# Administrative Proceeding No. 3-20260

**Disciplinary Proceeding No. 2018059545201**

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# United States Securities and Exchange Commission

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**DEPARTMENT OF ENFORCEMENT,**

Complainant,

v.

**ROBERT ESCOBIO,**
(CRD No. 703813)

Applicant/Respondent.

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## REPLY BRIEF OF RESPONDENT – ROBERT ESCOBIO

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## ARGUMENT

### I.

### NAC erred in ruling that no mitigating evidence existed and in failing to remand this matter for an evidentiary hearing to address the continual coercion and duress Robert Escobio experienced as the result of indefinite, repetitive incarceration imposed by a subsequently reversed federal court Order.

***Escobio Presented Mitigating Evidence of Coercion and Duress***

FINRA argues that Escobio failed to establish a "genuine issue of fact relevant to mitigation" or establish facts showing "any stress related to the contempt order." FINRA Answer Brief at pp. 2-3, 19. However, FINRA and NAC ignored the hearing officer's failure to mention or consider any of the mitigating evidence documented in the undisputed facts set forth in the Eleventh Circuit Court opinion attached and cited in support of Escobio's opposition to FINRA's Motion for Summary Disposition.[1]

The facts in the Eleventh Circuit's opinion showed that at all times relevant,[2] Escobio was under extraordinary and continual financial and emotional coercion and duress to make payments far beyond his then current income and assets as a result of

[1] See Exhibit 1 attached to Robert Escobio's Response in Opposition to Department of Enforcement's Motion for Summary Disposition and attached to Escobio's Statement of Disputed Facts in Response to the Department of Enforcement's Motion for Summary Disposition.

[2] The conduct here -- failure to comply with the 8210 requests -- occurred at exactly the same time Robert was incarcerated and faced further indefinite periods of incarceration if he failed to pay the onerous $10,000.00 per month installments.



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an illegal District Court contempt order that the appellate court reversed. The Court of Appeals noted that the record showed that Escobio's income as a pilot was only $30,000 to $40,000 a year, that he had no income from any other source, and his individual assets were approximately $330,000 -- including all the funds he had in an exempt[3] IRA account. Nonetheless, the district court required Escobio to pay $350,000 within 10 days of March 18, 2019 and $10,000 per month for every month thereafter. The specified penalty for failure to pay any portion of the required installments was *immediate* incarceration, without any opportunity for extension or a hearing to first show inability to pay.

As a result, after paying the purge amount of $350,000 in April, Escobio was required to pay $10,000 per month on May 1st and *every* month thereafter -- even though there was insufficient proof that Escobio earned or had individual assets from which he could timely produce $10,000 every month, or face indefinite coercive re-incarceration. See Appendix A, p. 2, 7. FINRA and NAC ignored the repetitive coercive effect of the illegal order of contempt. That order forced Escobio to focus only on earning and obtaining funds to avoid repetitive and indefinite incarceration. See Answer Brief at 21.

[3] Fla. Stat. Ann. § 222.21 provides, *inter alia*, that retirement accounts such as Escobio's Individual Retirement Account, are exempt assets that are not subject to turn over to a civil judgment creditor. Thus, the district court's illegal contempt order compelled Escobio to turn over exempt assets and not take time off from work in order to avoid reincarceration.



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Thus, Escobio was left with the Hobson's choice of repetitive, indefinite incarceration and loss of his employment if he failed to earn and find sufficient funds to make the required installments *in full*, every month, or take time off and risk loss of his only employment in order to comply with the Department of Enforcement's requests and OTR.

While a hearing officer who never experienced repetitive, indefinite incarceration in a federal prison may not fully appreciate the stress that the constant threat of reincarceration placed on Escobio, it is an undisputed material fact presented a genuine issue that the hearing officer ***must*** view in the light most favorable to the non-movant. The law is clear that the "evidence of the non-movant *is to be believed*, and *all justifiable inferences are to be drawn in his favor*." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)(emphasis added). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," or as here, the hearing officer, on a motion for summary disposition. *Id.* See also, *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997) (citing *Hairston v. Gainsville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993)). See also, *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990)(all reasonable doubts about the facts must be resolved in favor of the non-movant.



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The Record shows that the Hearing Panel erroneously found that "**no"** mitigating factors existed and did not discuss any mitigating factors in the Record. See Hearing Panel Decision at p. 11. Duress and coercion are mitigating factors recognized when a party requests leave from the ordinary application of rules, laws or terms of a contract. See https://www.merriam-webster.com/legal/mitigating%20circumstance, *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003) (decision invalidating a contract modification due to duress was upheld because the government withheld progress payments). Failure to note and discuss the mitigating factors imposed by the District Court's illegal, coercive Order requiring repetitive incarceration should Escobio fail to make any portion each and every payment is clear error, and failure to view them in the light most favorable to the non-movant is an abuse of discretion.

Accordingly, NAC's findings that Robert failed to present mitigating evidence must be rejected and remanded with directions to conduct an evidentiary hearing, and, alternatively, to rescind the bar imposed in this matter based upon the extreme conditions Robert was faced with at the time of DOE's 8210 requests.



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## II.

**NAC's decision must be reversed because it improperly relied upon uncorroborated, inadmissible, speculative hearsay in an affidavit from an individual without personal knowledge to justify the Department of Enforcement's (DOE) investigation and continued investigation into a statutorily disqualified resigned member.**

Although the law is clear that hearsay evidence, unsupported inferences, speculation or conjecture are improper in summary judgment affidavits and declarations, cannot support or defeat a motion for summary judgment, FINRA now urges this Court to disregard Rule 56 of the Rules of Civil Procedure. See, Rule 56(c), Federal Rules of Civil Procedure. See also, *SEC v. Jacoby*, 2021 U.S.Dist. LEXIS 20262 (DC Md 2021); *Dorral v. Dep't of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002), overruled on other grounds by *Garcia v. Dep't. of Homeland Sec.*, 437 F.3d 1322 (Fed. Cir. 2006).

It is undisputed that FINRA's Department of Enforcement ("DOE") motion for summary disposition showed that DOE's investigation was solely based upon Ms. Arno's erroneous conclusion that the mere fact that the former clients sent emails to "robert.escobio@stshc.com" provided "evidence that [Robert] Escobio continued to use his Southern Trust e-mail address." *See* Escobio Disputed Facts regarding DOE's UF Nos. 7, 8 and 9. A registered entity's business decision to leave an email account open after amember leaves is a prudent measure that businesses engage in to be able to identifyclients that may not be aware that a member is no longer associated



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with the firm. Ms. Arno's suspicions were not supported by a single customer complaint, eye-witness testimony or copy of an email initiated by Robert Escobio to any STS client supported. Such speculative conclusions are improper to consider in support of a motion for summary disposition.

## III.

## A Permanent Bar is Punitive Due Where Undisputed Mitigating Factors are Not Considered.

In *Saad v. SEC,* 405 U.S. App. D.C. 254, 256-57, 718 F.3d 904, 906-07 (2013), the Court reversed and remanded the imposition of a permanent bar due to the failure of the SEC to adequately address all mitigating factors. The Court explained:

> In reviewing a disciplinary sanction imposed by FINRA, the SEC must determine whether, with "due regard for the public interest and the protection of investors," that sanction "is excessive or oppressive." 15 U.S.C. § 78s(e)(2). As part of that review, the SEC must carefully consider whether there are any aggravating or mitigating factors that are relevant to the agency's determination of an appropriate sanction. *See PAZ Sec., Inc. v. SEC,* 494 F.3d 1059, 1065, 377 U.S. App. D.C. 413 (D.C. Cir. 2007) ("PAZ I"). This review is particularly important when the respondent faces a lifetime bar, which is "the securities industry equivalent of capital punishment." *Id*.
>
> Saad has consistently advanced a number of mitigating factors that he claims should militate against a lifetime bar. The SEC addressed several of these factors and chose not to credit them. However, the agency plainly ignored two important considerations: (1) the extreme



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> personal and professional stress that Saad was under at the time of his transgressions; and (2) the fact that Saad's misconduct resulted in his termination *before* FINRA initiated disciplinary proceedings. The latter consideration is particularly significant because it is specifically listed in FINRA's Sanction Guidelines as a potential mitigating factor.

718 F.3d at 906-07.

When evaluating whether a sanction imposed is excessive or oppressive, "the Commission must do more than say, in effect, petitioners are bad and must be punished," *Blinder, Robinson & Co., v. SEC,* 837 F.2d 1099, 1113 (D.C. Cir. 1988); The Commission must be particularly careful to address potentially mitigating factors before it affirms an order expelling or barring an individual -- the securities industry equivalent of capital punishment. *Paz Sec. v. SEC,* 494 F.3d 1059, 1064-65 (2007). *Cf. Steadman v. SEC,* 603 F.2d 1126, 1137-40 (5th Cir. 1979) ("when the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors"), *aff'd on other grounds,* 450 U.S. 91, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981).

The mitigating factors in this matter show that the conduct did not warrant the securities industries equivalent of capital punishment. By the time Robert received the first two Rule 8210 “requests,” this statutorily disqualified, terminated former member was at the Federal Detention Center unable to email or contact individuals



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who were not on his approved call or email list, and all such communications are recorded and monitored. *See bop.gov/inmates/communications.jsp.* Subsequent 8210 requests were all received while Escobio was under the constant pressure that he would be immediately and indefinitely incarcerated if the draconian monthly payments were not timely received, in full. Indeed the record shows that Escobio was reincarcerated when his wife delayed making a monthly payment from her personal funds while Escobio's case was being argued at Eleventh Circuit Court of Appeals. This type of extortionate pressure upon a retired, former member that is statutorily disqualified from re-entering the industry exemplifies the circumstances where debarment is unnecessary and excessive.



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## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the SEC set aside NAC's Decision and the sanctions imposed below.

Dated: August 16, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021 I filed the foregoing brief with The Office of the Secretary, Securities and Exchange Commission, 100 F Street, NE, Room 10915, Washington, D.C. 20549-1090 via electronic mail to apfilings@sec.gov, with copy to the Office of General Counsel, FINRA, 1735 K Street, N.W. Washington, D.C. 20006 Attn: Ashley Martin via electronicmail to Ashley.martin@finra.org.

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