**NATIONAL FUTURES ASSOCIATION**

**BEFORE THE**

 **BUSINESS CONDUCT COMMITTEE**

In the Matter of: )

 )

**INSTITUTIONAL LIQUIDITY LLC** ) NFA Case No. 13-BCC-031

(NFA ID #367140); **MARK D. KRIER** )

(NFA ID #406816); **JAMES D. PIERON** )

(NFA ID #420686); and **JASON L.** )

**TANNER** (NFA ID #323680) )

 Respondents. )

**JASON L. TANNER’S
ANSWER TO
NFA COMPLAINT FILED JANUARY 13, 2014**

 In response to the NFA’s January 13, 2014 Complaint, Jason L. Tanner, through counsel, answers and sets forth his defenses.

**NFA Allegations - - Need for Dismissal with Prejudice**

1. The NFA alleges that Jason Tanner failed to timely cooperate in an NFA investigation, and makes an identical charge against ILQ and Mark Krier. The NFA also makes an unrelated charge against James Pieron for failure to supervise to assure cooperation in the NFA investigation. All of the charges are **baseless**.

**Sole Question as to Tanner**

1. Can Tanner as a principal/associated person of ILQ, an FCM/FDM, violate Rule 2-5 “by failing to timely cooperate” in the production of financial records to the NFA when Tanner did not have the ability to produce to the NFA - - he was **without** possession, custody or control of - - the requested business and private financial statements of a third party, Harrison Associates and Harald McPike[[1]](#footnote-1) - - principals of ILQ?

**Tanner’s Request of the Committee**

1. **The Complaint must be dismissed with prejudice**. The NFA wrongfully seeks sanctions against Tanner. Its allegations are **contrary to fundamental legal principals and common sense**. Tanner did not fail to timely cooperate in the NFA’s investigation because he did not have possession, custody or control, or the ability to produce, the documents the NFA commanded. No one can be held legally accountable for a failure to do something he was incapable of performing. The NFA is attempting to make Tanner a **scapegoat**.

**Summary of Facts and Answer as to Tanner**

1. On March 18, 2013, the NFA requested financial information as to HA/HMcP and ILQ. (At the time, Tanner was a former employee of the NFA and a five-month employee of ILQ. Harrison is an owner and principal of ILQ and HMcP owns Harrison and is a principal of ILQ.)
2. Before the close of business on August 19, Tanner and Krier provided all ILQ requested information to NFA.
3. Given that Tanner was not an employee, representative, or a control person of Harrison or HMcP, he lacked possession, custody or control of their documents or the ability to produce such documents. **Only HMcP controlled a decision whether financial statements for Harrison or himself would be produced.**
4. As to the NFA requests, Tanner was **merely a conduit** of communications between the NFA and HMcP and Craig Mawdsley, a senior executive of HMcP.
5. All NFA requests pertaining to Harrison or HMcP were promptly forwarded to Mawdsley by Tanner or Krier without interpretation or modification of scope.
6. Beginning on March 25, 2013 and continuing until September the NFA had written and oral communications with Mawdsley about the requested HMcP documents.
7. Given Tanner’s inability to produce information that he did not possess, have custody over, or control, on May 29, 2013 an NFA Associate General Counsel, Ronald Hirst, took up **direct negotiations** with Mawdsley as to the NFA’s requests.
8. An impasse occurred in the negotiations between Mawdsley and the NFA as to what constituted “relevant” documents. Mawdsley was hesitant to recommend to HMcP that he produce documents irrelevant to the NFA’s objectives that reflected HMcP’s private business and personal affairs.
9. On July 29, the NFA served notices of deposition to Tanner and Krier requiring their appearance at the NFA’s offices on August 6.
10. Just prior to Tanner’s August 6 deposition and **for the first time**, Tanner was provided with documents he believed were responsive to the NFA’s requests of HMcP. At his deposition, Tanner provided those documents to the NFA and they were entered into the deposition record as exhibits.
11. After Tanner’s August 6 deposition, Tanner continued to act as a conduit of communication between Mawdsley and the NFA through the coordination of phone calls to answer NFA questions and to pass along additional NFA requests of HA/HMcP to Mawdsley.
12. Upon the receipt of any NFA requested documents pertaining to Harrison or HMcP, Tanner promptly delivered the documents to NFA without delay or modification.
13. As a consequence of the foregoing, the NFA’s objectives were **fully met**. The NFA inquiry established beyond doubt that **(1)** there is **no undisclosed party** associated with HA/HMcP as principals of ILQ, **(2)** HMcP has the financial **capabilities to fund** ILQ, **(3)** there was **no suspicious activity** in connection with HMcP’s capital infusions into ILQ and **(4)** HA/HMcP **never has had any “relationships”** with Trevor Cook or the Martinez family. No one could reasonably conclude to the contrary based on any fact, suspicion or otherwise.
14. Tanner was notified of the upcoming issuance of the NFA Complaint against Krier, ILQ and himself. At about 4:00 p.m. on January 10, 2014, Tanner spoke by telephone with NFA Associate General Counsel Ron Hirst. He agreed that Tanner and Krier had done everything in their power to facilitate the production of the requested documents relating to HA/HMcP. Hirst went on to say to Tanner “. . . you are between a rock and a hard place . . . there was little you could control . . . the action is aimed at the guys in the Bahamas . . . Mark (Krier) and you should receive $50,000 bonuses for taking the bullet on this . . . .,” or similar words to the same effect.

**Principals Applicable to**

**Determining Tanner’s Culpability;**

**No Violation of Rule 2-5 or of a**

**Duty Which Cannot Be Fulfilled**

1. Because Tanner **did not** have the ability to control HMcP’s delivery of financial information to the NFA, and his **consistent good faith efforts** to work with the NFA toward its objectives, there could not have been a violation of Compliance Rule 2-5. There was no failure on Tanner’s part to cooperate with the NFA.
2. A **duty** to produce a document or person is enforceable by the NFA **unless** the compelled party shows he she **cannot produce** the compelled document or person. Under the facts of this case, the NFA **(1)** knew that Tanner **did not have possession, custody or control of HMcP’s financial statements**, **(2)** accepted Tanner acting as a conduit between the NFA and HMcP’s senior executive, Mawdsley, in an effort to secure the requested documents, and **(3)** even took up direct negotiations with Mawdsley in order to reframe the scope of the NFA’s requests and ultimately to have each of the requests satisfied by HMcP. Given the absence of possession, custody or control of the financial information, Tanner cannot be held legally responsible and sanctioned for a duty he **could not perform**.
3. There was no failure on Tanner’s part to **timely cooperate** with the NFA. In fact, the hearing record will be replete with communications evidencing Tanner’s cooperation which was timely and unfaltering.
4. The legal principal supporting Tanner’s arguments has its derivation in the Federal Rules of Civil Procedure. F.R.C.P. Rule 34(a)(1) permits a party to demand production by another party of items in the responding party’s **possession, custody or control**. The cases interpreting this F.R.C.P., as well as the interpretation of similar discovery or compliance rules like the NFA’s Compliance Rule 2-5, hold that a responding party cannot be sanctioned for failure to produce a document **if the party does not have the ability to comply**.

**Pararagraph by Paragraph**

**Specific Answers to the Complaint**

1. The following paragraphs correspond by number to the numbered paragraphs in the NFA’s January 13, 2014 Complaint.

**Jurisdiction**

1. Admits the allegations in paragraph 1.
2. Admits the allegations in paragraph 2.
3. Admits the allegations in paragraph 3.
4. Admits the allegations in paragraph 4.

**Background**

1. Admits the allegations in the first four sentences in paragraph 5. Deny the allegations in the fifth sentence in paragraph 5, and further state that the words “virtually every month” calls for a subjective determination.
2. Upon information and belief, admits the allegations in paragraph 6, and further states that those allegations have no relevance to the alleged violations. In mid-2010, Pieron, HMcP and counsel for ILQ, then an FCM, met with the NFA staff in Chicago to report on the anticipated future business operations of ILQ and to seek the NFA’s informal endorsement, including discussions of Trevor Cook and the Martinez family. The NFA staff then took the opportunity to question Pieron and HMcP about their business relationships. ILQ was approved as an FDM in April 2011.
3. Tanner is without sufficient information to admit or deny the allegations in paragraph 7, and therefore denies those allegations, and further states that those allegations have no relevance to the alleged violations.
4. Upon information and belief, admits the allegations in paragraph 8, and further states that the allegations are irrelevant to the alleged violations.
5. Upon information and belief, admits the allegations in the first and second sentences in paragraph 9. Denies the allegations in the third sentence in paragraph 9 in that the term “business relationship” implies something more than an arm’s length business relationship and that Pieron was somehow involved with Cook’s criminal conduct. Upon information and belief, admits the allegations in the fourth sentence in paragraph 9, and further states that those allegations have no relevance to the alleged violations.
6. Upon information and belief, admits the allegations in the first sentence in paragraph 10, except denies the use of the term “business partner,” and further states that those allegations have no relevance to the alleged violations. Tanner is without sufficient information to admit or deny the allegations in the second sentence in paragraph 10, and therefore denies those allegations, and further states that those allegations have no relevance to the alleged violations. Upon information and belief, admits the allegations in the third sentence in paragraph 10.
7. Upon information and belief, admits the allegations in the first and second sentences in paragraph 11. Deny the allegations in the third and fourth sentences in paragraph 11.
8. Admits the allegations in the first sentence in paragraph 12. Deny the allegations in the second sentence in paragraph 12. Admits the allegations in the third sentence in paragraph 12.
9. Deny the allegations in paragraph 13.
10. Admits the allegations in the first sentence in paragraph 14. Upon information and belief, admits the allegations in the second sentence in paragraph 14, and further states that the introductory words “After NFA learned of this . . .” are misleading and leave a false impression in that the NFA knew in advance of the early 2013 capital infusion since the NFA verified the transfer of funds to ILQ referred to in the first sentence in paragraph 14.
11. Deny the allegations in paragraph 15.

**Applicable Rules**

1. The statement in paragraph 16 is not an allegation but a purported summary of NFA Compliance Rule 2-5, and no response thereto is required. Tanner states that the Rule should be read, interpreted and enforced as a whole, including any referenced and all applicable constitutions, rules, regulations, customs and usages of the futures industry and all applicable law.
2. The statement in paragraph 17 is not an allegation but a purported summary of NFA Compliance Rule 2-36(e), and no response thereto is required. Tanner states that the Rule should be read, interpreted and enforced as a whole, including any referenced and all applicable constitutions, rules, regulations, customs and usages of the futures industry and all applicable law.

**Count I**

1. Tanner reasserts the answers heretofore provided in paragraphs 1, 2 and 4-16.
2. Admits the allegations in paragraph 19.
3. Tanner is without sufficient information to admit or deny the allegations in the first and second sentences in paragraph 20 in that he does not know what the NFA was “concerned about” or “noticed,” and therefore denies the allegations in those two sentences. Admits the allegations in the third and fourth sentences in paragraph 20, and further states that at the time ILQ had total assets of $44 million and net capital in excess of $23 million. Admits the allegations in the fifth sentence in paragraph 20.
4. Admits the allegations in the first and third sentences in paragraph 21, and further states that ILQ has not violated any NFA financial requirement and maintained adjusted net capital in excess of $23 million during the period in question. Total assets were over $43.5 million. Tanner is without sufficient information to admit or deny the allegations in the second sentence in paragraph 21 in that he does not know what “concerned NFA,” and therefore denies the allegations in the second sentence.
5. Admits the allegations in paragraph 22, and further states that the term “financial partner” has been used to refer to Harrison or HMcP and the past and ongoing commitment to ILQ.
6. Admits the allegations in paragraph 23.
7. Tanner is without sufficient information to admit or deny the allegations in paragraph 24 in that he does not know why (“Because”) the NFA commenced its investigation as used in the first sentence, what the “NFA also wanted to determine” as used in the second sentence, and what the “NFA wanted to check” as used in the third sentence, and therefore denies the allegations in paragraph 24. Tanner further states that (a) the reference to Trevor Cook and the Martinez family in the third sentence in paragraph 24 is superfluous to the alleged violations and (b) no one could reasonably conclude based on any fact, suspicion or otherwise that Harrison or HMcP had any “relationships” with Trevor Cook or the Martinez family.
8. Admits the allegations in the first sentence in paragraph 25, and further states that the letter should be read, interpreted and enforced as a whole. Deny the allegations in the second sentence in paragraph 25 in that it implies bad faith on the part of ILQ and is not a full recitation of the events that took place in connection with the 2011 examination. Admit the allegations in the third sentence in paragraph 25, and further states that these were the only documents requested by the NFA as to which Krier and others at ILQ had possession, custody or control or the ability to produce to the NFA.
9. Admits the allegations in the first sentence in paragraph 26, and further states that by such allegation the NFA admits that it was in discussions and negotiations with Mawdsley, a senior executive of HMcP, and this fact underscores that it was HMcP, and not the respondents, who had possession, custody and control of the HMcP documents for production to the NFA. Tanner is without sufficient information to admit or deny the allegations in the second sentence in paragraph 26 in that he does not know what “In reviewing the bank statements, NFA found,” and therefore denies the allegations in the second sentence.
10. Admits the allegations in paragraph 27.
11. Admits the allegations in paragraph 28.
12. Admits the allegations in paragraph 29, and further states that the NFA has omitted important facts and events prior to April 16, 2013 when an NFA staff member, Valerie O’Malley, informed Krier that she would provide to ILQ a written explanation on April 5, 2013 more clearly explaining details of the NFA’s document requests of March 18, 2013. Such written explanation “more clearly explaining details” was never provided to ILQ. ILQ further states that in the NFA’s April 16, 2013 letter, its recital of requests that had been made on March 18, 2013 was inaccurate. The NFA randomly changed its requests of HA/HMcP. ILQ further states that the referred to April 16, 2013 letter should be read, interpreted and enforced as a whole.
13. Admits the allegations in the first sentence in paragraph 30, and further states that the referred to discussions addressed much more than what is alleged and included discussions with regard to the scope of the requested documents. ILQ further states that the allegations in the first sentence constitute an admission by NFA of its negotiations with Mawdsley as a senior executive of HMcP. Deny the allegations in the second sentence in paragraph 30, and further state (a) that ILQ and its employees were unable to comply with certain NFA requests in that they did not have possession, custody and control of the HMcP documents and (b) the NFA took up negotiations with Mawdsley with regard to the requested production of the HMcP documents. ILQ further states that, in fact, there were modifications to and changes by the NFA with respect to their April 16, 2013 requests of HMcP. Deny the allegations in the third and fourth sentences in paragraph 30 and further state that the referred to Krier letter should be read, interpreted and enforced as a whole.
14. Admits the allegations in the first sentence in paragraph 31, and further states that Krier was actively engaged in cooperation with the NFA to facilitate the production of the documents it requested. In an April 22, 2013 email to Rachel Branderburg of the NFA and three others at the NFA, Krier stated:

“. . . I do want to make it clear the (sic) we fully intend on assisting the NFA in any way possible to achieve their desired level of verification. We will do whatever we can to work with the NFA and Mr. . . . (“HMcP”) so that adequate verification can be achieved . . . We will be communicating and working with Mr. . . . (“HMcP”) and his representatives when he returns from vacation to further discuss the NFA’s requests. . . . ”

Admits the allegations in the second and third sentences in paragraph 31, and further states that, in fact, the NFA did “alter its stance” and had “further discussions” with regard to the scope of the production of Security Management bank statements.

1. Admits the allegations in paragraph 32, and further states that by reason of the production referred to in paragraph 32 ILQ had provided all documents requested by the NFA in its March 18, 2013 letter. Such production **by** HMcP was consistent with the suggestion of Hirst during a telephone conversation between Hirst and Tanner on April 25, 2013.
2. Tanner is without sufficient information to admit or deny the allegations in the first and second sentences in paragraph 33 in that he does not know what the “NFA noted” and what the “NFA also found,” and therefore denies the allegations in the first sentence. Tannerfurther states that the Foreign Bank’s letters included relevant financial information as to HMcP.
3. Admits the allegations in paragraph 34, and further states that thereby the NFA admits that it engaged in direct negotiations with Mawdsley with respect to the HMcP financial information.
4. Admits the allegations in paragraph 35, and further states that thereby the NFA admits that it again modified certain of its prior requests for documents and engaged in ongoing negotiations with Mawdsley. ILQ further states that during such conversations, there were discussions of whether the requested financial information would include both “incoming” and “outgoing” funds into the account. Mawdsley was willing to recommend to HMcP that he produce statements showing funds “incoming” into the account in order to address the NFA’s concerns that there might be undisclosed principals by reason of HMcP equity contributions into ILQ, but Mawdsley was hesitant to recommend to HMcP that he produce documents showing monies “outgoing” in such account since it was irrelevant to the NFA’s inquiry and would involve information private and personal to HMcP.
5. Admits the allegations in the first sentence in paragraph 36. Deny the allegations in the second and third sentences in paragraph 36 in that the NFA mischaracterizes Mawdsley’s June 3, 2013 email, and Tanner further states and underscores that by such allegations the NFA is acknowledging and admitting that Mawdsley, as a senior executive of HMcP, was in a position to make recommendations to HMcP regarding the release of HMcP financial information, and that ILQ, Tanner and Krier did not have possession, custody or control of such information nor the ability to decide whether such information should be produced to the NFA.
6. Tanner is without sufficient information to admit or deny the allegations in the first and second sentences in paragraph 37 in that he does not know what the “NFA decided” and what the “NFA also wanted to ask,” and therefore denies the allegations.
7. Admits the allegations in paragraph 38.
8. Admits the allegations in paragraph 39.
9. Admits the allegations in paragraph 40.
10. Admits the allegations in paragraph 41.
11. Admits the allegations in paragraph 42.
12. Admits the allegations in paragraph 43, and further states that by such testimony Tanner was acknowledging that neither ILQ, Krier or he had possession, custody or control of HMcP’s financial information and that all decisions with respect thereto were to be made by HMcP.
13. Deny the allegations in the first sentence in paragraph 44, and further states that the allegations in that sentence are a mischaracterization of Tanner’s testimony. Deny the allegations in the second sentence in paragraph 44, and further states that the allegations are not relevant to the alleged violations. Deny the allegations in the third sentence in paragraph 44, and further states that it does not know “the misimpressions on NFA’s part” and further states that the allegations in that sentence are a mischaracterization of Tanner’s testimony.
14. Admits the allegations in the first sentence in paragraph 45. Deny the allegations in the second and third sentences in paragraph 45. Tanner is without sufficient information to admit or deny the allegations in the fourth and fifth sentences in paragraph 45 in that he does not know what the “NFA. . . noted” and what the “NFA also determined,” and therefore denies the allegations in those two sentences.
15. Admits the allegations in paragraph 46 to the extent that Tanner understands the allegations in the paragraph.
16. Admits the allegations in the first sentence in paragraph 47. Tanner is without sufficient information to admit or deny the allegations in the second sentence in paragraph 47 in that he does not know what the “NFA also noted,” and therefore denies the allegations in the second sentence in paragraph 47, and further states that the NFA’s allegations mischaracterize the completeness or duplicity of the statements provided on August 20, 2013.
17. Admits the allegations in the first and second sentences in paragraph 48, and further states that by such allegations the NFA is admitting the conduit role of Mawdsley in communicating with HMcP about decisions with respect to the financial statements of HMcP. Deny the allegations in the third sentence in paragraph 48 in that they are mischaracterization of what Tanner said.
18. Deny the allegations in the first sentence in paragraph 49. Deny the allegations in the second sentence in paragraph 49, and further states that the Complaint mischaracterizes the nature of the inquiries made by the NFA during the referred to telephone conversation among Cynthia Cain, Mawdsley and Tanner and further states that Mawdsley offered to put the NFA staff in contact with personnel at the foreign bank, UBS AG, that would be able to answer any question that the NFA might have regarding the nature of the account and the type of the transactions that could be conducted in an account of such type. The NFA declined the opportunity to be put in contact with UBS AG.
19. Admits the allegations in paragraph 50, and further states that the letter should be read, interpreted and enforced as a whole.
20. Admits the allegations in paragraph 51.
21. Deny the allegations in paragraph 52, and ILQ further states that the allegations are a mischaracterization of the communications, good faith efforts, and production of information between March 18, 2013 and September 2013.
22. Deny the allegations in paragraph 53, and further states that in a series of communications the NFA asked for information on a “piecemeal basis.”
23. Deny the allegations in paragraph 54.
24. Deny the allegations in paragraph 55.

**Count II**

1. ILQ reasserts the answers heretofore provided in paragraphs 1, 3, 5-15 and 17.
2. Admits the allegations in paragraph 57.
3. Admits the allegations in the first sentence in paragraph 58, and further state that Pieron’s ability to have the NFA’s requests met in a timely and proper manner were limited by ILQ’s, Tanner’s, Krier’s and his own lack of possession, custody or control over HMcP’s financial information. Deny the allegations in the second and third sentences in paragraph 58.
4. Deny the allegations in paragraph 59.

**Affirmative Defenses**

1. The NFA Complaint fails to state causes of action upon which relief can be granted.
2. The NFA Complaint fails to allege facts sufficient to establish the required elements for a finding of a violation of Compliance Rule 2-5 by ILQ, Tanner and/or Krier.
3. The NFA Complaint fails to allege facts sufficient to establish the required elements for a finding of a violation of Compliance Rule 2-36(e) by Pieron.
4. The NFA’s own actions, including those actions alleged by it in its Complaint and those to be made a matter of the record at the hearing, establish that there has not been a violation of Compliance Rule 2-5 by ILQ, Tanner or Krier or a violation of Compliance Rule 2-36(e) by Pieron.

**WHEREFORE**, Tanner respectfully requests that the NFA Business Conduct Committee deny the relief sought and dismiss the Complaint against him with prejudice.

 Respectfully submitted,

 /s/

 John M. Fedders

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 **Counsel for Jason L. Tanner**

February 18, 2014

**Certificate of Service**

 I, John M. Fedders, counsel for Jason L. Tanner, hereby certify that on February 18, 2014, true and correct copies of the foregoing **Jason L. Tanner’s Answer to NFA’s Complaint filed January 13, 2014,** were served upon the following via Federal Express overnight delivery service for priority delivery on February 19, 2014.

Legal Department - Docketing

National Futures Association

Suite 1800

300 South Riverside Plaza

Chicago, Illinois 60606

Cynthia Cain Ioannacci, Esq.

Legal Department

National Futures Association

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and were served upon the following by personal delivery on February 19, 2014:

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 /s/

 John M. Fedders

1. Harrison Associates is referred to as “Harrison.” Harald McPike is referred to as “HMcP.” Collectively, they are referred to as “HA/HMcP.” [↑](#footnote-ref-1)