds belonged to him personally and making unfounded and unsupported allegations, which FINRA never once required Mr. Mouton to substantiate[6]. Although Respondent notified FINRA at the onset by letter dated May 21, 2009 that Mr. Mouton was not a customer and that the real customer was ACII pursuant to a signed engagement letter,

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[4] Mr. Mouton's request that the funds were going back "*from whence they came*" was deceitfully intended to imply the funds were being returned to ACII [CX-48], which was the source of the subject funds, as evidenced by a wire confirmation showing that the funds came directly from ACII to Crusader. FINRA failed to perform any investigation whatsoever to confirm whether the funds had been returned to ACII and realized for the first time at the Hearing, three years after the investigation began, that the funds had not been directed by Mr. Mouton back to his employer, but had been directed by Mr. Mouton to himself (a separate company he controlled). FINRA had relied solely on Mr. Mouton's self-serving assurance without any independent investigation that ACII had received the return of the funds, which was simply not the case.
FINRA Panel Hearing, pages 322-27 [Bates No. 000311].

[5] Despite the obvious fact that ACII is not mentioned anywhere in Mr. Mouton's personal complaint wherein he falsely claims ownership of his employer's funds, FINRA's continued belief was that Mr. Mouton was making the complaint on behalf of AmeriChip. FINRA Hearing Panel, page 327 [Bates No. 000311]. A simple reading of the complaint itself shows Mr. Mouton was not making the complaint on behalf of anyone other than himself for his own personal gain and enrichment [RX-63]. It was only at the Hearing that FINRA finally acknowledged Mr. Mouton did not file the complaint on behalf of ACII and no one at ACII ever complained about the funds. FINRA Hearing Panel, pages 328-29 [Bates No. 000311].

[6] In addition to deceptively filing the complaint with FINRA in his own name falsely claiming personal ownership of the funds, Mr. Mouton also made unfounded allegations within his complaint which unfounded allegations were never supported by any evidence whatsoever. To the contrary, the record shows that the unfounded allegations Mr. Mouton made in his complaint were untrue. At the Hearing, Respondent's attorney asked Mr. Mouton to substantiate the unfounded claims that he made in his complaint and Mr. Mouton refused to answer the question; and the FINRA Hearing Panel declined to compel Mr. Mouton to answer the question. Consequently, Mr. Mouton was never made to account for these unfounded allegations in his fraudulent complaint. FINRA Panel Hearing, pages 275-279; 444-446 [Bates No. 000311].

Enforcement steadfastly refused to acknowledge that Mr. Mouton was not a client or customer until confronted directly by the NAC Panel.[7], [8]

For four years, Enforcement held fast to the contention that this proceeding was intended to vindicate the rights of an unsuspecting customer that have been trampled by an unscrupulous broker. Yet, there was no client or customer whose rights were trampled and no client or customer is complaining. The only complaining party, Mr. Mouton (i) was not a customer at any time[9]; (ii) did not own the funds or have any rights to demand disbursement of the funds directly to himself or his separately-owned entity, and (iii) acted in a manner to serve his own conflicting personal interests.[10]

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[7] Q: "Mr. Margolin: Who was Mr. West's client here?"
A: "Mr. Barkin: ACII was the client."
NAC Panel Hearing, page 48 [Bates No. 001889].

[8] In one instance counsel for Enforcement even refers to Mouton as a "party" to the transaction. FINRA Panel Hearing, page 178 [Bates No. 000311].

[9] Notwithstanding that ACII made an 8K public SEC filing confirming that Mr. Mouton had resigned his position and left the company in May 2009, FINRA continued to believe that Mr. Mouton was still somehow ACII's representative, so anything FINRA was asking of Mr. Mr. Mouton would have been AmeriChip. FINRA Panel Hearing, page 322 [Bates No. 000311]. Further, FINRA continued to maintain that Mr. Mouton and ACII were essentially one and the same; so, when Mr. Mouton told FINRA "we were repaid", FINRA "was looking at it as the same thing, as far as when he [Mr. Mouton] said we were repaid, that meant AmeriChip [ACII] was repaid." FINRA Panel Hearing, page 326 [Bates No. 000311]. Not true! Without any independent investigation or verification, FINRA simply took the word of a former employee to mean that when he said "we" were repaid, it meant that ACII was the party who received the funds. One of the reasons that FINRA was willing to accept Mr. Mouton's word on this critical point was because FINRA "didn't hear any other complaints from AmeriChip [ACII] directly." FINRA Panel Hearing, page 327. Why would ACII complain to FINRA about an issue with a former employee!? These blatantly incorrect and unsubstantiated assumptions apparently justified FINRA's decision not to ever attempt to contact anyone at ACII.

[10] Any and all attempts by Respondent to raise these underlying, undisputed, facts to FINRA during the 'so-called' investigation were met with distain and contempt from FINRA who concluded that Respondent was merely attempting to shift the blame. FINRA Hearing Panel, page 545 [Bates No. 000311]. Consequently, despite the mountain of record evidence to the contrary, FINRA continued to wrongly assert that Mr. Mouton was the customer and that the funds belonged to Mr. Mouton. The record clearly shows that neither of these fundamental assumptions by FINRA was ever true.

Even after Enforcement finally conceded that there was no customer complaint, the NAC opinion still identified Mr. Mouton as a customer because the record had been so poisoned by Enforcement's unsupportable characterization of Mr. Mouton's role.

B. Respondent's Actions were Authorized

Mr. Mouton himself aptly confirmed in an independent writing and so reiterated in his testimony that there were never any express limitations placed on Respondent's use of the subject funds. Yet, the Panel and the NAC found otherwise, relying exclusively on a third-party equipment lender's *preliminary* term sheet to which Respondent was not a party and which reflected only the then-current and far-from-final status of the loan negotiations with the potential equipment lender.[11] The potential lender's preliminary request was that an initial earnest money amount be held until closing, but that term was never formally accepted by ACII or by Respondent; no such obligation was ever imposed upon ACII or upon Respondent; and no such commitment was ever made by ACII or by Respondent.

Respondent testified that he intentionally transferred funds from an account called the "Crusader Escrow Account" and used the funds for personal and business expenses. However, the Panel and the NAC misconstrued this testimony and misapplied their own misconstruction to conclude that Respondent's interim use of the subject funds constituted an intentional violation of FINRA Rules. The Panel and the NAC leapt blindly to the unsupported conclusion that *any* use of the funds by Respondent constituted an intentional misuse thereof, *notwithstanding* the

[11] No effort was made by FINRA to authenticate or to place in any temporal context the lender's preliminary term sheet, which necessarily and understandably changed several times over the duration of the transaction.

understanding and agreement of the parties that there would be no restrictions on the use of the funds pending the closing of the equipment loan transaction.[12]

The Panel and the NAC disregarded completely the written words of Mr. Mouton in favor of their own interpretation that is unwaveringly hostile to Respondent. Despite Mr. Mouton's stalwart resistance to FINRA's pressure and his abject refusal to retract his prior written statements,[13] the Panel and the NAC gave no consideration to documents that were edited, revised, and executed by Mr. Mouton himself, under no compulsion and without lucre. Both Mr. Mouton's May 26, 2009 letter to FINRA and Mr. Mouton's September 23, 2009 Declaration provide unrefuted and unchallenged evidence substantiating Respondent's contention that there were no limitations and no restrictions imposed regarding the permitted uses of the funds.[14,15] Mr. Mouton also acknowledged that he himself could and should have

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[12] The hunt for a hard-asset commercial loan secured by equipment is not a "Best Efforts Securities Offering", as incorrectly concluded by the FINRA Panel and by the NAC. Any assertion that this loan transaction was a securities offering is pure sophistry reached only by self-serving gyration.

[13] In the Fall of 2009, in order to create facts that supported its fabricated narrative, FINRA drafted an Affidavit for Mr. Mouton to sign that directly contradicted Mr. Mouton's own May 26, 2009 letter to Respondent. Mr. Mouton refused to sign that version of the Affidavit that was drafted by FINRA in an inappropriate attempt to change the actual facts of the matter to support its own enforcement objectives.

[14] "[T]here ... was no written agreement between either myself or [ACII] and Crusader Securities governing or restricting how the equipment loan deposit was to be held, used, invested or otherwise."

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"[S]ince there was no written agreement with Crusader governing the deposit, the deposit was unrestricted and was at Crusader's discretion during the intervening period until the expected closing of the equipment loan or until the possible return of the deposit, if a transaction did not ultimately close."
May 26, 2009 Letter from Mr. Mouton to FINRA (emphasis added) [RX-66].

[15] In Mr. Mouton's September 23, 2009 Declaration, Mr. Mouton confirmed the authenticity and accuracy of the May 26, 2009 letter: "[W]ith respect to the attached letter dated May 26, 2009, I was contacted by Mr. West after the resolution of my complaint and asked if I would submit a letter outlining my understanding of the circumstances surrounding the complaint. By telephone, Mr. West verbally outlined certain facts and asked if I felt these facts were true, whereupon I concurred. He then asked if I had any objection to him or his representative drafting this letter and sending to me for review, and I indicated to him that I had no objection. Shortly thereafter, I received a draft, I corrected certain verbiage with which I was uncomfortable; discussed same with Mr. West and ultimately printed, signed, and returned this letter to him for his use."

done more to avoid any potential misunderstanding with Respondent regarding use of the funds.[16]

Although Respondent scrivened the initial draft of the May 26, 2009 letter after a telephone conference with Mr. Mouton to confirm their prior oral understandings, there is not one scintilla of evidence to support the conclusion that the words were not Mr. Mouton's own words *or* that Mr. Mouton was somehow coerced into signing the May 26, 2009 letter *or* that statement(s) contained therein were not completely true and completely accurate.[17] The Panel's consideration of the May 26, 2009 letter is itself curious because the Panel and the NAC apparently assigned weight to another portion of Mr. Mouton's September 23, 2009 Declaration, even though that Declaration was craftily drafted by Enforcement to skirt the issue of whether there were any restrictions or limitations placed on the use of the funds, by reporting only that Mr. Mouton did not specifically *give authority* to use the funds other than to promote the loan transaction.[18] Such a "pick-and-choose" methodology, without foundation or predicate, should not be permitted to provide a basis to ban Respondent for life. The absence of any evidence to support the strained interpretation of events cagily crafted by Enforcement cannot in civilized

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September 23, 2009 Declaration of Mr. Mouton (emphasis added) [RX-68].

[16] "[A]s a point of fact, part of the reason I offered the May 26th letter was because I felt I should have done a better job specifying use and any restrictions to use of funds prior to submitting those funds to be held by Crusader, rather than mistakenly assuming that the funds were being held in a separate account until closing." September 23, 2009 Declaration of Mr. Mouton (emphasis added) [RX-68].

[17] FINRA Decision, page 10, fn. 61, Bates No. 001741.
See September 23, 2009 Declaration of Mr. Mouton [RX-68].

[18] The September 23, 2009 Declaration says that Mr. Mouton did not "give authority", but the Declaration does not address or refute or controvert in any way the converse proposition that was addressed directly in the May 26, 2009 letter; to wit, there were NO restrictions on the use of the funds: "[T]he deposit was unrestricted and was at [Respondent's] discretion [to use] during the intervening period...." [RX-66], [RX-68].

society-governed by the rule of law-be allowed to provide the fodder for the bludgeoning to which Respondent has been subjected.

Although the NAC appears to have given some nominal recognition to the May 26, 2009 letter, the NAC grossly misinterpreted the purpose of the letter.[19] The NAC concluded (somewhat astonishingly given the explicit statements in the letter) that the May 26, 2009 letter is simply evidence of Mr. Mouton's withdrawal of the complaint. Notwithstanding the NAC's blatant mischaracterization, the May 26, 2009 letter was not presented for the purpose of demonstrating Mr. Mouton's intention to withdraw his complaint; rather, it was presented to explain: (a) the circumstances surrounding the transaction; (b) how the interactions between Mr. Mouton's employer, ACII, and Respondent actually occurred; and (c) why Respondents' actions and beliefs were reasonable, and not intentionally wrongful. The NAC simply misapplied the evidence.

C. No Mitigation?

The Panel found "no mitigating factors, only aggravating ones".[20] This exemplifies the unjustified prejudices against and the preconceived notions about Respondent. It is beyond the realm of reason to conclude that there are zero mitigating factors. Life's events are not black or white.

The NAC did consider at least some of the mitigating factors: (1) withdrawal of the complaint; (2) Respondent's lack of disciplinary history; and (3) Respondent's full cooperation

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[19] "West suggests that [the complainant's] withdrawal of his *customer* complaint lessens the seriousness of his misconduct." Emphasis added to show continued incorrect reference to Mr. Mouton being Respondent's customer.
NAC Decision, page 12 [Bates No. 001947].

[20] FINRA Decision, page 11 [Bates No. 001745].

and complete compliance with FINRA's investigation.[21] However, the NAC declined to address several other material and influential mitigating factors or, at the least, provide justification for its failure to consider such factors.[22] Instead, the NAC held that the presence of these additional factors are not mitigating, but that the non-existence of the exact same factors must be considered to be "aggravating". The same criterion that serves as mitigation cannot be viewed simultaneously as an aggravating factor.

Without any competent evidence that an agreed or imposed restriction was violated and without any sign of intentionally deceitful conduct or even reckless disregard for proper practice, Respondent's actions cannot possibly be considered so perverse that no quantum of mitigation would prevent the imposition of a permanent ban. No reasonable interpretation of the evidence could lead an independent decision-maker to conclude that Respondent's actions were so unscrupulous and so heinous that nothing less than a permanent bar will suffice.

Not a single participant in the underlying equipment loan transaction and no other witness of any ilk (other than the FINRA investigator who perceived absolutely nothing, but had already pre-determined Respondent's guilt) testified or suggested that Respondent had intentionally misused funds of anyone (let alone, a client/customer) at any time (let alone, over time).

The Panel and the NAC made the unsupported leap that, because of his vast experience,[23] Respondent *should have known* that there were restrictions imposed upon the funds regarding

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[21] NAC Decision, pages 11-13 [Bates No. 001947].

[22] "We have considered and reject without discussion all other arguments of the parties". NAC Decision, page 13 [Bates No. 001947].

[23] "In order for us to credit West's Argument that he misunderstood the intended use of the deposit, we must accept the premise that West, an individual with a Masters of Business Administration, 20 years of commercial real estate experience, 18 years of investment banking experience, and 17 years of commercial real estate

interim-use or return-timing. The NAC justifies its speculation (i.e., the creation of facts out of whole cloth) by concluding that Respondent was aware that Respondent was misusing funds because he gave Mr. Mouton a "myriad of excuses".[24] Respondent acknowledged that the funds were not disbursed immediately[25] and has always taken responsibility for his decision not to disburse the funds immediately under the circumstances; however, Respondent had to consider that disbursing the funds on the eve of final approval by the third party equipment lender was not the proper course of action for ACII. Likewise, Respondent acknowledged that he could and should have been more forthcoming with Mr. Mouton regarding Respondent's concerns and the real cause for the delay in the disbursement of the funds; however, the choice to withhold from Mr. Mouton Respondent's real concerns about the decision was based on Respondent's valid concerns and true doubts as to Mr. Mouton's loyalty and commitment to ACII, because the path charted by Mr. Mouton appeared certain to leave the client/customer without a remedy for its serious cash flow troubles.

D. Not a Securities Transaction

The underlying transaction was not a securities transaction in any sense or by any definition of that term. Respondent was not acting as a broker of securities. The transaction was a contemplated commercial equipment loan transaction secured by identified hard assets. Respondent did not maintain brokerage accounts or customer money in the normal course of

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experience, believed he could have used the funds wired to the "Crusader Securities Escrow Account" to pay personal and business expenses."
NAC Decision, page 11 [Bates No. 001947].

[24] West's argument "is plainly contradicted by the myriad of excuses that he provided [Mr. Mouton] after he misused the deposit."
NAC Decision, page 11 [Bates No. 001947].

[25] "The delay was my fault. I take responsibility for that."
FINRA Panel Hearing, page 482 [Bates No. 000601].

Respondent's business and did not do so here, except pursuant to the specific agreement of the parties (and the "parties" did not include the third party lender who had no direct contractual relation with Respondent). The only contractual relationship was the engagement letter between ACII and Respondent.

The tasks to be performed did not require the training, the certifications, the skills or the services of a licensed securities broker. The following exchange between NAC Panelist Andrew Margolin and Enforcement counsel Samuel Barkin exemplifies this point:

> **Mr. Margolin:** There was no securities account here?
>
> **Mr. Barkin:** That's correct.
>
> **Mr. Margolin:** Was the activity that is at issue for this transaction activity that would require him either be registered or to be run through a securities broker?
>
> **Mr. Barkin:** No. Not that I'm aware of. [26]

The transaction was strictly a commercial installment loan to be secured by operating equipment owned by ACII. The net proceeds of the equipment loan were to be used to fund day-to-day operations of the company. The type of loan never changed, although certain implementing factors did change over the course of the deal. It is undisputed that no securities and no passive investment were involved at any time in any way. Notwithstanding the facts of the matter and Enforcement's own testimony, the NAC's decision still incorrectly referred to the commercial equipment loan transaction as a "best efforts" *securities* offering.

E. The Alleged Misconduct was over a *Short* Period of Time

The NAC concluded that Respondent's alleged misconduct occurred over an *extended* period of time.[27] To the contrary there was a reasonable basis for the time that lapsed between

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[26] NAC Panel Hearing, pages 48-50 [Bates No. 000311].

[27] "We find that West's misconduct occurred over an extended period of time". NAC Decision, page 13 [Bates No. 001947].

(a) the purported demand for the disbursement from someone (to wit, Mr. Mouton) whose loyalty and authority was questioned and (b) the transmittal of the full amount of the funds. During the weeks after Mr. Mouton demanded disbursement of funds deceitfully to himself (even though the fund was established by and for ACII, Mr. Mouton's disclosed principal), Respondent had to (a) reconcile the confusing incongruity and apparent disconnect between Mr. Mouton's demand for return of "*his*" funds[28] and the engagement on behalf of ACII and (b) come-to-grips with the unexplained and seemingly inexplicable nature of the facially-bad decision that Mr. Mouton was making for his employer, ACII, to walk away from the only funding source then available for this cash strapped company in an historically-tight credit market.

There was no evidence of any requirement or any expectation that Respondent was to return the funds immediately upon request. Most importantly, the equipment loan that Respondent had identified and negotiated for ACII was still available to close[29] and any delay or interruption of that loan closing was clearly not in ACII's best interests. In the absence of an agreement or external regulation (and there was neither), Respondent only had to return the funds within a reasonable period of time and Respondent did just that.[30]

The NAC Decision does not provide any guidance regarding the duration of time over which the alleged misconduct occurred or what is considered to constitute an "extended period of

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[28] Despite the undisputed fact that the funds belong to ACII, Mr. Mouton, seeing what he perceived to be the increasingly risky financial situation at ACII after being employed just four short months, chose to deploy his own self-help remedy by effectuating his own-style garnishment to recover on his alleged promissory note or, in the absence of the unsubstantiated loan, simply to enrich himself.

[29] As supported by a voicemail message from Brian Acosta (the equipment lender) to Mr. Mouton on April 28, 2009 wherein Acosta states he doesn't think Mr. Mouton is being honest and that there are still several options for an equipment loan for ACII to close [RX-64].

[30] Stipulation #9 [Bates No. 000299].

time". The evidence supports the conclusion that Respondent disbursed the funds as directed by Mr. Mouton within 20 days after request for disbursement was made by Mr. Mouton. The authorization to disburse the funds came after business hours on April 8, 2009 (effectively April 9th).[31] Respondent disbursed the funds on April 28, 2009. So the relevant inquiry is the period from April 9, 2009 - April 29, 2009, during which time Mr. Mouton applied continuing, unrelenting and intense undue pressure for what turned out to be the misappropriation of his employer's funds for his own enrichment. In that context, 2-3 weeks is not too long given the continued confusion and uncertainty (from all participants) surrounding the status of the loan transaction.

On April 28, 2009 after months of hard work by Respondent to get a much-needed deal closed for his client, ACII, in a tight credit market (post-2008 mortgage collapse), the lender's representative left a voicemail for Mr. Mouton indicating that he did not believe that Mr. Mouton was being honest and that the lender was still trying to get a deal closed for ACII.[32] To be so close and to have Mr. Mouton (for personally motivated reasons contrary to the best interests of his employer) decide unilaterally to kill the deal in the final hour and demand the return of the funds (for what turned out to be for Mr. Mouton's own enrichment) was directly contrary to the clear financial needs of ACII. It was not unreasonable for Respondent (having his client's best interests in mind) to want to allow things to settle before succumbing to an unusual amount of unexplainable pressure from Mr. Mouton and "pulling the plug" on the only available and viable loan opportunity for Respondent's client, ACII. Respondent used the time to be able to make more studied choices and more rational decisions regarding whether and how to proceed with the loan opportunity that was made available solely due to the diligent efforts of Respondent and

[31] April 8, 2009 e-mail from Brian Acosta to Mr. Mouton [RX-61].

[32] See voice mail from Brian Acosta, the lender's representative, on April 28, 2009 [RX-64].

which could not be easily replaced or replicated in the tight credit market that prevailed at the time. Again, Mr. Mouton left his employer, ACII, within two weeks of misappropriating his employer's funds for his own enrichment depriving ACII the ability to either close the equipment loan generating much needed net proceeds to fund operations or, in the alternative, receive the return of its deposit to fund operations.

Enforcement cited no law or precedent which suggests that 20 days constitutes an extended period of time under the incongruent circumstances created by the unexplained and facially destructive decision by Mr. Mouton to abandon the loan transaction for his employer, ACII.[33] The NAC cites *Dep't of Enforcement v. Neaton* in which the SEC held that Mr. Neaton's violations "occurred over a long period of time."[34] However, in that case, Mr. Neaton's violations occurred over a 12-year period.[35] Apparently, Respondent's 20-year unblemished career is not worth affording Respondent any time to recognize, analyze and address a complex situation, so that his actions could be tailored to avoid undue damage to his client/customer, ACII.

F. Not a Traditional Escrow Agent and No Escrow Agreement

Enforcement, the Panel, and the NAC equate Respondent's actions with a hornbook violation of a standard escrow agreement. However, the circumstances surrounding this transaction were anything but "standard"; indeed, they were very unusual for Respondent and very different from Respondent's core business. In the normal course of his business,

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[33] Guidelines at 6, Principal consideration 9 ("Whether the respondent engaged in the misconduct over an extended period of time").

[34] *Dep't of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip., aff'd Exchange Act Release No. 65863, page 18.

[35] Id.

Respondent did not and does not open, maintain or manage client trust accounts, escrow accounts, or general-brokerage and securities accounts. It is undisputed that Respondent was not acting as a traditional escrow agent. Escrow agents are almost never permitted to withdraw escrow deposits, nor will they collect fees from the escrow funds they hold. The situation here was different. Not only was Respondent permitted to withdraw the funds, but Respondent was permitted to retain his fee from the escrow funds.[36]

There was no written or even suggested escrow terms for this transaction. There were no written or even oral pronouncements of terms restricting how, when or under what circumstances the funds must be maintained, may be used or should be disbursed.[37] The funds came to Respondent only when ACII was uncomfortable sending the funds directly to an unfamiliar third-party lender in another state.[38] Any suggestion that Respondent had a plan from the outset to misuse the funds is simply not supported by or reasonably inferred from *any* evidence adduced.

The uncontroverted agreement from the onset was that the funds were unrestricted and free for use and that Respondent would either retain the funds as his fee for identifying and negotiating the subject equipment loan or return the funds if the deal did not eventually close, which is exactly what Respondent did.

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[36] "From these funds flowing through the Escrow Account, Crusader will retain its fees and net fund the balance to the appropriate parties in that particular transaction."
October 22, 2008 Advisory Agreement, page 4 [RX-2].

[37] [T]here ... there was no written agreement between either myself of Americhip [ACII] and Crusader Securities governing or restricting how the equipment loan deposit was to be held, used, invested or otherwise (emphasis added).
May 26, 2009 letter from Mr. Mouton to FINRA [RX-66].

[38] Complainant readily acknowledges that it was he who asked Respondent to hold ACII's funds and not the other way around as FINRA repeatedly alleges in its fictional narrative.
FINRA Hearing Panel, page 263 [Bates No. 000311].

G. Respondent's Candor, Honesty, and Full Compliance with All FINRA Requests

The NAC contends that Respondent's complete and unwavering compliance with Enforcement's investigation and the extraordinary effort given by Respondent to comply with FINRA's Rule 8210 requests "merely satisfies [Respondent's] obligations."[39] The NAC held that Respondent's effort did not amount to "substantial assistance" within the meaning of the Guidelines.[40]

The FINRA *Sanction Guidelines* state:

> [W]hether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.[41]

The NAC cites *Dep't of Enforcement v. Neaton.* However, *Neaton* provides no guidance on what factors are considered when determining "substantial assistance" or what weight should be given to the various factors. There is no indication of what Mr. Neaton did and we cannot compare Mr. Neaton's compliance with Respondent's yeoman's effort to cooperate to the n'th degree.[42]

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[39] "We also reviewed West's claims that his response to FINRA Rule 8210 requests provided during the investigation of this matter are mitigating, but we find that West's compliance with information and document requests merely satisfies his obligation under FINRA Rule 8210 and does not amount to 'substantial assistance' within the meaning of the Guidelines."
NAC Decision, page 12 [Bates No. 001947].

[40] Id. at page 12.

[41] FINRA Sanction Guidelines #12.

[42] The Opinion states "[t]he record, however, does not show Neaton provided FINRA with any more than the assistance that was required of him." *Dep't of Enforcement v. Neaton*, NAC Decision January 7, 2011, page 14, fn. 33.

In Dep't of Enforcement v. Houston, the SEC provided some guidance on the factors to consider regarding FINRA requests, including:

(1) the nature of the information requested;

(2) whether in the information requested has been provided;

(3) the number of requests made;

(4) the time respondent took to respond; and

(5) the degree of regulatory pressure required to obtain a response.[43]

A review of the record shows that FINRA investigators issued Respondent more than 100 document requests, including subparts.[44] Respondent complied expeditiously and completely with each and every FINRA discovery request.[45] Respondent complied with every request even when the request sought extremely sensitive and unduly personal information, including entirely irrelevant information about Respondent's *wife and four young children.*[46] His candor, honesty and compliance with FINRA's investigation were noteworthy and should have been considered in determining the appropriate sanction for Respondent.[47]

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[43] *Dep't of Enforcement v. Houston*, SEC Decision February 20, 2014, page 6.

[44] 8210 FINRA requests.

[45] "Did you ever ask a question that [respondent] to not answer? No."
FINRA Panel Hearing, page 321 [Bates No. 000601].

[46] 8210 FINRA requests.

[47] Also noteworthy is the fact that FINRA did not request any documentation from Mr. Mouton, did not seek any information from the equipment lender. Indeed to this day, FINRA has never ever contacted Respondent's client, ACII, to discover whether any restrictions were violated.

H. Finding of Fact Without Supporting Evidence

A. No Harm. FINRA concluded without supporting evidence that Respondent's conduct had the potential to cause serious harm.[48] There was no testimony and no evidence that Respondent's actions (or potential delays in action) jeopardized or could reasonably have been expected to jeopardize in any manner the equipment loan transaction, ACII or anyone else. The fact of the matter is the only actions that resulted in harm to the client were those of Mr. Mouton by deceitfully demanding his employer's funds for his own enrichment totally ending the only commercial equipment loan opportunity for ACII that would have generated much needed net loan proceeds to fund its ongoing operations, following which, Mr. Mouton immediately abandoned his employer, ACII, to pursue other opportunities. Notwithstanding the complete absence of any supporting evidence, Enforcement argued and the NAC concluded that a third-party lender with whom Enforcement never communicated "would have walked away from the transaction" if they had discovered Respondent's actions.[49] Why would the lender have "walked away" when the lender was still actively clamoring for the loan transaction to proceed on April 28, 2009?[50] This extrapolation was particularly specious when you consider that Respondent's delay in disbursing the funds was for the purpose of salvaging the desperately-needed loan opportunity for ACII. Regardless, it is undisputed that no one was harmed by Respondent's actions.

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[48] "If Ability Capital had discovered the deposit was gone it would have walked away from this transaction. That could have caused huge problems for ACII and the complainant."
NAC Transcript, page 47 [Bates No. 001889].

[49] Id.

[50] See voice mail message from Brian Acosta, the lender's representative [RX-64].

B. No Maximum Fee. FINRA concluded without a scintilla of evidence that $89,000 would have been Respondent's *maximum* fee if the transaction had been consummated.[51] Again, the absence of any evidence did not dissuade the FINRA Panel or the NAC from reaching that speculative and positional posture. The only evidence on the issue supports a *contrary* conclusion, as Respondent testified that his fee would have easily been well in excess of $89,000.[52,53] The Panel failed to ever consider that Respondent's fee could be anything other than $89,000 without ever understanding how Respondent's fee was calculated or even acknowledging the undisputed fact that the $89,000 was a very preliminary rough estimate for illustrative purposes only. To FINRA, the $89,000 was the *fixed maximum* fee to which Respondent would ever be entitled, even though Respondent's engagement letter with ACII provided for *percentage* fees based on different tranches or allocations of senior debt (1%) versus mezzanine debt (7%). These tranches evolved over time based on the changing (drastically declining) value of the equipment that was to serve as collateral.[54] The fee noted on that preliminary worksheet was merely one of several preliminary line items used to illustrate the

[51] Chairman: "Are you telling me there is no circumstance under which the compensation to [Respondent] could have been higher than $89,000.00?"
Mr. Barkin (Enforcement's lawyer) responded (without predicate, foundation or corroboration): "Yes.... The $89,000 was actually more than [Respondent] was entitled to."
NAC Transcript, page 42 [Bates No. 001889].

[52] West testified, without contravention: It was well known that [my fee for putting together the deal] was going to be more than $89,000... because the appraisals were based on values before 2008..."
FINRA Hearing Transcript, page 412 [Bates No. 000601].

[53] The $89,000 notation was merely a one-line, plug entry on a very preliminary estimate. The preliminary estimate was simply a tool prepared by Respondent at the onset of the engagement to illustrate for his client, ACII, the potential amount of net proceeds that could be derived from pursuing an equipment loan and was based on a myriad of preliminary assumptions, the most important of which was the value of the equipment that would serve as collateral, which equipment had not yet been appraised.

[54] For every dollar that was reallocated from the senior tranche to the mezzanine tranche of the commercial equipment loan because of the lower than expected equipment collateral value, the fee increased significantly by 6% (7% for mezzanine vs 1% for senior) pursuant to the engagement letter.

potential net proceeds from an equipment loan. This illustration was merely one tool made available to assist ACII's Board in determining whether to pursue an equipment loan before any potential equipment lender was even contacted.

I. The Sanctions Imposed are Grossly Disproportionate to the Conduct

Respondent admits, and has consistently acknowledged, that, despite having a prior oral agreement with the customer which was subsequently confirmed in the May 2009 letter, he made a mistake in retrospect by using the funds without first obtaining written confirmation from the customer and for failing to consult with Mr. Mouton regarding all the reasons for the delay in returning the funds.[55] It was poor decision-making on Respondent's part and Respondent accepts responsibility for his actions.[56] However, the Panel and the NAC took Respondent's admission (to wit: he should have received *written* confirmation of the understandings reached *before* using the funds) as an admission that Respondent intentionally misused the funds. Respondent's misconduct (if it was misconduct, rather than something short of "best practices") occurred because Respondent failed to obtain prior *written* authorization to use the funds, **NOT** because he intentionally misused funds which he had no right to use. However, the Panel and the NAC failed to recognize this critical distinction between a failure to use "best practices" and wrongful conversion.[57]

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[55] FINRA Panel Hearing, page 482 [Bates No. 000601].

[56] "The delay was my fault. I take responsibility for that."
FINRA Panel Hearing, page 482 [Bates No. 000601].

[57] FINRA Sanctions Guidelines, #13, "whether the respondent's misconduct was the result of an intentional act, recklessness or negligence".

The FINRA Panel and the NAC based their decisions entirely on their *own* version of "he should have known better". In our system of justice that cannot alone be the basis for a finding of willful or intentional misconduct. Respondent's conduct may constitute a failure to adhere to best practices, but it does not support the Draconian result reached here. The facts adduced and Respondent's stellar and unblemished career in investment banking and in real estate supports the conclusion that Respondent only used the funds *because* there was a specific understanding with an established relationship involving a non-securities transaction that allowed for his unrestricted use of the funds as subsequently codified in writing.

FINRA's *Sanctions Guidelines* provide various factors to be considered in determining the severity of sanctions to be imposed.[58] The following is a list of the relevant factors:

1. The Respondent's relevant disciplinary history[59]:

   None.

2. Whether the Respondent voluntarily paid restitution prior to detection or intervention:[60]

   Yes. Respondent disbursed the funds as demanded <u>before</u> he had any knowledge of the complaint. The FINRA complaint and FINRA's involvement did not bear upon Respondent's decision to disburse the funds as directed. Respondent was made aware of the complaint approximately one month AFTER the funds had already been returned.

[58] FINRA Sanctions Guidelines.

[59] FINRA Principal #1.

[60] FINRA Principal #4.

3. Whether the Respondent engaged in numerous acts and/or a pattern of misconduct:[61]

   No. Respondent's actions boil down to his not obtaining *written* authorization *prior to* use the funds (although there was a verbal understanding from the onset that was later confirmed in writing supporting Respondent's use of funds) and not communicating more clearly with Mr. Mouton, despite Respondent's sincere skepticism regarding Mr. Mouton's motives which were contrary to the best interests of his employer, ACII. This is <u>not</u> a pattern of misconduct.

4. Whether Respondent's misconduct was over an extended period of time:[62]

   No. Respondent's actions occurred over a brief period of days and for valid reasons and concerns about the questionable rationale and motivation of Mr. Mouton killing a deal that would have been financially beneficial for his employer, ACII.

5. Whether the Respondent attempted to conceal his conduct, mislead, deceive or intimidate a customer or regulatory authority:[63]

   No. Respondent was 100% forthcoming and compliant with Enforcement. Respondent never misled, deceived, or intimidated Mr. Mouton, the customer (ACII), or Enforcement.

6. Whether Respondent's actions caused injury to any party:[64]

   No, it is undisputed that no party was injured as a result of Respondent's conduct.

7. Whether Respondent attempted to delay the investigation:[65]

   No. Respondent's responses and cooperation were "spot on".

8. Whether Respondent attempted to conceal information from FINRA:[66]

   No. Absolutely not.

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[61] FINRA Principal #8.

[62] FINRA Principal #9.

[63] FINRA Principal #10.

[64] FINRA Principal #11.

[65] FINRA Principal #12.

[66] FINRA Principal #12.

9. Whether Respondent provided inaccurate or misleading information to FINRA[67]:

No. No. No.

10. Whether Respondent's misconduct was the result of an intentional act, recklessness or negligence:[68]

Respondent's actions were based on a specific understanding that he was free to use the funds without restriction, retain the funds if the deal closed, or return the funds if the deal didn't close, which is exactly what Respondent did. At worst, Respondent failed to deploy "best practices" by not getting this understanding in writing at an earlier stage. There is absolutely no evidence establishing or even reasonably suggesting that Respondent's misconduct was intentional.

11. Whether Respondent was previously sanctioned for the same or similar misconduct:[69]

No. Never.

12. Whether Respondent was previously warned about the misconduct:[70]

No. Never.

13. Whether Respondent can demonstrate that his misconduct was aberrant:[71]

Yes. Respondent has 20+ years of investment banking experience and this is the first instance of any alleged misconduct. Respondent's long and exemplary record demonstrates that he would not have used the funds if he were not expressly authorized to do so. In fact, Respondent's long and exemplary record supports Respondent's position that he only used the funds based on the understanding that he had with his client.

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[67] FINRA Principal #12.

[68] FINRA Principal #13.

[69] FINRA Principal #14.

[70] FINRA Principal #15.

[71] FINRA Principal #16.

14. The number, size and character of the transactions at issue:[72]

The alleged misconduct involved one non-securities transaction. The transaction could have been rightfully and legally handled by someone with no licensure in the securities industry. In fact, the NAC acknowledged that, if Respondent had initially deposited these funds directly into his own personal/account, there would have been no potential violation because this loan transaction was not a securities transaction.

15. The level of sophistication of the injured or affected customer:[73]

No customer was affected or injured by Respondent's actions or inaction. Mr. Mouton was not a customer and no customer ever complained or was ever contacted by FINRA at any time. However, even if Enforcement's characterization of Mr. Mouton were accurate, Mr. Mouton is an experienced and savvy serial entrepreneur with a Master's in Business Administration and a Master's in Finance.[74] Mr. Mouton also had prior dealings with Respondent and this historical experience with Respondent provided the level of comfort to support the understanding between the parties regarding the use of the funds pending closing (or termination) of the equipment loan.

Respondent is an experienced investment banker with a long history of ethical and exemplary service to his clients. A lifetime bar for Respondent is disproportionate, extreme, and completely unnecessary, even if all of the findings that are actually supported by evidence were upheld. A lifetime bar is inconsistent with the FINRA *Sanctions Guidelines*. There is no precedent for penalizing conduct of this nature to such an extreme degree, if at all given the unique and unusual circumstances including Mr. Mouton's self-serving actions and nefarious motivations for filing the complaint that gave rise to this matter in the first place. The FINRA Panel and the NAC considered only aggregating factors, completely disregarding any mitigating ones.[75]

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[72] FINRA Principal #18.

[73] FINRA Principal #19.

[74] FINRA Hearing Transcript, page 160 [Bates No. 000311].

[75] In one of the more blatant examples, the FINRA Panel and the NAC gave zero weight to Mr. Mouton's May 26, 2009 letter to FINRA which outlines the understanding between the parties because it was initially

Conclusion

In 2009, Securities regulators were going through a rough time, with several high profile cases. FINRA even ran television ads at the time boasting about how many brokers they had recently kicked out of the securities industry presumably to prove to the public it was being tough on its member brokers. However, Respondent is not Bernard Madoff, even though Respondent's first conference call about the complaint with FINRA in late May 2009 (a month *after* the funds had been returned) concluded with the FINRA representative stating to Respondent, "Even Madoff returned funds to his clients."

Respondent has never cheated or scammed anyone. At worst, Respondent's actions were in retrospect ill-advised in the absence of advance *written* authority from the client/customer (albeit based on an oral agreement subsequently confirmed in writing). However, they were not intentionally perpetrated to harm anyone. The up-front equipment loan funds came to Respondent unexpectedly when the customer opted not to send the funds to the out-of-state lender with whom it had no prior dealings. This was not part of any scheme. It was isolated incident where unusual circumstances collided and a regrettable choice was made to proceed without a prior written confirmation of the arrangement, particularly the scope of Respondent's authority to use the funds and the terms/timing of any disbursement. Application of the FINRA *Sanctions Guidelines* cannot support and does not justify a permanent bar because there was, at worst, a misunderstanding and competent mitigating factors are present. The facts and evidence do not support the findings and the punishment does not fit the conduct.

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drafted by Respondent. At the hearing, Mr. Mouton confirmed that the statements in the May 26, 2009 letter are accurate. Yet, the Panel and the NAC gave full credence to Mr. Mouton's September 23, 2009 Declaration, despite that fact that it was prepared by Enforcement. FINRA Panel Hearing, page 331 [Bates No. 000311].

The FINRA Panel Decision and the NAC Decision should be reversed and, given that FINRA's entire case was based on incorrect assumptions derived from a non-customer complaint made for nefarious purposes and nothing more than surmise, conjecture, speculation and inference that were unsupported and unsubstantiated by competent substantial evidence or even a fair and proper investigation, the entire matter should be expunged from Respondent's permanent record.

Respectfully submitted,

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