BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Blair Alexander West

For Review of Disciplinary Action Taken by

FINRA

File No. 3-15811

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Jennifer Brooks
Associate General Counsel

Celia L. Passaro
Counsel

FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8985 – Telephone
202-728-8264 – Facsimile

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I. INTRODUCTION

This case concerns Blair Alexander West's brazen violation of the most basic and fundamental trust owed to a customer – the obligation to refrain from misusing customer property. West has admitted the underlying facts here, and his misuse of his customer's funds is well established.

In connection with an investment banking engagement, West agreed to hold a deposit for his customer, AmeriChip International, Inc., ("AmeriChip")[1] pursuant to a term sheet. West's engagement agreement provided that he would earn a fee for the transaction if and when it closed. West directed AmeriChip to wire the deposit to an account he had entitled an "escrow account," but which had no escrow agreement or agent, and which West fully controlled.

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[1] In its decision, the NAC referred to AmeriChip as "AII."

Immediately upon receiving the deposit, West transferred it into other business and personal accounts. Over the next few weeks, West admittedly spent the entire deposited amount to pay his personal and business expenses, including past due mortgage payments and tennis- and golf-club fees. When the potential transaction did not go forward, West did not return the deposit promptly. Instead, weeks went by and West waited until he received funds from another source before he returned the deposit.

On appeal to the Commission, West splits hairs and relies on technicalities to argue that his misconduct was merely a regrettable choice. Remarkably, he argues that, despite the voluminous evidence to the contrary, he was actually authorized to spend his customer's money. In the face of clear written agreements setting forth how the deposited money was to be held and used, he denies that there was any writing that explicitly restricted his use of the money. In addition, he claims, for the first time, a supposed oral agreement that authorized him to use the funds – a claim which is controverted by the overwhelming documentary evidence. Significantly, West cannot explain why, if he was authorized to use the money, he engaged in a months-long deception meant to conceal his actions from his customer.

The truth is that West took a calculated risk. The AmeriChip deposit presented an opportunity to solve his personal cash flow problems. West took his customer's money and used it to pay his outstanding debts. He hoped that the transaction would close, his fee would cover the money he had taken, and no one would be the wiser. Unfortunately for West, this is not what happened. The transaction stalled and his customer asked for the return of the money. After West broke several promises to return the money, his frustrated customer alerted FINRA to his misconduct.

The NAC's findings and sanctions are well supported in the record. Indeed, the key facts are undisputed. Because West's conduct represented a gross deviation from the standards of commercial honor required of individuals employed in the securities industry, the Commission should affirm the NAC's decision that he violated FINRA Rule 2010, and its sanction of a bar, and dismiss West's application for review.

II. FACTUAL BACKGROUND

The facts are largely undisputed and the parties stipulated to the key facts. (*See* Stipulations, RP 299-303.)[2]

A. West and Crusader Securities

West is an experienced financial professional with an MBA from the University of Chicago and over 20 years of investment banking experience. (RP 299, 334, 659.) In addition to numerous securities licenses, West held a New York real estate license and owned a real estate brokerage firm during the relevant period. (RP 673.) West entered the securities industry in January 1996 when he joined Credit Suisse First Boston as a general securities representative. (RP 299.) At Credit Suisse, West worked in the real estate investment banking group where he was eventually promoted to vice president and participated in transactions worth over $2 billion. (RP 663-65.)

West left Credit Suisse in March 2000. (RP 655.) Three years later, West established his own broker-dealer, Crusader Securities LLC ("Crusader"). (RP 299.) West described Crusader

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[2] "RP" refers to the page number in the certified record. "West Br. __" refers to West's Initial Brief.

as providing boutique investment banking services to small companies. (RP 335, 673-74.) West was the sole principal of Crusader and was registered as a general securities representative, a general securities principal, and an investment banking limited representative. (RP 299, 873-89.) West also served as Crusader's President, Chief Compliance Officer, and Financial and Operations Principal ("FINOP"). (RP 299, 335, 873-89.) West remained associated with Crusader in these multiple capacities until February 2011, when the firm terminated its FINRA membership. (RP 299.) West is not currently associated with any FINRA firm. (*Id.*)

B. West Agrees to Assist AmeriChip in Raising Capital

In October 2008, Drew Mouton, the Vice Chairman of AmeriChip, approached West to obtain Crusader's and West's assistance in raising capital for AmeriChip.[3] (RP 300.) Mouton knew West from previous business dealings and sought his help with the struggling company. (RP 540, 556-57.)

On or about October 22, 2008, AmeriChip entered into an agreement with Crusader (the "Advisory Agreement"), pursuant to which Crusader agreed to introduce AmeriChip to "certain capital sources, including possible financial and strategic investors and/or lenders." (RP 300, 894.) West signed the Advisory Agreement on behalf of Crusader, and Mouton signed for AmeriChip. (RP 893-98.)

As compensation for its services, AmeriChip agreed to pay Crusader a "Corporate Advisory Fee" of $20,000. (RP 300, 894.) AmeriChip also agreed to pay Crusader an additional fee with respect to any capital that Crusader obtained for AmeriChip during the engagement.

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[3] Mouton later became the CEO of AmeriChip. (RP 471.)

(RP 300, 894-95.) Specifically, the Advisory Agreement stated that Crusader would be "paid a fee at each closing" based on a percentage of the financing raised. (RP 894.) The percentage varied based on the type of financing. (*Id.*)

The Advisory Agreement did not permit Crusader to collect its fee until the capital funding transaction closed. It stated explicitly that the fee "shall be fully earned and paid at each closing and shall be paid by wire transfer from [AmeriChip] . . . through . . . Crusader Securities, member FINRA." (RP 895.) Once a transaction closed, the Advisory Agreement permitted Crusader to deduct its fee directly from any capital funding proceeds. (RP 895-96.)

C. West Facilitates a Sale and Leaseback Transaction Between AmeriChip and Ability

In late 2008, Crusader, through West, identified a potential source of financing for AmeriChip – Ability Capital Solutions, Inc. ("Ability").[4] (RP 300.) Ability was an asset-based financing company that specialized in business equipment leases.[5] (*Id.*) On December 9, 2008, West received a proposed term sheet from Ability that he forwarded to AmeriChip (the "Term Sheet"). (RP 300, 899-902.)

Pursuant to the Term Sheet, Ability would provide AmeriChip with a loan in the form of a sale and leaseback transaction. (RP 948-49.) If the transaction was approved, Ability would

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4 In its decision, the NAC referred to Ability as "ACS."

5 Ability was affiliated with another company, Matrix Business Solutions. West testified that he considered Ability and Matrix "one and the same" and sometimes referred to them as Ability and other times as Matrix. (RP 340.)

purchase equipment from an operating subsidiary of AmeriChip for $3.5 million and then lease the purchased equipment back to AmeriChip's subsidiary.[6] (*Id.*)

The Term Sheet required that AmeriChip make an initial deposit with Ability of $113,513.68, which consisted of the first and last payments due under the proposed lease (the "Deposit"). (RP 301, 901-02, 949.) The Term Sheet provided that the Deposit would either be: (1) applied to the transaction if it ultimately closed; (2) returned "promptly" to AmeriChip if the transaction did *not* close; or (3) forfeited to Ability if AmeriChip declined to close the transaction after approval, failed to supply due diligence, or suffered a material adverse change in its credit. (RP 949.)

D. West Agrees to Hold the Deposit in Escrow

During negotiations, a disagreement arose between AmeriChip and Ability concerning the manner in which Ability would hold the Deposit. (RP 301, 923, 931, 933-36.) Mouton advised West that AmeriChip was not willing to provide the Deposit to Ability, a company unfamiliar to AmeriChip, unless the funds were held in an escrow account. (RP 351, 480.) Ability, however, did not have an escrow account and was reluctant to open one solely for this transaction. (RP 934-35.) West stepped in and offered to have Crusader hold the Deposit. (RP 352-53, 435, 484, 553-54, 937.) Ability and AmeriChip agreed to this compromise.

West testified that he revised the Term Sheet to reflect this compromise. (RP 356-57, 939-40.) The Term Sheet provided that the Deposit would "be wired to Crusader Securities, LLC (member FINRA) upon acceptance of this letter and *held by Crusader until closing*." (RP

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[6] AmeriChip's subsidiary was called KSI Machine & Engineering, Inc. (RP 341.)

940 (emphasis added).) The Term Sheet further provided that the Deposit would "be returned to the Lessee [AmeriChip] *promptly* should [Ability] decline to approve [the] transaction.[7] (*Id.* (emphasis added).)

On December 15, 2008, West forwarded the revised Term Sheet and a document entitled, "Crusader Securities Escrow Account Bank Wire Instructions" to Mouton. (RP 360-61, 941-45.) Mouton signed the Term Sheet on December 19, 2008, and returned it to West. (RP 301, 947-49.) Following West's instructions, Mouton wired the Deposit to what West referred to as Crusader Securities' "escrow account" at HSBC Bank (the "HSBC Account") on December 24, 2008. (RP 301, 953.) Prior to receiving the Deposit, the HSBC Account had a zero balance. (RP 1091.) While West called this an "escrow account," there was no escrow agreement or escrow agent, and it remained entirely in West's control. (RP 363-64.)

E. West Receives the Deposit for Escrow and Immediately Uses It to Pay for His Personal and Business Expenses

At the time AmeriChip wired the Deposit to the HSBC Account, both West and Crusader were suffering severe financial problems. Crusader's operating account had a negative balance, and its bank had recently imposed service charges for items unpaid due to insufficient funds. (RP 366-67, 1094.) In addition, West was behind in his mortgage payments and did not have cash to pay other personal debts. His personal checking account, which he held jointly with his wife, had maintained a negative balance for at least two weeks and incurred service charges for insufficient funds. (RP 369-70, 1119.)

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[7] While the parties made some changes to this provision, the version that appeared in the finalized and executed Term Sheet was not materially different from the one West had drafted. (RP 940, 949.)

What West did after receiving the Deposit is undisputed. The documents show, and West admitted, that he immediately began to disburse the Deposit to other Crusader accounts and to his own personal bank account to pay for personal expenses and Crusader's business expenses. (RP 301, 361-71.) Within moments of receiving the Deposit, West transferred $89,000[8] from the HSBC Account to Crusader Securities' operating account. (RP 1091, 1094.) West then transferred $72,500 of that $89,000 to his personal checking account. (RP 1095, 1119.) West also wired $7,500 to an operating account belonging to Crusader Securities' parent company, Crusader Financial Group, Inc. – a company also owned and controlled by West. (RP 368-69, 1095, 1141.)

Two days later, West began depleting the deposited funds to pay his personal debts. (RP 1119-22.) He made mortgage payments for his residence totaling $27,000; paid $3,500 to his home equity line of credit; made $5,500 in payments to other creditors; and paid personal expenses, including cable television fees, clothing purchases, golf- and tennis-club fees, and telephone bills. (*Id.*) West admitted that, by January 2009, he had spent the entire $72,500 deposited into his personal checking account. (RP 371, 1123.)

Between January and February 2009, West transferred the remainder of the Deposit (approximately $24,500) from the HSBC Account to his personal bank account and other

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[8] In connection with the Term Sheet, and at Mouton's request, West provided Mouton with a document summarizing the potential uses of the Ability transaction proceeds, including Crusader's anticipated fee. (RP 344, 921.) By West's own calculations, based on the parameters of the Term Sheet, that fee was expected to be $89,000. (*Id.*) West argues that the NAC wrongly found that $89,000 would have been the maximum Crusader could have earned from the Ability transaction. (West Br. at 20-21.) Irrespective of whether this is true, the fact is that, at the time West transferred the Deposit out of the HSBC Account and spent it, Crusader had earned no fee at all. The Advisory Agreement provided that the fee would be earned only if the transaction closed. (RP 895.) At this point it had not, and, in fact, it never did.

Crusader accounts. (RP 1092-93.) West admitted that he withdrew and spent the entire Deposit to pay his personal debts and Crusader's business expenses. (RP 378, 1096-1101; 1123-38.)

F. West Conceals His Misuse of AmeriChip's Deposit

Soon after West misappropriated the Deposit, Mouton began to ask for its return, and West embarked on a weeks-long effort to conceal his misconduct and deceive Mouton into believing that the funds were still in the HSBC Account. By mid-February 2009, it appeared that AmeriChip and Ability would not close the transaction, which had stalled for several weeks. On February 20, 2009, Mouton directed West to return the Deposit. Mouton emailed West, "It's [the] end of the week – I'm assuming nothing concrete from [Ability]. We're going into the 9th week since deposit made, and I need to put that cash to use. Time to call it."[9] (RP 991.) West ignored Mouton's request to return the Deposit. Instead, West responded that he was in the process of obtaining an update from Ability and another potential investor and that he would send Mouton a new term sheet for this other investor. (*Id.*)

Three days later, Mouton followed-up with West, again requesting return of the Deposit. Mouton wrote, "Have you communicated with [Ability] that 9 weeks is too long, and we need a commitment now or the return of deposits? Today's the day." (RP 994.) West responded that he agreed that Ability needed to make a decision and suggested that Crusader keep the Deposit to use in connection with other potential deals. West wrote, "Yes . . . they need to make a decision this week or return the deposit they hold. The deposit we [Crusader] hold would apply to the

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[9] Each email has been quoted verbatim.

new term sheet with our investor. It is provided for in the term sheet." (RP 993.) West, however, had already spent the Deposit, but did not tell Mouton. (RP 378.)

Mouton rejected West's suggestion that the Deposit be held for another deal, stating, "The funds you hold are mine personally . . . with terms that require short-term payback, so they'll need to come back. This new deal . . . we'd fund from a different source . . . ." (RP 993.) Thus, on February 25, 2009, Mouton sent West the bank account information to return the Deposit. (RP 995.) The next day, West urged Mouton to "[p]lease just be patient a few more days. We expect to hear a positive response next week." (RP 997.)

On February 27, 2009, Mouton responded to West's email and stressed his urgent need for the return of the Deposit. Mouton explained that he could "work with a term sheet on Mon[day] or Tues[day], but [if] not, I *have* to get that cash back to put to use." (RP 999.) Mouton reiterated his request for the return of the Deposit on March 4, 2009. Mouton emailed West:

> It's now [been] 2 more weeks since we were "close" to getting something closed, and 10 weeks since initiating this deal.
>
> What am I supposed to do here? At this point, my internal credibility with my Board is damaged . . . I'm sitting around waiting for who knows what, after giving "pass or fail instructions," just in order to get my own – personal – $130k deposit funds back, *long* after any reasonable deal should have closed.

(RP 1001.)

The next day, West again stalled Mouton, writing, "it would be a waste to through [sic] that all away to start over with someone else. I know it has been many weeks to get to this point but I ask that you please be patient just a little while longer while we push to get this deal closed

for you." (*Id.*) Again, West did not tell Mouton that he had already spent all the funds for his own purposes. (RP 381-82.)

Mouton and West continued to exchange emails throughout early-March 2009. The tenor of their communications remained the same. Mouton repeatedly insisted that either the Ability transaction close immediately or that West and Crusader return the Deposit. In each instance, West continued to stall and insist that AmeriChip and Ability were within days of closing the transaction. (RP 1003-15.)

Mouton testified that, by mid-March, the ongoing "trouble" with the release of the Deposit began to concern him, and he was worried that the Deposit was no longer in the HSBC Account. (RP 498-99.) On March 10, 2009, he communicated that doubt to West. Mouton emailed West, "insofar as I gave *explicit instructions* going on 3 weeks ago to get an answer or return deposits, and have repeated it now multiple times without result, how can you expect my Board to have any comfort that those deposit funds are even still there?" (RP 1007.)

In his response, West ignored Mouton's concerns, and instead pointed the finger at Ability. He wrote, "I understand. We have been riding [Ability] everyday . . . . All I can tell you is what [Ability] is telling me . . . ." (RP 1011.) During his testimony before the Hearing Panel, West conceded that he was not about to admit to Mouton that he had spent the Deposit. (RP 387.)

On March 25, 2009, Mouton wrote, "It's been awfully quiet the last week or two. Where'd everybody go?" (RP 1017.) Mouton also emailed West and a representative from Ability that same day, asking that Ability confirm the release of the Deposit from escrow. Mouton wrote, "Having not heard anything in the last week from anyone on this deal, I'm

assuming this project is a no go. Please confirm, and lets [sic] get the release documentation rolling." (RP 1019.) On April 8, 2009, a representative from Ability responded to Mouton's email, stating that he did not have any authority over the Deposit and that he was "fine" with "releasing the funds from escrow." (RP 301-02, 1035.)

On April 8, 2009, Mouton again provided wire instructions for the return of the Deposit. (RP 1037.) But, West did not return the Deposit. Consequently, on April 11, 2009, Mouton demanded that West immediately return it. Mouton wrote:

> I haven't gotten an email from you in almost a full month . . . . I haven't gotten a comment or response on the 4 messages I've sent since last Friday. Is there some kind of problem I need to be aware of?
>
> More immediately, what else do I have to do in order to get you to return the $113,513.68 I wired to your escrow account in December?
>
> I've already made it clear to you that [this] is causing me a lot of problems, so I need you to address this immediately.

(RP 1039.)

West waited three days to reply because there was a problem – he did not have the funds to return to Mouton. (RP 393, 395-96.) West, however, continued to conceal this. Although West admitted that he always had access to email and could work from anywhere (RP 655-56), he blamed the delay on having been out of the office for Easter and promised that he would "try to get you a wire back before the end of this week or at worst early next." (RP 1041.)

Six days later, West still had not returned the Deposit. Instead, he emailed Mouton on April 20, 2009, trying to buy more time. He wrote to Mouton that he was back in the office and would send the wire transfer that week. (RP 1043-44.) He made this promise despite knowing

that he still did not have the cash. (RP 396-97, 399-400.) Mouton responded – for a third time – with wire instructions for returning the Deposit. (RP 1043.)

When Mouton did not receive the Deposit on April 20 or 21, he again demanded an explanation. In an April 22, 2009 email, Mouton wrote, "Please tell me where my money is, and why it's the middle of the week and I still haven't received it." (RP 1045.) West ignored Mouton's question yet again. Instead, he apologized for the delay and assured Mouton, "You will have the wire this week." (*Id.*) A frustrated Mouton replied, "What exactly does that mean? I need to know specifics, that I can rely on, and why this continues to drag on?" (*Id.*) West did not respond.

West withheld from Mouton that he was trying to replace the Deposit by renting his Southampton home for the summer. West testified that in late January 2009, he commenced discussions with a potential renter. (RP 793.) By late February or early March, they had agreed upon a price, but no lease had been signed because West wanted to structure the deal to avoid paying taxes on the lease proceeds. (RP 794.) West testified that he "came up with a structure" to avoid these taxes, whereby he would lease his home to Crusader Financial (Crusader Securities' parent company), and Crusader Financial would in turn sublease the house to the renters. (RP 794-95.) This would allow West to "shelter the income" from the lease by applying it to Crusader Financial's net operating loss. (RP 795.) Remarkably, West testified that, while he could have had the lease signed and had the proceeds in hand as early as March, he delayed the transaction in order to gain this tax benefit for himself. (RP 798).

G. West Returns the Deposit After Mouton Files a Complaint Against West and Crusader Securities

By April 23, 2009, Mouton had had enough. He emailed West demanding that the Deposit be returned immediately and telling West that he intended to report him to the authorities. Mouton emailed West:

> It has now been a month and a half since I first requested the return of my escrow funds, followed by a month of dodging my calls and messages. By your own email, it's also been more than two weeks since you received [Ability's] confirmation, and there is no reasonable explanation why you haven't returned my funds.
>
> It's evident that rather than remain in a segregated escrow account, my funds have been converted to some other use, which is a crime.
>
> * * *
>
> [I]f my funds have not been transferred by end of business today, my first calls tomorrow morning will be to FINRA and the NY Attorney General, followed by a faxed letter to both from my attorney.

(RP 1047-48.)

West responded to Mouton's email within minutes, assuring Mouton that he expected to send the wire the following day. He also, for the first time, told Mouton that the HSBC Account had no escrow agreement. West wrote, "Crusader has no escrow agreement with you [Mouton] or [AmeriChip]." West stressed that, "[t]he issue dealt with the funds being in a time sensitive deposit that did not make them readily available." (RP 1047.) West never explained what he meant by "time sensitive deposit." In fact, Mouton's suspicions of West's use of the Deposit were absolutely right. West had used the Deposit to pay personal expenses and it was no longer in the HSBC Account. (RP 402.) West could not replace the funds because he had not yet received the lease payment for his Southampton home. (RP 406-07.)

West did not return the Deposit the following day, as he had promised in his email, because he still did not have the money. (*Id.*) Instead, West tried to buy still more time. He emailed Mouton, "[w]e are hoping to get your wire instructions to the bank this afternoon but it may slip into Monday. We assure you that you ARE getting the money back . . . and ask for your patience just a little while longer." (RP 1051.)

Three days later, West continued stalling Mouton. On April 27, 2009, West contacted Mouton via email and told him that the wire instructions would be sent "this afternoon." (RP 1055-56.) West promised this despite the fact that he still had not received the rental payment, and did not have the money. West emailed Mouton later that same day and claimed, "I just checked with the bank and it does not appear as though the wire went out this afternoon. Not sure why[,] but I was assured it would be going out tomorrow. Our apologies for the extra day." (RP 1055.) Of course, West knew exactly why the wire had not gone out – he had not initiated the transfer while awaiting payment from the renters. (RP 406-07.)

Mouton testified that he filed complaints against West and Crusader with FINRA and the New York Attorney General's office. (RP 516.) On April 28, 2009, Mouton emailed West that the "New York AG is waiting confirmation of funds transfer, since you said it would be today, and as I informed them[,] my only complaint was with non-receipt of funds. I have no problem pulling my complaints when the transfer occurs." (RP 1055.) That afternoon, Mouton filed a formal complaint on FINRA's website. (RP 523, 1057-58.)

That same afternoon, West, upset about the complaints, sent Mouton a succession of vitriolic emails.[10] In these emails, West stated that he had hired an attorney to handle Mouton's purported "threats of criminal activity to resolve a civil matter," and again claimed that Mouton had "no written agreement" with Crusader. (RP 1053-56.)

On April 29, 2009, more than two months after Mouton's initial request, and a full three weeks after Ability's release of the Deposit, West finally returned the Deposit to Mouton. West did so, however, only after he received the rental payment. (RP 302, 406.)

In May 2009, West submitted a letter to FINRA that Mouton had signed withdrawing his complaint. (RP 1689-90.) Mouton testified that he signed the letter at West's request and that it had been drafted by West. (RP 524-25.) West submitted the letter in response to FINRA's Rule 8210 request for information about the complaint. (RP 1063, 1072-73.) Mouton testified that, despite his agreement to sign the letter, he did not believe West had the right to use the Deposit, he expected the Deposit to be held in escrow until closing, and that his email communications with West supported that understanding. (RP 525-26, 528-29.)

III. PROCEDURAL BACKGROUND

A. Proceedings Before the Hearing Panel

FINRA's Department of Enforcement filed a two-cause complaint against West in June 2011. (RP 7-11.) The first cause alleged that West misused AmeriChip's funds in violation of

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[10] While West asserts that he did not know about Mouton's complaint to FINRA until after he had returned the Deposit, the documentary evidence is clear that Mouton had told West he was going to complain to FINRA and other authorities a week before the Deposit was returned. (RP 1047-48.)

FINRA Rule 2010. (RP 8-9.) The second cause, which involved a separate transaction, alleged that West failed to utilize a proper escrow account in connection with a contingency offering and that West prematurely withdrew escrow funds before the offering's contingency was satisfied.[11] (RP 9-10.) Enforcement alleged that West's conduct with regard to the second count caused Crusader to violate Securities Exchange Act of 1934 Rule 15c2-4, and that West violated NASD Rule 2110.[12] (RP 10.)

After a two-day hearing, the Hearing Panel issued its decision in July 2012, finding that West violated FINRA's rules as alleged in the complaint. (RP 1745-56.) The Hearing Panel barred West for the misuse of customer funds in connection with the AmeriChip transaction. (RP 1756.)[13]

B. Proceedings Before the NAC

Before the NAC, West appealed only the Hearing Panel's sanction for misuse of customer funds. (RP 1948-60.) West admitted that he had misused AmeriChip's funds, but argued in favor of lesser sanctions. (RP 1826.) West argued that the misuse resulted from a misunderstanding caused by the lack of an explicit written agreement concerning the use of the funds, and Mouton's purported "unspoken assumption" that the funds would be held in escrow.

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[11] These funds were prematurely withdrawn from the HSBC Account – the same account into which AmeriChip later wired the Deposit.

[12] NASD Rule 2110 was in effect at the time of the misconduct related to the contingency offering, which occurred prior to the AmeriChip transaction.

[13] In light of the bar, the Hearing Panel declined to impose sanctions for the violations under cause two. (RP 1756.)

(RP 1808-10.) West further asserted that he never "*even discussed*" the use of the Deposit with Mouton. (RP 1809.)

In its decision, the NAC affirmed the Hearing Panel's findings that West had misused customer funds, as well as its sanction barring West. (RP 1948-60.) In affirming the Hearing Panel's findings, the NAC acknowledged that West did not contest liability for the AmeriChip transaction. (RP 1956.) The NAC also considered and rejected West's mitigation arguments. It found that there was no misunderstanding because the relevant documents were clear. (RP 1957-58.) Moreover, the NAC found that West's experience and background, and his actions in trying to conceal his conduct, established that he knew he was not permitted to use the Deposit. (1958.) The NAC also found that West's misconduct was intentional, occurred over an extended period of time, and served to benefit him financially. (RP 1958, 1960.) In addition, the NAC rejected West's mitigation arguments based on Mouton's letter withdrawing his complaint, West's lack of disciplinary history, and West's compliance with his Rule 8210 obligations during the investigation. (RP 1959.)

IV. ARGUMENT

The Commission should uphold the NAC's findings that West misused customer funds and affirm the sanction of a bar in all capacities. Despite West's admission of liability and only requesting a reduced sanction before the NAC, West now argues that the NAC's decision should be reversed. (West Br. at 27.) West appears to base his appeal of liability on two grounds. First, West asserts that he was actually authorized to use the Deposit because there were no "express limitations" on his use of the funds. (West Br. at 6.) He also suggests that there was an oral agreement authorizing him to use the funds. (West Br. at 26.) Second, West argues that the

AmeriChip transaction is not a proper subject for FINRA enforcement under Rule 2010 because it did not involve securities. (West Br. at 11-12.)

As discussed below, West is wrong on all counts. West admitted his liability for misuse of AmeriChip's funds before the NAC. (RP 1826.) West cannot disclaim his earlier admissions. And the arguments that West now advances for reversing the NAC's decision are unsupported and meritless. The Advisory Agreement and the Term Sheet put express limitations on the use of the Deposit. Moreover, there is absolutely no evidence in the record of any oral agreement that provided anything different.

West's subsequent conduct also contradicts any claim that his use of the funds was authorized. Despite numerous demands from Mouton, West never told him he had spent the Deposit. Indeed, the documents show that he stalled and misled Mouton. He told Mouton over and over that the transaction would close imminently. Later, he kept promising to return the Deposit even when he knew he did not have the money to do so.

West also appeals the NAC's sanction. He argues that the sanction of a bar is inappropriate and disproportionate, that the NAC failed to consider all mitigating factors, and improperly applied several aggravating factors. As set forth below, the NAC properly applied the Sanction Guidelines ("Guidelines"), considered all relevant evidence of mitigating and aggravating factors, and properly barred West for his egregious misuse of customer funds. The Commission should uphold the NAC's sanction.

A. West Admitted That He Misused the Deposit and Failed to Preserve This Issue for Appeal Before the Commission

West's argument that the NAC's finding that he misused customer funds should be reversed is foreclosed by his prior admission of liability. In his brief to the NAC, West admitted

that he misused AmeriChip's money. West's NAC brief is crystal clear. West wrote that he "did not tell the Hearing Panel and he is not telling the [NAC] that he did not misuse [AmeriChip's] funds." (RP 1826.) Rather, he argued that while "[h]e did misuse them," that misuse was based on a misunderstanding between Mouton and himself.[14] (*Id.*)

It is well recognized that "statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney." *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981). Briefs submitted on behalf of a party – like West's NAC brief – clearly contain statements made within the scope of the attorney's agency. Indeed, assertions contained in a legal brief are not only evidentiary admissions, but they may be considered binding judicial admissions. *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) (determining that counsel's factual statement in legal brief constituted a binding admission). Thus, the admission of liability in his NAC brief binds West here.

In addition, because West did not appeal the finding of misuse to the NAC, he failed to preserve this issue for appeal to the Commission. It is well established that issues not raised in an initial appeal are waived in subsequent appeals. *See Nicholas T. Avello*, 58 S.E.C. 395, 400 (2005), *aff'd*, 454 F.3d 619 (7th Cir. 2006); *Mayer A. Amsel*, 52 S.E.C. 761, 767 (1996) (holding that arguments are waived where raised for the first time on appeal); *see also In re Nortel Networks Corp. Sec. Lit.*, 539 F.3d 129, 132 (2d Cir. 2008) ("It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation omitted)); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989)

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[14] In his Wells submission, which he attached to his answer to the complaint, West also admitted that the Deposit "should have been kept *untouched* in a separate Crusader account until the closing." (RP 41-42.)

("[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal. . . .").

Here, West ignores his previous admissions, and changes his theory. Moreover, he now asserts, for the first time, that his use of the Deposit was authorized by an alleged agreement for which there is absolutely no evidence. (West Br. at 7.) Specifically, while in his brief to the NAC West asserted that "there was no direction, *oral or written*, from [AmeriChip] or any of its officers" concerning the use of the Deposit, (RP 1809 (emphasis added)), he now claims there was an "oral agreement" which authorized his use of the Deposit. (West Br. at 26.)

The Commission should reject West's attempt to rewrite history. If he believed he was authorized to use the Deposit, he should have made this argument before the NAC. If there was an oral agreement authorizing West's use of AmeriChip's money, then he should have presented this evidence at the hearing and preserved this issue on appeal before the NAC. But, there is no evidence of any such agreement in the record. West should not be allowed to walk away from his own admissions because he believes he may have better luck before a different adjudicator. *See Amsel*, 52 S.E.C. at 767 (noting that "a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action" (internal citation omitted)). Nonetheless, West's new arguments do not change the result, and the NAC's findings that he misused customer funds, as well as its sanction of a bar, should be sustained.

B. West Misused Customer Funds in Violation of FINRA Rule 2010 When He Used the Deposit to Pay for His Personal and Business Expenses

West misused AmeriChip's funds in violation of FINRA Rule 2010. Rule 2010 requires members and associated persons to "observe high standards of commercial honor and just and

equitable principles of trade." An associated person misuses customer funds "where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer." *Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NASD NAC May 23, 2001). It is well established that using customer funds for personal purposes without the customer's knowledge or authorization is a misuse of customer funds that violates just and equitable principals of trade. *See Kevin Lee Otto*, 54 S.E.C. 847, 852 (2000), *aff'd*, 253 F.3d 960 (7th Cir. 2001); *see also Patel*, 2001 NASD Discip. LEXIS 42, at *25 ("The misuse of customer funds . . . violates [FINRA Rule 2010] because such conduct is patently antithetical to the high standards of commercial honor and just and equitable principles of trade that the [FINRA] seeks to promote." (internal quotation omitted)).

The record convincingly proves that West used customer funds for personal purposes without his customer's knowledge or authorization. West admitted all the key facts underlying his misuse of AmeriChip's Deposit. The relevant documents unambiguously provided that the Deposit was to be held by Crusader until closing or returned promptly. The circumstances and documentary evidence overwhelmingly support that the Deposit was to remain in escrow. And yet, West used the Deposit to pay his own personal expenses and Crusader's business expenses.

1. The Deposit Consisted of Customer Funds

There is no question that the funds misused here were customer funds. Indeed, in his brief, West admits that AmeriChip was his customer, and he takes pains to point out that the Deposit consisted of AmeriChip's funds. (West Br. at 3.) AmeriChip became a customer of West and Crusader when it executed the Advisory Agreement. (RP 893-98.) Mouton was the Vice Chairman and, later, the CEO of AmeriChip, and acted as its representative. (RP 300, 471.) Whether the funds originated from a loan by Mouton to AmeriChip is irrelevant. The only

relevant fact is that the funds were deposited in the HSBC Account by a customer – AmeriChip and its representative Mouton – in connection with West's business relationship with them.

2. West Admitted That He Used AmeriChip's Funds to Pay Personal and Business Debts

West admitted and stipulated that within minutes of receiving the Deposit, he transferred it out of the HSBC Account and into other Crusader accounts and his own personal bank account. (RP 301, 361-72.) He acknowledged that over the next several weeks he spent the entire Deposit to replenish his overdrawn accounts, pay his personal bills, and pay expenses for Crusader entities. (RP 301, 361-72, 378.) He then concealed his use of the Deposit for weeks, stalling Mouton by asking him to give the transaction just a little more time, and ignoring Mouton's demands that he tell him why the funds were not returned. (RP 378, 381-82, 396-400, 991-1019, 1027-56.) There is no question West used AmeriChip's money to pay his personal and business debts.

3. The Advisory Agreement and Term Sheet Established How the Deposit Was to Be Held and Did Not Authorize West to Use It

The Term Sheet and Advisory Agreement expressly limited the use of the Deposit. First, the Advisory Agreement, which was drafted by West himself (RP 680), provided that the fee received by Crusader would only be "fully earned and paid at each closing." (RP 895.) Thus, until the Ability transaction closed, Crusader had no right to the fee. And while the Advisory Agreement did allow Crusader to deduct its fee from the proceeds of any transaction, nothing in

that, or any other document, gave West the right to "prepay" himself or his company any fees.[15] Because the Ability transaction never closed, neither West nor Crusader ever had any right to take AmeriChip's money.

The Term Sheet, the relevant portions of which West revised, explicitly provided how the Deposit was to be held and used. The Deposit was to be "*held* by Crusader until closing." (RP 949 (emphasis added).) The Term Sheet further provided that the Deposit would be: (1) applied to the transaction if it closed; (2) returned to AmeriChip *promptly* if it did not; or (3) forfeited to Ability if AmeriChip failed to meet certain requirements. (*Id.*) Nothing in the Term Sheet allowed West to take and spend the Deposit for his own benefit.

The other evidence in the record, and common sense, supports this straightforward reading of the documents. AmeriChip, Mouton, and Ability believed and expected that the Deposit would be held by Crusader in escrow. First, West's contention that he was allowed to use the Deposit is controverted by the purpose of the Deposit and the commercial realities here. (West Br. at 6-9.) If West was permitted to unilaterally and secretly spend the Deposit for his own purposes, then why would Ability require a Deposit at all? It would not. The purpose of the Deposit was to give Ability some assurance of AmeriChip's seriousness before investing time and money into the transaction. The Deposit would also compensate Ability if AmeriChip failed to meet its obligations under the Term Sheet. West's misconduct frustrated the obvious purpose of the Deposit.

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[15] While West appears to have abandoned this "prepayment" argument in favor of asserting a new theory consisting of a supposed agreement which allowed him to use the Deposit, he has in past filings described his actions as "advance[ing] himself the compensation he would be receiving had the loan succeeded." (RP 1812.)

Second, West's concealment of his misconduct is further evidence that he knew the Deposit was to be held in escrow. West's deception is evident in the many emails between Mouton and him. (RP 991-1019, 1027-56.) Moreover, West testified that he never told Mouton or Ability that the Deposit had been spent. (RP 378, 381-82, 387, 395-402.) He repeatedly stalled and misled Mouton, providing him with false assurances meant to lull him into believing the Deposit was safely in escrow. (RP 406-07, 991-1019, 1027-56.) He never explained to Mouton that he could not return the Deposit until April 29 because he did not have the money. West withheld the truth in the face of Mouton's repeated demands for information about the location of the funds and their immediate return. As the NAC found, "the email communications between West and [Mouton], lead us to conclude that West knew that he should hold the Deposit pending the close of the sale and leaseback transaction." (RP 1058.)

Finally, West argues that because the Deposit was not transferred to an appropriate escrow account (i.e., with an escrow agreement and escrow agent) the parties intended for West to use the Deposit however he wanted. (West Br. at 15-16.) But there is no evidence that Mouton or Ability knew that Crusader did not treat the funds as being held in escrow. Indeed, the record overwhelming supports the fact the Mouton and Ability were led to believe the funds were in an escrow account. (RP 361, 390, 941-45, 991-1019, 1027-1056.) Significantly, West had AmeriChip transfer the Deposit into an account that West called an "escrow account." West cannot use his own deception to now argue that the parties intended for him to have unrestricted use of the Deposit.

Nor does the fact that Mouton did not question the authenticity of his trusted advisor's escrow account give West a free pass to do whatever he wanted with his customer's money. West knew that the impetus for having Crusader hold the Deposit in the first place was Mouton's

concern for its safety and his desire to have it held in escrow. (RP 301, 351, 480, 923, 931, 933-36.) This was Mouton's expectation when West directed him to wire the Deposit to what West called an "escrow account." (RP 952, 513-15.) Mouton trusted West and West betrayed that trust.

West also claims there was an oral agreement authorizing him to use the Deposit. (West Br. at 26.) As discussed above, West advances this argument for the first time in this appeal, and for that reason it is foreclosed. Moreover, there is not a shred of evidence in the record that establishes that such an agreement existed. Indeed, both West's and Mouton's testimony, and the documentary evidence, directly contradicts the existence of such an oral agreement. (RP 378, 381-82, 387, 513-15, 991-1019, 1027-56.)

West's reliance on Mouton's letter withdrawing his complaint as evidence of an oral understanding is misplaced and disingenuous. (West Br. at 7-9.) The letter, which was drafted by West or his attorney in response to FINRA's investigation, and which Mouton agreed to sign after the Deposit had been returned, is self-serving and contradicted by the contemporaneous evidence. As discussed above, the Term Sheet and Advisory Agreement set out the parameters for use of the Deposit. (RP 893-98, 948-49.) The emails exchanged between Mouton and West, moreover, confirm that Mouton believed that the Deposit would be held in escrow. (RP 941-45, 991-1019, 1027-1056.) In his emails, Mouton repeatedly refers to the funds being "in escrow." (RP 1029, 1039, 1047.) He wrote to Ability requesting the "release" of the escrow funds. (RP 1029-36.) As his concerns grew, Mouton explicitly stated that he feared the funds were no longer in escrow. For example, on March 10, 2009, Mouton asked "how can you expect my Board to have any comfort that those deposit funds are even still there?" (RP 1007.) On April 23, 2009, Mouton wrote that it is "evident that rather than remain in a segregated escrow

account, my funds have been converted to some other use." (RP 1047.) West let Mouton continue to believe the funds were in escrow. And, significantly, West didn't tell Mouton there was no escrow agreement for the account until after Mouton threatened to complain to the authorities. (*Id.*)

West's after-the-fact letter simply does not stand up in light of the contemporaneous written agreements and communications. Indeed, in his signed declaration and hearing testimony, Mouton confirmed his true understanding. (RP 1693, 525-29.) Mouton testified that he believed the funds would remain in escrow until closing. He said "I assumed all along that these funds would be sitting in an escrow account," and maintained that, despite signing the letter, West did not have the right to withdraw the deposit to pay his personal expenses. (RP 513, 525-29.)

Moreover, the existence of such an agreement is completely implausible given West's concealment of his use of the Deposit. If he and Mouton had such an agreement, West would have explained that he was waiting to receive replacement funds. Then, Mouton would never have alerted FINRA to any misconduct.

The record overwhelmingly shows that the Deposit was intended to be held by West in escrow and that West was not authorized to use his customer's money to pay his personal and business expenses.

4. West's Claim That His Misconduct Is Excused Because It Was Based on His Desire to Protect AmeriChip Is Not Credible and Irrelevant

West tries to excuse his delay in returning the Deposit by claiming he was protecting AmeriChip from Mouton's purported self-interested malfeasance. (West Br. at 11.) This excuse

is not only irrelevant to West's misuse of the Deposit, but it is also directly contradicted by West's testimony at the hearing.

West's claim of concern for AmeriChip is unsupported. First, there is absolutely nothing in the record to show that West was concerned about Mouton. Nor is there any evidence that he did anything to communicate any concerns about Mouton to anyone at AmeriChip.

But, even if it were true that West was concerned, this does nothing to excuse West's own breach of loyalty to AmeriChip. Mouton was unquestionably the Vice Chair and CEO of AmeriChip, and authorized to act and make decisions on its behalf. (RP 300, 471.) Any claim that he did not act in AmeriChip's best interest is irrelevant to West's misconduct. West's unsupported allegations about Mouton's motives and relationship to AmeriChip are a distraction meant to divert the Commission's attention from West's misconduct.

Moreover, West admitted the real reason for the delay in returning the misused funds in his hearing testimony. He had spent the money for his own purposes. (RP 301, 367-72.) West was working to finalize the lease of his Southampton home and intended to use those proceeds to replace the Deposit. (RP 396-97, 793-99.) Indeed, he returned the Deposit the same day he received those proceeds. (RP 302, 406, 800.) West's brazenly self-serving conduct at the expense of his customer is the real issue here.

5. FINRA Rule 2010 Applies to All Business Related Conduct

West argues that the misconduct here did not involve a securities transaction and therefore FINRA lacks jurisdiction.[16] (West Br. at 11-12.) West is mistaken. FINRA's authority to pursue disciplinary action for violations of FINRA Rule 2010 encompasses unethical business related misconduct, regardless of whether the misconduct involves a security. *See James A. Goetz*, 53 S.E.C. 472, 477-78 (1998) (explaining that NASD Rule 2110 applies when the respondent's misconduct reflects on his ability to comply with regulatory requirements fundamental to the securities business and to fulfill his obligations in handling other people's money); *Thomas E. Jackson*, 45 S.E.C. 771, 772 (1975) ("Although [respondent's] wrongdoing in this instance did not involve securities, the [FINRA] could justifiably conclude that on another occasion it might.").

West and Crusader Securities were registered with FINRA and thus subject to its rules and enforcement jurisdiction. West's misconduct here occurred in connection with a business relationship between Crusader and AmeriChip. Rule 2010 is a general ethics rule that applies to all business related conduct. The fact that the financing transaction did not involve securities

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[16] In his brief, West quotes exchanges with a NAC subcommittee member during oral argument, concerning the issues of who was Crusader's customer, and whether the transaction involved securities. (West Br. at 5, 12). West's suggestion appears to be that the questions posed by the subcommittee member somehow undercut the NAC's findings against him. These questions, asked at oral argument to clarify factual matters, do not change the fact that the NAC properly found that West misused customer funds and that it is well established that Rule 2110 applies irrespective of whether the transaction involved securities.

does not affect the applicability of FINRA Rule 2010 or undercut the NAC's finding that West's misconduct here violated the rule.[17]

6. The NAC Considered All Relevant Evidence in Finding That West Violated Rule 2010 by Misusing Customer Funds

West accuses the Hearing Panel and NAC of basing their decisions upon an "*assumption* crafted out of whole cloth." (West Br. at 3.) First, the Hearing Panel's decision is not under review here. The NAC's decision is the final action of FINRA that is subject to review by the Commission. *See* 15 U.S.C. § 78s(e); FINRA Rules 9351(e), 9370(a). Thus, any findings of the Hearing Panel are irrelevant. *See Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 n.17 (Nov. 8, 2006).

Moreover, the NAC properly considered all the relevant evidence, including the agreements and West's own admitted conduct, in coming to its decision. The NAC simply rejected West's implausible interpretation of the evidence. (RP 1956-60.)

West also points the finger at FINRA's investigation and accuses FINRA of not conducting a "fair and proper investigation" of the AmeriChip transaction. (West Br. at 1.) This is another attempted diversion from West's admitted misconduct. The matter on appeal is the NAC's decision – not the investigation. The NAC's decision is fully supported by the record.

West's accusation here appears to be based on his contention that FINRA failed to investigate certain matters related to Mouton, including his loan to AmeriChip and whether he

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[17] West asserts that the NAC "incorrectly referred" to the AmeriChip transaction as a "'best efforts' securities offering." (West Br. at 12.) This is simply wrong. The only time a securities *offering* is mentioned is in the Hearing Panel's decision in connection with the contingency offering that was the subject of the second cause. (RP 1752.)

had a right to be repaid on that loan. (West Br. 3-4.) West's focus on individuals and entities not within FINRA's jurisdiction is a transparent diversionary tactic. West offered no proof of these scandalous allegations, and they are, at best, pure speculation and conjecture.[18] (*Id.*) Moreover, these matters are entirely irrelevant to whether West himself misused customer funds. West was obligated as a registered person to keep safe and not use his customer's money for personal purposes. He was also obligated to conduct himself in a manner consistent with the high standards of just and equitable business practices expected of an associated person of a FINRA member. West plainly violated these obligations. Pointing the finger at Mouton does nothing to change this.

To the extent West's complaint is about Mouton's credibility as a witness, West had the opportunity to raise these issues on cross-examination. Indeed, West's counsel conducted a lengthy cross-examination of Mouton at the hearing. (RP 529-96, 755-65, 773-75.) In any event, as the NAC noted in its decision, the facts upon which the findings and sanctions were based were largely the subject of the parties' stipulations and otherwise undisputed.[19] The documents speak for themselves here and establish West's misconduct.

For all these reasons, the Commission should affirm the NAC's finding that West misused his customer's funds in violation of FINRA Rule 2010.

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[18] West's continued insistence on blaming others reveals his continuing failure to appreciate the seriousness of his own admitted misconduct. West makes unsupported allegations of wrong-doing against Mouton, blames FINRA for pursuing its investigation, and even blames HSBC bank for his failure to set up a proper escrow account. (RP 682.) West's continuing refusal to acknowledge responsibility for his actions serves to underscore the egregious nature of his misconduct. *See, e.g., Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496 (Nov. 9, 2012).

[19] The NAC noted that "the facts of this case are undisputed and subject to the parties' stipulations." (RP 1948; *see also* Stipulations at RP 299-303.)

C. The Sanction of a Bar for West's Misuse of Customer Funds Is Neither Excessive nor Oppressive

The Commission should affirm the NAC's sanctions, as they are neither excessive nor oppressive. *See* 15 U.S.C. § 78s(e)(2). Moreover, the sanctions here are consistent with the Guidelines and the protection of the investing public. The Commission considers the principles articulated in the Guidelines and has regularly affirmed sanctions that are within the recommended ranges. *See Robert Tretiak*, 56 S.E.C. 209, 233 (2003); *Daniel D. Manoff*, 55 S.E.C. 1155, 1166 (2002).

For improper use of customer funds, the Guidelines advise the NAC to generally consider a bar.[20] Where the improper use, however, results from a misunderstanding of the customer's intended use of the funds, or other mitigation exists, the Guidelines provide that an adjudicator may consider a lengthy suspension. *Guidelines*, at 36. FINRA has routinely imposed a bar where a registered representative improperly used customer funds. *See, e.g.*, *Patel*, 2001 NASD Discip. LEXIS 42, at *27-28 (imposing a bar where respondent used customer funds to pay his own expenses); *Otto*, 54 S.E.C. at 856 (affirming imposition of a bar where respondent misused customer funds for his personal benefit).

The NAC carefully considered the grave nature of West's misconduct, as well as all evidence of aggravating and mitigating factors. The Commission has held that the "deception of a client about the use of money is unethical and reprehensible." *Otto*, 54 S.E.C. at 852. For this

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[20] *See FINRA Sanction Guidelines* 36 (2013) (Improper Use of Funds), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf (hereinafter *Guidelines*). The NAC applies the applicable Guidelines in place at the time of its decision. The relevant portions of the Guidelines are attached as Appendix A.

serious violation, the NAC appropriately barred West in all capacities. (RP 1960). The NAC rejected West's claim of misunderstanding, found that his misconduct "represents an egregious breach of trust on the part of an experienced securities industry professional," and concluded that "after careful consideration of the record and the evidence of aggravating and mitigating circumstances presented," the sanction of a bar was "abundantly supported here." (*Id.*) The NAC's bar falls squarely within the Guideline recommendations and the sanction should be affirmed.

1. The NAC Properly Found Several Aggravating Factors, Concluded That West's Misconduct Was Egregious and Barred Him

a. West's Misconduct Was Intentional and He Acted to Conceal His Actions from His Customer

The NAC properly found aggravating the evidence that West's misuse of the Deposit was intentional. (RP 1958); *Guidelines*, at 7 (Principal Considerations, No. 13). When the dispute concerning the Deposit arose, West proposed that Crusader hold the Deposit. (RP 352-53, 435, 484, 553-54, 937.) He personally provided Mouton with instructions to wire the Deposit to the "Crusader Securities Escrow Account." (RP 361, 941-45.) West then personally transferred the Deposit to other accounts that he controlled, and used it to pay his debts. (RP 301, 361-71.)

The NAC properly found that West's concealment of his misconduct was an additional aggravating factor. (RP 1958); *Guidelines*, at 6 (Principal Considerations, No. 10). The documentary evidence shows that West, in numerous emails, misled and lied to Mouton. He let Mouton believe that the Deposit was in escrow and stonewalled him for weeks by promising that the transaction would close imminently and, later, that he would return the Deposit when he did not have the funds to do so. (RP 991-1019, 1027-56.) At the hearing, West admitted that he

never told Mouton that he had spent the Deposit and agreed that he was "not about to tell him." (RP 378, 381-82, 387, 396-400.)

b. West's Misconduct Occurred over an Extended Period of Time

The NAC also properly found that West's misconduct occurred over an extended period of time, an aggravating factor under the Guidelines. (RP 1960); *Guidelines*, at 6 (Principal Considerations, No. 9). West's misuse of the funds involved multiple transfers and payments over several weeks. West made several transfers from the HSBC Account in December 2008 and January and February 2009, ultimately transferring the entire Deposit to other Crusader accounts and his own personal account. (RP 1091-1160.) He then made multiple payments to pay various business and personal debts. (*Id.*) Moreover, West's misconduct continued throughout February, March, and April 2009, as he concealed his use of the Deposit from Mouton, and made repeated promises to return it when he did not have the funds to do so.

West's characterization of his actions as occurring over a few days is artificially narrow. (West Br. at 14.) West only acknowledges the period between Ability's April 8, 2009 release of the Deposit and his return of the funds on April 29, 2009. But even accepting *arguendo* West's flawed premise, this period is actually three weeks. The Term Sheet required that the Deposit be returned "promptly." (RP 949.) Three weeks is not prompt for a simple wire transfer.

Moreover, West conveniently ignores that his misconduct started months before, on December 24, 2008, when he transferred the Deposit out of the HSBC Account and used it to pay his bills, and continued until he ultimately returned it. The NAC's conclusion that West's misconduct occurred over an extended period of time is well supported.

c. West Benefitted Financially from His Misuse of Customer Funds

The NAC also correctly found that West received financial benefit from the misuse of AmeriChip's money. (RP 1960.) He used the Deposit to replenish funds in Crusader's and his own personal bank accounts, both of which had negative balances and were incurring fees. (RP 367, 370-71, 1094, 1119.) He was able to make payments on his past-due mortgage, and to pay various other personal and business debts. (RP 371, 1105-40.) Also, West's delay in returning the Deposit to AmeriChip allowed him to structure his home lease as a tax shelter, providing him with an additional monetary benefit. (RP 793-98.)

Unquestionably, both West's initial misuse of the funds to pay his bills, and the subsequent delays in returning the Deposit benefitted him financially. West put his own interests before that of his customer, violating the most fundamental trust owed to a customer. As recognized by the Guidelines, the financial benefits West realized are an aggravating factor here. *Guidelines*, at 7 (Principal Considerations, No. 17).

2. The NAC Carefully Considered All Purported Evidence of Mitigating Factors

The NAC considered all the purportedly mitigating factors advanced by West, and properly rejected them. The factors West cites—i.e., his lack of disciplinary history, his compliance with Rule 8210 Requests, his return of the Deposit, and Mouton's attempt to withdraw his complaint—do not mitigate West's admitted misconduct.

a. West's Lack of Disciplinary History Is Not a Mitigating Factor

The NAC appropriately applied FINRA's longstanding position that a respondent's absence of prior disciplinary history is not a mitigating factor. *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 F. App'x 886 (11th Cir. 2011); *see also Keyes*, 2006 SEC LEXIS 2631, at *23 (stating that the absence of disciplinary history is not mitigating because "an associated person should not be rewarded for acting in accordance with his duties as a securities professional"). The fact that West may have previously complied with FINRA rules, does not excuse his serious violation here.

Moreover, West mischaracterizes his conduct here as "aberrant." (West Br. at 24.) In fact, the AmeriChip transaction was not the first time West violated the rules with respect the handling and use of customer funds. West admitted that he misused the HSBC Account in connection with a separate transaction (the subject of the second cause of action) and that he prematurely withdrew a fee from the account before he was entitled to it. (RP 302, 416-18.) Accordingly, the Hearing Panel found a violation of NASD Rule 2110 for West's misconduct alleged under the second cause of action, a fact that West cannot ignore. (RP 1756.)

b. West's Compliance with FINRA's Rule 8210 Requests Is Not a Mitigating Factor

West also argues for a lesser sanction on the grounds that he cooperated with FINRA's investigation, including with the Rule 8210 requests that he characterizes as calling for "extremely sensitive and unduly personal information, including entirely irrelevant information about [West's] *wife and four young children*." (West Br. at 18.) The record demonstrates that

West did not provide substantial assistance to FINRA but rather cooperated as he was obligated to do.

Although the Guidelines provide that an associated person's substantial assistance to FINRA during an investigation is generally mitigating, the law is clear that compliance with Rule 8210 requests is an obligation of every registered person, and that compliance with the rule is not "substantial assistance." *See Dep't of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *31 n.33 (FINRA NAC Jan. 7, 2011), *aff'd*, Exchange Act Release No. 65863, 2011 SEC LEXIS 4232 (Dec. 1, 2011); *Keyes*, 2006 SEC LEXIS 2631, at *23 & n.22 (explaining that respondent's cooperation in the investigation was consistent with the responsibilities he agreed to when he became an associated person and does not constitute substantial assistance).

Moreover, West's assertion that the Rule 8210 requests were irrelevant does not lessen his misconduct for his misuse of funds. It is well settled that "an associated person may not 'second guess' [FINRA's] requests for information," or "take it upon [himself] to determine whether information is material to [a FINRA] investigation." *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21-26 (Jan 20, 2009); *see also Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007) ("As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot. They may not refuse such requests on the grounds of relevance or otherwise set conditions on their compliance, and [FINRA] is not required to justify its information requests in order to obtain compliance from members and their associated persons.")

Here, there is no allegation that West failed to comply with FINRA's Rule 8210 requests. The issue is whether his compliance, something that is the unequivocal obligation of every member and associated person, amounts to substantial assistance sufficient to mitigate his misuse of funds under FINRA Rule 2010. Plainly, it is not. Therefore, the NAC properly found that his obligatory compliance provides him with no mitigation.[21]

c. West's Return of the Deposit After Mouton Threatened to Complain to FINRA Is Not a Mitigating Factor

The Guidelines allow the NAC to consider whether an associated person voluntarily and reasonably attempted to pay restitution to his customer prior to detection. *Guidelines*, at 6 (Principal Considerations, No. 4.) West's repayment of the Deposit here does not meet this standard. First, there was a substantial delay in the return of the Deposit. West returned the Deposit more than two months after Mouton's initial request, and, by his own admission, 20 days after the funds were released by Ability. (RP 301-02.) West admitted that the delay was caused by his use of the Deposit and his desire to achieve a tax benefit for himself. (RP 793-98.) Thus, West did not return the Deposit "promptly" as required by the Term Sheet. (RP 949.) Moreover, West only returned the Deposit after Mouton threatened to complain to FINRA and other authorities. (RP 1047-48.)

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[21] West's reliance on the Commission's decision in *Kent M. Houston* is misplaced. *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614 (Feb. 20, 2014). Indeed, West completely misreads *Houston*, which says nothing with respect to what constitutes substantial assistance. Rather, *Houston* concerned the factors applicable to sanctions in the case of a partial failure to comply with Rule 8210. Indeed, the factors West cites in his brief, are those applicable to determining the sanction for a partial failure to comply with Rule 8210, and are completely inapposite to whether a respondent has provided substantial assistance in an investigation. (West Br. at 18); *Houston*, 2014 SEC LEXIS 614, at *14.

In any case, even if West had returned the Deposit immediately, it would not change the fact that he misused the funds when he used them to pay personal debts. *See Otto*, 54 S.E.C. at 854-56 (sustaining a bar where the associated person ultimately returned a customer's funds with interest after using them for his personal purposes); *Manoff*, 55 S.E.C. at 1165-66. Under these circumstances, West's return of the Deposit is not a mitigating factor.

d. Mouton's Attempt to Withdraw His Complaint Is Not a Mitigating Factor

West advances contradictory arguments with respect to Mouton's complaint to FINRA, neither of which is mitigating. First, he asserts that the NAC erred because there was no real customer complaint relating to his use of the Deposit, because AmeriChip, not Mouton, was Crusader's customer. (West Br. 3-6.) On the other hand, he asks the Commission to credit Mouton's letter attempting to withdraw his complaint as both evidence that he was authorized to use the Deposit (*see supra* Part IV.B.3) and as mitigating the sanction. (West Br. 6-9.) West's arguments are both incorrect and inapposite.

Mouton was the Vice Chairman of AmeriChip, and thus acted as its representative. West's attempt to minimize Mouton's role by casting him as "merely a short-term employee" of AmeriChip is disingenuous. (West Br. 3.) At the time Mouton was signing the Advisory Agreement on behalf of AmeriChip, West raised no question about Mouton's authority to do so. Nor did West object to working with Mouton exclusively on the transaction for AmeriChip.

In any case, even if FINRA's investigation was prompted by the complaint of a non-customer, it would not diffuse West's misconduct. FINRA's enforcement power does not depend upon a customer complaint. *See Bernard D. Gorniak*, 52 S.E.C. 371, 373 n.5 (1995) ("The [FINRA's] power to enforce its rules is independent of a customer's decision not to

complain, which may be influenced by many factors."). FINRA had the authority to investigate West's conduct and pursue an enforcement action against him irrespective of the source of the investigation.

Moreover, the NAC properly rejected Mouton's attempt to withdraw his complaint as a mitigating factor. (RP 1959.) A customer's withdrawal of a complaint does not absolve a respondent of liability. *See Raymond M. Ramos*, 49 S.E.C. 868, 871-72 (1988) (imposing a bar and $15,000 fine for conversion of customer funds despite the customer's having sought leniency for the salesman). Here, Mouton only withdrew his complaint after West returned the Deposit. And he did so at West's request and with a letter that had been drafted by West. That Mouton signed West's self-serving letter after he got his money back neither changes the facts of West's misconduct, nor mitigates it.

3. West's Other Mitigation Arguments Are Inapplicable and Foreclosed by His Failure to Raise Them Before the NAC

West sets forth a list of supposedly relevant mitigating factors from the Guidelines. (West Br. at 22-25.) These factors, which West raises for the first time before the Commission, include: the lack of customer harm;[22] whether West was previously sanctioned for similar conduct; whether West had received prior warnings from regulators; the number, size and character of the transactions at issue; and the level of sophistication of the customer affected. *Guidelines*, at 6-7 (Principal Considerations, Nos. 11, 14, 15, 18, 19.) West failed to present

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[22] Even if this factor were applicable here, it does not help West. The Commission has repeatedly held that a lack of customer harm is not mitigating. *See Eliezer Gurfel*, 54 S.E.C. 56, 58 & 64 (1999) (affirming bar where applicant converted firm's commission checks), *aff'd*, 205 F.3d 400 (D.C. Cir. 2000); *see also Amsel*, 52 S.E.C. at 768 (affirming bar despite fact that no customer suffered as a result of any of appellant's actions).

these arguments to the NAC, and they are thus foreclosed here. (RP 1825). *See Avello*, 58 S.E.C. at 400 (finding that issues not raised in an initial appeal are waived in subsequent appeals); *Amsel*, 52 S.E.C. at 767 (holding that arguments are waived where raised for the first time on appeal).

Moreover, West misstates and misapplies certain factors. As the Guidelines explain, not every factor is relevant in every case, but, rather, the "relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation." *Guidelines*, at 6. For example, West argues that his one-time misuse of customer funds is not a "pattern of misconduct" under the Guidelines. (West Br. at 23.) *Guidelines*, at 6 (Principal Considerations, No. 8.) A respondent need not misuse funds more than once to warrant the sanction of a bar. Rather, the Guidelines provide that an adjudicator may consider a bar for the improper use of funds absent a misunderstanding or other mitigation.

In another example, West argues that his conduct was "aberrant" under the Guidelines. (West Br. at 24.) *Guidelines*, at 7 (Principal Considerations, No. 16.) However, the consideration that West cites is directed to firms and provides that the misconduct at issue be considered in the context of a firm's historical compliance record. This consideration is plainly inapplicable to West's misuse of funds here. The same is true of considerations such as the "number, size and character of the transactions" – a consideration targeted to trading violations. *Guidelines*, at 7 (Principal Considerations, No. 18.) In short, West is foreclosed from advancing new mitigating arguments on appeal, but, in any event, none of the additional arguments he raises are relevant to sanctions for his misconduct.

4. The NAC Properly Found That There Was No Misunderstanding

The NAC properly rejected West's claim that his misuse of the Deposit was the result of a misunderstanding. (RP 1957-58.) The crux of West's misunderstanding claim was that because there was no written agreement with Crusader explicitly saying he could not use the Deposit, and because the Deposit would essentially equal his fee if the transaction closed, he believed he could prepay himself the fee. (RP 723-24, 837-38.) He testified that he did not think there was anything wrong with using the Deposit to pay his personal and business expenses. (RP 424.) The NAC properly rejected this claim. (RP 1957-58.) The documentary evidence, West's own admissions, and common sense establish that West knew exactly what he was doing when he misused his client's money.

First and foremost, the Term Sheet and Advisory Agreement unambiguously set out how the Deposit was to be held and used. (RP 893-98, 948-49.) While Crusader was not a signatory to the Term Sheet, West revised the relevant portions, and was well aware of its requirements. (RP 356-57, 939-40.) Similarly, the Advisory Agreement, which was also drafted by West, was clear that Crusader would not be entitled to any fee until closing. (RP 893-98.)

Second, West's own conduct shows that he knew he was doing something improper. West had his customer wire the Deposit to an account that looked like an escrow, but which he fully controlled. (RP 358, 363-64, 941-45.) He then secretly spent the Deposit for his own personal purposes, and stonewalled and misled Mouton for months, leading him to believe the Deposit was still in the HSBC Account, and repeatedly breaking his promises to return it. West's deception is persuasive evidence that there was no misunderstanding.

Third, as the NAC pointed out, in order to believe West's misunderstanding claim, one would have to ignore everything we know about West. (RP 1958.) West had an MBA and worked in the investment banking business for decades. (RP 299, 334, 659.) West was also a licensed real estate broker and owned a real estate brokerage firm – a business which routinely uses escrowed funds. (RP 673.) Additionally, West was the sole principal of Crusader, held a number of broker licenses, and acted as its Chief Compliance Officer. (RP 299, 335, 873-89.) As such, he was obligated to know the rules with respect to holding customer funds. Yet despite all these facts, West would have the Commission believe that he did not understand what it meant to hold customer funds in escrow. West's assertion flies in the face of reality.

Finally, West's claim of misunderstanding does not make sense in light of the commercial expectations of the parties. The reason Ability wanted the Deposit was to protect its investment of time and money in the transaction. AmeriChip wanted the Deposit held in escrow because Mouton did not know Ability and worried that Ability might walk away with the money. (RP 480, 923, 931.) Mouton trusted that West, a person he knew from previous business dealings and whom he had engaged to act on AmeriChip's behalf, would protect the funds. West, however, frustrated both parties' purposes and expectations when he spent the Deposit.

When West promised to hold the Deposit in escrow but spend it to pay his mortgage, it was a breathtaking breach of trust; not a misunderstanding. West intentionally misused his customer's funds and the NAC's sanction of a bar should be affirmed.

V. CONCLUSION

The obligation to refrain from misusing customer funds is the most basic and fundamental trust owed to a customer. West's misuse of AmeriChip's Deposit was a gross

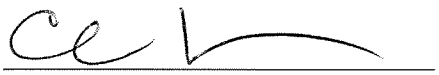
deviation from the standards of commercial honor and just and equitable principles of trade required of individuals in the securities industry. The NAC properly found that West's "egregious breach of trust" violated FINRA Rule 2010. (RP 1960.)

The bar that the NAC imposed for West's egregious misconduct is fully supported by the record. In assessing the bar, the NAC consulted the Guidelines and identified and considered all evidence of aggravating and mitigating factors. West disregarded basic ethical principles, intentionally misused the Deposit, benefitted financially by violating his duty to his customer, and concealed his misconduct. A bar in all capacities is fully warranted.

The Commission should affirm the NAC's decision and dismiss West's application for review.

Respectfully submitted,

Alan Lawhead
Jennifer Brooks
Celia L. Passaro

By: 

Celia L. Passaro
Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8985 – Telephone
202-728-8264 – Facsimile

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APPENDIX A

FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

Table of Contents

Principal Considerations in Determining Sanctions

The following list of factors should be considered in conjunction with the imposition of sanctions with respect to all violations. Individual guidelines may list additional violation-specific factors.

Although many of the general and violation-specific considerations, when they apply in the case at hand, have the potential to be either aggravating or mitigating, some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation.[1] The relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation. This list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines.

1. The respondent's relevant disciplinary history (see General Principle No. 2).
2. Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.
3. Whether an individual or member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention by the firm (in the case of an individual) or by a regulator, to revise general and/or specific procedures to avoid recurrence of misconduct.
4. Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.
5. Whether, at the time of the violation, the respondent member firm had developed reasonable supervisory, operational and/or technical procedures or controls that were properly implemented.
6. Whether, at the time of the violation, the respondent member firm had developed adequate training and educational initiatives.
7. Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.
8. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
9. Whether the respondent engaged in the misconduct over an extended period of time.
10. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.
11. With respect to other parties, including the investing public, the member firm with which an individual respondent is associated, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.

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1 *See, e.g., Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating).

12. Whether 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.

13. Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.

14. Whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection. Adjudicators may also consider whether another regulator sanctioned a respondent for the same misconduct at issue and whether that sanction provided substantial remediation.

15. Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.

16. Whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record.

17. Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.

18. The number, size and character of the transactions at issue.

19. The level of sophistication of the injured or affected customer.

VI. Improper Use of Funds/Forgery

- Conversion or Improper Use of Funds or Securities
- Forgery and/or Falsification of Records

Conversion or Improper Use of Funds or Securities

FINRA Rules 2010 and 2150[1], and NASD Rule 2330 and IM-2330

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Conversion*[2] (No fine recommended, since a bar is standard.) *Improper Use* Fine of $2,500 to $50,000.	*Conversion* Bar the respondent regardless of amount converted. *Improper Use* Consider a bar. Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution.

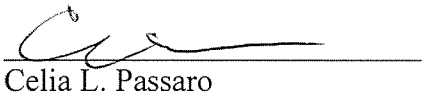
1 This guideline also is appropriate for violations of MSRB Rule G-25

2 Conversion generally 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

CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 12,717 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully submitted,



Celia L. Passaro
Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8985 – Telephone
202-728-8264 – Facsimile