BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Blair Alexander West Southampton, NY, Respondent.	DECISION Complaint No. 2009018076101 Dated: February 20, 2014

Respondent misused customer funds. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Samuel L. Barkin, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: David E. Robbins, Esq.

Decision

Blair Alexander West appeals a Hearing Panel decision issued on July 26, 2012. The Hearing Panel found that West misused customer funds that were intended to be held in escrow pending the close of a sale and leaseback transaction. The Hearing Panel barred West for the conduct. After an independent review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Facts

Unless otherwise noted, the facts of this case are undisputed and subject to the parties' stipulations.

A. West

West entered the securities industry in January 1996, when he registered with a FINRA firm as a general securities representative. He remained associated with that firm until March 2000. Three years later, in March 2003, West established his own broker-dealer, Crusader Securities

LLC.[1] West registered with Crusader Securities as a general securities representative, general securities principal, investment banking limited representative, and Financial and Operations Principal ("FINOP").[2] West also served as Crusader Securities' Chief Executive Officer and Chief Compliance Officer. West remained associated with Crusader Securities in these various capacities until February 2011, when the firm filed a Uniform Request for Withdrawal from Broker-Dealer Registration ("Form BDW"). Thereafter, West registered with another FINRA firm. West associated with that firm from April through December 2011. He has not associated with another FINRA firm since the termination of his registration in December 2011.

B. Crusader Securities Enters into an Advisory Agreement with AII

In October 2008, DM, the Vice Chairman of AII, approached West to obtain Crusader Securities' and West's assistance in capital raising for AII.[3] On or about October 22, 2008, AII entered into an agreement with Crusader Securities (the "Advisory Agreement"), pursuant to which Crusader Securities agreed to introduce AII to "certain capital sources, including possible financial and strategic investors and/or lenders." The Advisory Agreement stated that, "[a]ny such capital source shall be referred to as a 'Crusader Investor.'" West signed the Advisory Agreement on behalf of Crusader Securities, and DM signed the Advisory Agreement on behalf of AII.

As compensation for its services, AII agreed to pay Crusader Securities a "Corporate Advisory Fee" of $20,000. AII also agreed to pay Crusader Securities a "Capital Placement Fee" and/or "M&A [Merger & Acquisition] Fee" with respect to any capital that Crusader Securities assisted AII in raising during the engagement. Specifically, the Advisory Agreement stated:

> The Company [AII] will seek certain amounts of capital to finance and/or refinance the Corporate Strategy and you are requesting that Crusader [Securities] introduce and advise the Company in obtaining the Requisite Capital on a best efforts basis. The Company hereby grants Crusader [Securities] the exclusive right to represent the Company on such a transaction(s). As compensation for this service, Crusader [Securities] will be paid a fee at each closing as follows: (i) for common equity, preferred equity, convertible debentures, warrants, and/or options a fee equal to 10.0 [percent] of such amount for the first $5.0 million of equity raised and then 8.5 [percent] of such amount thereafter (the "Equity Fee"); (ii) for mezzanine and/or subordinate financing, a fee equal to 7.0 [percent] of such amount (the "Mezzanine Fee") and/or (iii) for senior debt financing, a fee equal to 1.0 [percent] of such amount (the "Debt

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1 West testified at the hearing. West described Crusader Securities as a registered broker-dealer that provided "boutique investment banking" services to small companies.

2 Crusader Securities obtained an exemption from the two principal requirement of NASD Rule 1021(e). ™

3 DM testified at the hearing. DM described AII as a machining company for the automotive industry. The company is incorporated in Nevada and quoted on the OTC Bulletin Board™ under the symbol ACII.

Fee") [collectively, the Equity Fee, the Mezzanine Fee, and the Debt Fee are referred to as the "Capital Placement Fee"].

Although the Advisory Agreement prohibited Crusader Securities from collecting any of its fees until the capital funding transaction closed,[4] the Advisory Agreement permitted the firm to deduct its fees directly from the proceeds of the capital funding.[5]

C. AII's Potential Transaction with ACS

In late 2008, Crusader Securities identified a potential capital source to provide AII with $3.5 million of financing. The capital funding source was a company named ACS.[6] On December 9, 2008, Crusader Securities, on behalf of AII, received a proposed term sheet from ACS (the "Term Sheet").

Pursuant to the Term Sheet, ACS would provide AII with a first lien loan in the form of a sale and leaseback transaction. As part of the transaction, ACS would purchase equipment and machinery from a subsidiary of AII for $3.5 million, and then lease the purchased equipment and machinery back to AII's subsidiary.[7] The Term Sheet required that AII pay ACS $56,756.84 per month for a term of 84 months, resulting in an effective "lease rate" of 9.25 percent. The Term Sheet also provided AII with the option of repurchasing the equipment and machinery at the end of the lease for $1.00. Finally, the Term Sheet required that AII make an initial deposit of $113,513.68 with ACS, which consisted of the first and last payments due under the proposed equipment lease (the "Deposit").

During the negotiations for the sale and leaseback transaction, a disagreement arose between AII and ACS concerning the manner in which ACS would hold the Deposit. DM advised Crusader Securities that AII was not willing to provide the Deposit to ACS unless the funds were held in an escrow account. ACS, however, did not have an escrow account and was reluctant to open one solely for this transaction. As a compromise, ACS and AII agreed that Crusader Securities would

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4 The Advisory Agreement provided, "[the] Capital Placement Fee . . . shall be fully earned and paid at each closing and shall be paid by wire transfer from [AII] . . . through Crusader Securities, member FINRA."

5 The Advisory Agreement stated, "[AII] hereby grants Crusader [Securities] the exclusive right to be the escrow agent for any and all closings relating to this letter agreement with any and all capital fundings and/or transfers flowing through Crusader [Securities'] escrow account at HSBC (the 'Escrow Account'). From these funds flowing through the Escrow Account, Crusader [Securities] will retain its fees and net fund the balance to the appropriate parties in that particular transaction."

6 ACS is an asset-based financing company that specializes in business equipment leases for start-up organizations or those with marginal credit profiles. The company is incorporated, and maintains its principal place of business, in California.

7 The Term Sheet identified a subsidiary of AII as the lessee of the purchased equipment and machinery. For purposes of this decision, we refer to AII, and its subsidiary, as AII.

hold the Deposit in Crusader Securities' escrow account until the transaction closed. West revised the Term Sheet to reflect the parties' understanding of Crusader Securities' handling of the Deposit:

> An Initial Deposit of the First and Last Payment plus the Securitization Fee is required upon acceptance by [AII] of this letter. The First and Last Payment in the amount of $113,513.68 [the Deposit] will be wired to Crusader Securities, LLC (member FINRA) upon acceptance of this letter and held by Crusader [Securities] until closing . . . . Should [ACS] approve this transaction, the first and last payment shall be applied thereto. The First and Last Payment and refundable portion of the Securitization Fee will be returned to the Lessee [AII] promptly should [ACS] decline to approve this transaction.[8]

On December 15, 2008, West forwarded the revised Term Sheet and "Crusader Securities Escrow Account Bank Wire Instructions" to DM. DM signed the Term Sheet on December 19, 2008, and emailed it back to West. In accordance with West's instructions, DM wired the Deposit to the "Crusader Securities Escrow Account" at HSBC Bank USA, NA, in Southampton, New York, on December 24, 2008.

D. West Transfers the Deposit to His Personal and Business Accounts and Utilizes the Funds to Pay His Personal and Business Expenses

On December 24, 2008, the Crusader Securities Escrow Account had a zero balance. As soon as West made the Deposit, however, the account showed a credit balance of $113,513.68, the exact amount of the Deposit.

Within moments of making the Deposit, West transferred $89,000 from the Crusader Securities Escrow Account to Crusader Securities' operating account, which had a negative balance and recently had incurred service charges for items left unpaid due to insufficient funds. West then transferred $72,500 of that $89,000 to a personal checking account that he maintained with his wife at JP Morgan Chase Bank, NA and wired an additional $7,500 to Crusader Financial Group, Inc.'s operating account.[9] West left the remaining $9,000 of the $89,000 in Crusader Securities' operating account.

Prior to West's deposit of the $72,500 into his personal bank account at JP Morgan, the account had maintained a negative balance for at least two weeks and incurred service charges for items left unpaid due to insufficient funds. On December 26, 2008, two days after West received the Deposit and transferred the $72,500 into the account, he began depleting the deposited funds. 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 subscription fees, car notes, clothing purchases, golf and tennis club fees, and

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8 Although ACS and AII edited the revised Deposit provision that West submitted, the Deposit provision that appeared in the finalized and executed Term Sheet was not materially different from the one West had drafted.

9 Crusader Financial Group is the parent company of Crusader Securities.

telephone bills. By January 2009, West had spent the entirety of the $72,500 that he had deposited into his personal bank account at JP Morgan.

Between January and February 2009, West transferred the remainder of the Deposit (approximately $24,500) from the Crusader Securities Escrow Account to other Crusader Securities' accounts and his personal bank account at JP Morgan. By March 2009, West had withdrawn and spent the entire Deposit to pay Crusader Securities' business, and his own personal, expenses.

E. DM Demands That West Returns the Deposited Funds

By mid-February 2009, it appeared that AII and ACS would be unable to close the sale and leaseback transaction. The transaction had stalled for several weeks, and on February 20, 2009, DM sent West an email asking for a return of the Deposit. DM wrote, "It's [the] end of week – I'm assuming nothing concrete from [ACS]. We're going into the 9th week since deposit made, and I need to put that cash to use. Time to call it."[10] In response, West explained that he was in the process of obtaining an update from ACS and another potential investor, and that he would send DM a new term sheet for the potential investor over the weekend.

Three days later, on February 23, 2009, DM sent West a follow-up email regarding ACS and the Deposit. DM stated, "Have you communicated with [ACS] that 9 weeks is too long, and we need a commitment now or the return of deposits? Today's the day." West responded, "Yes . . . . they need to make a decision this week or return the deposit they hold. The deposit we [Crusader Securities] hold would apply to the new term sheet with our investor. It is provided for in the term sheet."

DM responded to West's email, stating that he did not want the Deposit applied to the alternative transaction that West had proposed. DM explained, "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 . . . ." On February 25, 2009, DM sent West the bank account information to return the Deposit. The next day, on February 26, 2009, West urged DM, "Please just be patient a few more days. We expect to hear a positive response next week. West added, "I will keep you updated on a daily basis."

DM responded to West's email on February 27, 2009. DM 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." DM reiterated his request for the return of the Deposit on March 4, 2009. DM 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

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[10] Each email has been quoted verbatim.

> get my own – personal – $130k deposit funds back, *long* after any reasonable deal should have closed.

In response, on March 5, 2009, West wrote, "[I]t 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."

DM and West continued to exchange emails throughout early-March 2009. The tenor of the emails remained the same as described above. DM insisted that AII's sale and leaseback transaction with ACS would have to close, or that West and Crusader Securities would have to return the Deposit. In each instance, West responded that AII and ACS were within days of closing the sale and leaseback transaction.

DM testified that, by mid-March, the ongoing "trouble" with the release of the Deposit began to concern him, and he worried that the Deposit was not in the Crusader Securities Escrow Account. On March 10, 2009, DM wrote to 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?" West responded on March 11, 2009. West wrote, "I understand. We have been riding [ACS] everyday . . . . All I can tell you is what [ACS] is telling me . . . ."

Between March 11 and 25, 2009, there was a lull in communications between DM and West. DM reinitiated contact with West on March 25, 2009. DM wrote, "It's been awfully quiet the last week or two. Where'd everybody go?" DM also emailed West and a representative from ACS that same day. DM stated, "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." On April 8, 2009, the representative from ACS responded to DM's email and stated that he did not have any authority over the Deposit, and that he was "fine" with "releasing the funds from escrow."

DM accordingly emailed West on April 9, 2009, to provide wire instructions and arrange for the return of the Deposit. West failed to return the Deposit on April 9, 2009, as instructed, and on April 11, 2009, DM emailed West:

> 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.

West replied three days later, on April 14, 2009. He explained that he had been out of the office for Easter and noted that he would "try to get you a wire back before the end of this week or at worst early next." West followed up with DM on April 20, 2009. West stated that that he was

back in the office and would send the wire transfer that week. DM responded to West's emails with specific wire instructions for the Deposit.[11]

When DM did not receive the Deposit on April 20 or 21, 2009, DM emailed West once again. On April 22, 2009, DM wrote, "Please tell me where my money is, and why it's the middle of the week and I still haven't received it." In his response, West apologized for the delay, but provided no explanation for it. Instead, West assured DM, "You will have the wire this week." DM replied, "What exactly does that mean? I need to know specifics, that I can rely on, and why this continues to drag on?"

F. DM Files a Complaint Against West and Crusader Securities with FINRA

On April 23, 2009, DM 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 [ACS'] confirmation,[12] 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 . . . from my attorney.

West responded to DM's email within minutes. He stated that he expected to send the wire the following day, and noted that "Crusader [Securities] has no escrow agreement with you [DM] or [AII]." West stressed that, "The issue [regarding the return of the Deposit] dealt with the funds being in a time sensitive deposit that did not make them readily available."

West did not return the Deposit the following day, as noted in his email. Instead, on the morning of April 24, 2009, West sent DM an email. He wrote, "We 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."

Three days later, on April 27, 2009, West contacted DM via email and told him that the wire instructions would be sent "this afternoon." West emailed DM later that same day. West explained, "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."

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11 DM previously sent this routing information to West in an email dated February 25, 2009.

12 A representative from ACS sent an email to DM on April 8, 2009, confirming that the Deposit should be released.

DM responded to West's email on the afternoon of April 28, 2009, when the Deposit did not appear in his bank account. DM stated that the, "New York AG [Attorney General] 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."[13] West returned the Deposit on April 29, 2009.[14]

II. Procedural Background

FINRA's Department of Enforcement initiated an investigation of the circumstances surrounding West's involvement in the sale and leaseback transaction after DM filed his complaint with FINRA. After completing the investigation, Enforcement filed a two-cause complaint against West in June 2011. The first cause of action alleged that West misused customer funds, in violation of FINRA Rule 2010.[15] The second cause of action, which involved a separate transaction, alleged that West failed to utilize a proper escrow account in connection with a contingency offering and asserted that West prematurely released escrowed funds before the offering's contingency was satisfied. Enforcement argued that West's conduct with regard to the second count caused Crusader Securities to violate Securities Exchange Act of 1934 Rule 15c2-4, and that West violated NASD Rule 2110.

A two-day hearing took place in New York in April 2012. Five witnesses testified at the hearing, including West. The Hearing Panel issued its decision in July 2012, finding that West violated FINRA's rules as alleged in the complaint. The Hearing Panel barred West for the misuse of customer funds, but declined to impose additional sanctions for the escrow violation in light of the bar.[16] This appeal followed.

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[13] DM testified that he filed complaints against West and Crusader Securities with FINRA, the FBI, and the New York Attorney General's office on the afternoon of April 28, 2009. DM informed West of the complaints in an email dated April 28, 2009. When West learned that DM had filed the complaints against him, West sent DM a succession of vitriolic emails, in which West stated that he had engaged an attorney to handle DM's purported "threats of criminal activity to resolve a civil matter." In May 2009, DM sent a letter to FINRA to withdraw the complaint against West and Crusader Securities. DM explained, "I now regret having filed the complaint, especially since I received the return of the [D]eposit in question the day after the complaint was filed."

[14] On April 29, 2009, West received income from the rental of his summer home. He repaid the Deposit from these funds.

[15] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[16] During the proceedings before the Hearing Panel, West and Enforcement agreed that a $5,000 fine was the appropriate sanction for the escrow violation. The Hearing Panel agreed and explained that it would have assessed the $5,000 fine if it had ordered additional sanctions for the second cause of action. Neither party requested our review of the Hearing Panel's findings or sanctions for the escrow violation, and we decline to exercise our discretion in this instance to review findings or sanctions that neither party appealed. We therefore affirm, without further discussion, the findings and sanctions for the second cause of action in this case. *See* FINRA Rule 9311(e) ("The National Adjudicatory Council may, in its discretion, deem waived any issue not

[Footnote continued on next page]

III. Discussion

The Hearing Panel found that West violated FINRA Rule 2010 because he misused customer funds. Although West does not contest liability for this cause of action, we briefly review and affirm the Hearing Panel's findings.

FINRA Rule 2010 requires that members and associated persons "observe high standards of commercial honor and just and equitable principles of trade."[17] 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 (1998) (explaining that the predecessor to FINRA Rule 2010 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 NASD could justifiably conclude that on another occasion it might.").

An associated person's misuse of a customer's funds violates FINRA Rule 2010. *See Kevin Lee Otto*, 54 S.E.C. 847, 852 (2000) (finding that respondent's personal use of customer's funds without customer's knowledge or authorization violated just and equitable principles of trade), *aff'd* 253 F.3d 960 (7th Cir. 2001); *Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *25 (NASD NAC May 23, 2001) ("The misuse of customer funds . . . violates [the predecessor to 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 NASD seeks to promote.'").

West admits that he improperly withdrew the Deposit from Crusader Securities Escrow Account prior to the closing of the sale and leaseback transaction and used the funds to pay his personal and business expenses.[18] In so doing, West misused customer funds and violated FINRA Rule 2010. *See Patel*, 2001 NASD Discip. LEXIS 42, at *24-25 ("An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer.").

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raised in the notice of appeal or cross-appeal."); *Dep't of Enforcement v. Hugh Vincent Murray III*, Complaint No. 2008016437801, 2014 FINRA Discip. LEXIS 33, at *5 n.5 (FINRA NAC Dec. 17, 2013).

[17] FINRA Rule 0140 makes all FINRA rules, including FINRA Rule 2010, applicable to both FINRA firms and all persons associated with FINRA firms.

[18] In his answer to the complaint, West admits that the Deposit "should have been kept *untouched* in a separate Crusader [Securities] account until the closing."

IV. Sanctions

For cases involving the improper use of customer funds, FINRA's Sanction Guidelines advise adjudicators to consider a bar.[19] The Guidelines, however, also explain that where the improper use results from the respondent's misunderstanding of the customer's intended use of the funds, or other mitigation exists, adjudicators should consider a fine of $2,500 to $50,000 and a suspension in any or all capacities for a period of six months to two years, and thereafter until the respondent pays restitution.[20]

On appeal, West requests that we reduce the bar that the Hearing Panel imposed to a one-year suspension in all capacities. In support of his request for a reduction in sanctions, West asserts that the Hearing Panel's sanctions fail to account for several mitigating factors, are inconsistent with the Guidelines, and are disproportionate to his misconduct. We begin our analysis with a review of each of the bases upon which West seeks a reduction in sanctions.

West argues that his misuse of the Deposit stemmed from a misunderstanding concerning the restrictions on his use of the Deposit pending the closing of the sale and leaseback transaction. West states that there was no written or oral agreement limiting his use of the Deposit prior to the transaction's closing, and consequently, that he did not know that he could not use the Deposit to pay his personal and business expenses. West adds that the lack of an agreement concerning his holding of the Deposit also led him to conclude that he could claim the Deposit prior to the sale and leaseback transaction's closing as a prepayment of Crusader Securities' advisory service fees on the transaction. The evidence in the record, however, belies this point and demonstrates that West's use of the Deposit prior to the closing of the transaction was not the result of any reasonable misunderstanding concerning the intended use of the funds.

The Advisory Agreement between Crusader Securities and AII, and the Term Sheet for the sale and leaseback transaction, expressly stated that Crusader Securities should hold the Deposit until the transaction closed.[21] The Term Sheet for the sale and leaseback transaction also explained what should happen to the Deposit, if the transaction closed or did not close. The Term Sheet stated that the Deposit: (1) should be applied to the sale and leaseback transaction, if ACS approved the transaction; (2) should be returned to AII, if ACS declined to approve the transaction; and (3) would be forfeited, if AII did not supply ACS with certain due diligence, AII declined to close the transaction after ACS granted its approval, or there was a material adverse change in AII's credit. Neither the language of the Advisory Agreement nor Term Sheet provided West with any basis to

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[19] *See FINRA Sanction Guidelines* 36 (2011) (Improper Use of Funds), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. We apply the applicable Guidelines in place at the time of this decision. *See id.* at 8.

[20] *Id.* at 36. We also consider the General Principles Applicable to All Sanction Determinations and Principal Considerations in Determining Sanctions, which adjudicators consult in every disciplinary case. *Id.* at 2-7.

[21] *See supra* note 5 for the quoted Advisory Agreement provision and Part I.C., for the quoted Term Sheet provision.

believe that he could use the Deposit to pay his personal and business expenses prior to the closing of the sale and leaseback transaction.[22]

In order for us to credit West's argument that he misunderstood the intended use of the Deposit, we must accept the premise that West, an individual with a Masters of Business Administration, 20 years of commercial real estate experience, 18 years of investment banking experience, and 17 years of securities industry experience, believed that he could use funds wired to the "Crusader Securities Escrow Account" to pay personal and business expenses. *See Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *29 (May 13, 2011) (explaining that industry experience contradicts claims of ignorance). West's argument not only is implausible, but also is plainly contradicted by the myriad of excuses that he provided to DM after he misused the Deposit.

Our review of the evidence in the record, particularly the email communications between West and DM, lead us to conclude that West knew that he should hold the Deposit pending the close of the sale and leaseback transaction. Indeed, if West's conduct was permissible, as he claims, there was no reason for him to mislead DM and conceal the fact that he had used the funds. We find that the repeatedly false assurances that West provided to DM concerning the Deposit's safekeeping and imminent return were egregious and serve to aggravate West's misconduct in this instance.[23]

We also find that West's misuse of the Deposit was intentional.[24] When DM and AII refused to proceed with the sale and leaseback transaction unless the Deposit was held in escrow, West proposed that Crusader Securities serve as the escrow agent for the transaction. West revised the Term Sheet to reflect that Crusader Securities would hold the deposit until the sale and leaseback transaction closed. West provided DM with instructions to wire the Deposit to the "Crusader Securities Escrow Account." West also personally transferred the Deposit to his personal and business bank accounts, used the Deposit to pay his personal and business expenses, and stonewalled DM when he requested the return of the Deposit. West's intentional misconduct is an aggravating factor.

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[22] West states that he properly used the Deposit because his advisory service fees exceeded the amount of the Deposit. West's argument is irrelevant and without merit. As an initial matter, as explained above, West had no right to the Deposit prior to the closing of the sale and leaseback transaction. Moreover, the documentary evidence in the record demonstrates that West's estimated fees totaled $89,000, far less than $113,513.68 that he withdrew and used for his personal and business expenses.

[23] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10) (considering whether the respondent attempted to conceal his misconduct or mislead or deceive a customer). At the hearing, West testified that he did not tell DM about his use of the Deposit because it was his "personal business." West stated, "It was a mistake, but it was my personal business. The fact that I'm renting my house, the fact that I'm doing tax strategies. Not something I talked about with clients."

[24] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13) (considering whether the respondent's misconduct was the result of an intentional act, recklessness, or negligence).

West suggests that DM's withdrawal of his customer complaint lessens the seriousness of his misconduct.[25] It does not. We find, as a general matter, that our enforcement power is distinct from any complaint a customer may file. *See Bernard D. Gorniak*, 52 S.E.C. 371, 373 n.5 (1995) ("The NASD's power to enforce its rules is independent of a customer's decision not to complain, which may be influenced by many factors."). We also note that a customer's withdrawal of a complaint has no bearing on our determination of sanctions for a violation of our rules. *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). Finally, we stress that DM withdrew his customer complaint, but did so only after West repaid the Deposit to DM. We therefore conclude that DM's withdrawal of the customer complaint does not mitigate West's misconduct in this case.

We consider West's request to credit his lack of disciplinary history, but emphasize our 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 Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006) (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").

We also reviewed West's claims that his responses to FINRA's Rule 8210 requests provided during the investigation of this matter are mitigating, but we find that West's compliance with the information and document requests merely satisfies his obligations under FINRA Rule 8210 and does not amount to "substantial assistance" within the meaning of the Guidelines. *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, at *1 (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).[26]

Finally, we analyzed West's argument that a bar "is not supported by the precedent of prior disciplinary decisions."[27] It is well-established, however, that the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action taken in other proceedings. *See PAZ Sec., Inc.*, Exchange Act Release

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[25] West's repayment of the Deposit also is not mitigating. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1165-66 (2002) (explaining that respondent's repayment of funds did not mitigate misuse of co-worker's credit card number); *see also Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 4) (considering whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct).

[26] *See also Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12) (considering whether the respondent provided substantial assistance to FINRA in its investigation of the underlying misconduct).

[27] West concedes that the prior disciplinary decisions to which he cites are not "precisely on point."

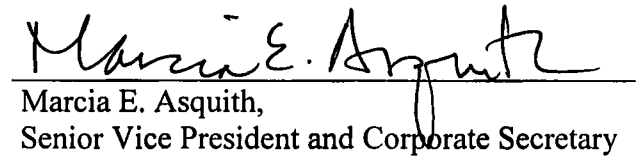
No. 57656, 2008 SEC LEXIS 820, at *30-31 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *see also Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) ("The Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases."); *Hiller v. SEC*, 429 F.2d 856, 858 (2d Cir. 1970) ("[W]e cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding.").

As we determine the appropriate sanctions for West's misuse of the Deposit, we find that West's misconduct continued over an extended period of time and served to benefit West financially.[28] In short, West's misconduct in this case represents an egregious breach of trust on the part of an experienced securities industry professional, and we conclude that the Guidelines' recommendation of a bar is abundantly supported here. Consequently, after careful consideration of the record and the evidence of aggravating and mitigating circumstances presented, we affirm the bar that the Hearing imposed in the proceedings below.

V. Conclusion

West misused customer funds, in violation of FINRA Rule 2010. For this misconduct, we bar him. We affirm the Hearing Panel's order for West to pay costs of $4,168.25, and we impose appeal costs of $1,481.79. The bar is effective as of the date of this decision. We have considered and reject without discussion all other arguments of the parties.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[28] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9) (considering whether the respondent engaged in the misconduct over an extended period of time), 7 (Principal Considerations in Determining Sanctions, No. 17) (considering whether the respondent's misconduct resulted in the potential for respondent's monetary gain).