

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES RICHARD WILLARD, III  
(CRD No. 1212281),

Respondent.

Disciplinary Proceeding  
No. 2006006046401

Hearing Officer – MC

**EXTENDED HEARING PANEL  
DECISION**

December 18, 2009

**Respondent is: (i) suspended from associating with any FINRA member firm in any capacity for 30 business days and fined \$5,000 for making unsuitable recommendations to a customer, in violation of Conduct Rules 2110, 2310, and IM-2310-2; (ii) suspended from associating with any FINRA member firm in any capacity for two years and fined \$75,000 for falsifying records of his member firm employer, in violation of Conduct Rules 2110 and 3110; (iii) fined \$2,500 for willfully reporting false information on Forms U4, in violation of Conduct Rule 2110 and IM-1000-1; and (iv) suspended from associating with any FINRA member firm in any capacity for six months and fined \$10,000 for willfully reporting false information on a Form U4 and failing to report material information on Forms U4, in violation of Conduct Rule 2110 and IM-1000-1. The suspensions are imposed concurrently.**

**Appearances**

Lynn M. Kasetta, Senior Regional Counsel, and Jonathan M. Prytherch, Senior Regional Counsel, Woodbridge, NJ, for the Department of Enforcement.

Eric S. Hutner, Esquire, New York, NY, for Respondent James Richard Willard, III.

## DECISION

### I. Background and Procedural History

In April 2006, Respondent James Richard Willard, III (“Willard”) was employed by and registered through FINRA member firm First Investors Corporation (“First Investors” or the “Firm”). For more than a decade, one of his customers was RM, a widow born in 1919. In the course of making an investment recommendation to RM, however, Willard told the Firm and wrote on a number of RM’s account documents that she was born in 1939, misrepresenting her age as 20 years younger than she was. He did so to avoid the heightened review the Firm required of recommendations to elderly customers. After discovering Willard’s misrepresentations of RM’s age, the Firm conducted an investigation and terminated his employment.

On June 10, 2008, FINRA’s Department of Enforcement (“Enforcement”) filed the four-cause Complaint in this disciplinary proceeding. The First Cause of Action alleges that Willard’s investment recommendation to RM in April 2006 was unsuitable, in violation of Conduct Rules 2110, 2310, and IM-2310-2.<sup>1</sup> The Second Cause of Action alleges that Willard falsified First Investors’ records by misrepresenting RM’s age, causing the Firm’s books and records to contain false and misleading information, in violation of Conduct Rules 2110 and 3110. The Third Cause of Action alleges that Willard willfully reported false information, by inaccurately describing the conduct leading to his discharge from the Firm on Forms U4 filed in September 2006 and December 2007, in violation of Conduct Rule 2110, and IM-1000-1.

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<sup>1</sup> As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Willard’s alleged misconduct. The applicable rules are available at [www.finra.org/rules](http://www.finra.org/rules).

Finally, the Fourth Cause of Action alleges that Willard also willfully failed to amend his Form U4 after receiving notification from FINRA that he was under investigation, and denied on a Form U4 he filed in December 2007 that he was the subject of an investigation, in violation of Conduct Rule 2110, and IM-1000-1..

In his Answer, Willard denied each of the allegations in the Complaint. However, in a Stipulation of Facts submitted by the parties on June 1, 2009, Willard stipulated that in April and December 2007, he failed to update his Forms U4, but denied that his failures to do so were willful.

An Extended Hearing Panel<sup>2</sup> convened a four-day hearing in Woodbridge, NJ, commencing on June 2, 2009.<sup>3</sup> At the conclusion of its deliberations, the Extended Hearing Panel found Willard liable for the misconduct alleged in each Cause of Action of the Complaint.

## **II. Findings of Fact and Conclusions of Law**

### **A. The Respondent**

From December 19, 1983, to August 4, 2006, Willard was registered as an Investment Company and Variable Contracts Products Representative through First Investors. From the early 1990's, he worked at the Firm's Binghamton, NY office.<sup>4</sup> On April 30, 1998, Willard also became registered as a General Securities Representative through the Firm. From September 21, 2006, to December 7, 2007, Willard was employed by and registered through FINRA member firm Cadaret, Grant & Co., Inc. ("Cadaret"). Since December 7, 2007, Willard has been

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<sup>2</sup> The Extended Hearing Panel was comprised of two current District 9 Committee members and the Hearing Officer.

<sup>3</sup> The transcript of each day's proceedings in the four-day hearing begins with page 1, so references to the hearing testimony are designated as "Tr." with a number identifying the day of the hearing, followed by a page number; thus, "Tr. 1, p. 24" refers to the transcript of the first day of the hearing at page 24. References to Enforcement's exhibits are designated "CX-\_", and references to Willard's exhibits are designated as "RX-\_"

<sup>4</sup> Tr. 3, pp. 121-122.

employed by and registered through FINRA member firm NFP Securities, Inc. (“NFP”). He is, therefore, subject to FINRA’s jurisdiction.<sup>5</sup>

## **B. Background**

The genesis of this case was the discovery by First Investors that Willard submitted account documents to the Firm on which he inaccurately represented RM’s true age.

### **1. The Altered Documents**

RM had been Willard’s customer at First Investors since 1994.<sup>6</sup> RM, born on June 20, 1919,<sup>7</sup> was in her mid-seventies when she became Willard’s customer. She was not a sophisticated investor.<sup>8</sup>

At RM’s request, Willard met with her at her home on April 12, 2006.<sup>9</sup> According to Willard, RM informed him she needed cash in order to pay bills.<sup>10</sup> In the course of their conversation, Willard learned that RM had an account at Wachovia Securities (“Wachovia”) with a value of approximately \$150,000.<sup>11</sup> At Willard’s suggestion, RM agreed to transfer the Wachovia account to First Investors.<sup>12</sup>

#### **a. Willard Calls His Manager**

From RM’s home during the meeting on April 12, Willard called his manager, Crystal DeMarco (“DeMarco”).<sup>13</sup> Willard explained that he called because the transfer required a

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<sup>5</sup> CX-1A.

<sup>6</sup> Stipulation of Facts, ¶ 2.

<sup>7</sup> CX-16, pp. 16, 25.

<sup>8</sup> Tr. 4, p. 178.

<sup>9</sup> CX-4A, Att. C, p. 2 of 4.

<sup>10</sup> Tr. 3, p. 180.

<sup>11</sup> *Id.*, pp. 182-184.

<sup>12</sup> *Id.*, p. 185.

<sup>13</sup> *Id.*, p. 186.

manager's approval, and that it was customary for him to call DeMarco under these circumstances.<sup>14</sup> He testified that when he apprised DeMarco of the situation, DeMarco asked how old RM was.<sup>15</sup> Willard claimed that the following occurred while he was on the telephone with DeMarco: he asked RM her age; she replied, "I am 67 years old. I am having a bad day. I feel like I'm 87"; and he duly informed DeMarco that RM was 67 years old.<sup>16</sup> Willard testified that DeMarco told him to proceed with the transfer.<sup>17</sup> A week later, on April 19, 2006, Willard returned to RM's residence with forms necessary to consummate the transfer.<sup>18</sup> Willard also gave RM prospectuses for three First Investors mutual funds in which he recommended she invest.<sup>19</sup>

DeMarco's account of the April 12 call differs from Willard's. DeMarco testified that she did not ask about RM's age during the telephone call.<sup>20</sup> DeMarco stated that it was not typical for Willard, an experienced broker, to call her from a client's home during a visit and she did not understand why Willard called her that day.<sup>21</sup> DeMarco said that when Willard called, she simply told him to bring RM's paperwork back to the office for review.<sup>22</sup> According to DeMarco, she met with Willard a day or two later. She said it was then that she asked if RM was

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<sup>14</sup> Tr. 4, p. 69.

<sup>15</sup> *Id.*, p. 186

<sup>16</sup> *Id.* When RM was interviewed on July 11, 2006, by DeMarco and Robert Morabito, who was then a First Investors Surveillance Specialist (Tr. 1, p. 163), RM stated clearly that she never told Willard that she was 67 years old or that she felt like 87. Tr. 1, pp. 208-209; CX-4A, Attachments G and H.

<sup>17</sup> Tr. 3, p. 189.

<sup>18</sup> *Id.*, pp. 193-194; CX-26, p. 15.

<sup>19</sup> Tr. 3, p. 203.

<sup>20</sup> Tr. 2, pp. 280-281.

<sup>21</sup> *Id.*, pp. 149-150.

<sup>22</sup> *Id.*, pp. 280-281.

over 70 years old and he replied “Not even close.”<sup>23</sup> Willard and DeMarco concur, however, that Willard told Demarco, incorrectly, that RM was 67 years old.<sup>24</sup>

**b. Willard Enters Incorrect Dates of Birth on Eight Account Documents**

Following his April 2006 meetings with RM, Willard falsified eight account documents to make it appear that RM was born in 1939. Four were new documents he created in April and May 2006 in connection with the transfer of RM’s accounts from Wachovia to the Firm.<sup>25</sup> The other four were pre-existing account documents on which Willard changed RM’s year of birth from 1919 to 1939 by writing over the second numeral “1” in 1919 to change 1919 to 1939.<sup>26</sup>

**c. DeMarco Reviews RM’s Account Transfer Documents**

DeMarco testified that the documents Willard gave her after the call on April 12 showed RM’s year of birth as 1939.<sup>27</sup>

Subsequently, on May 24, 2006, Willard gave DeMarco a document entitled Non-Retirement Account Transfer Form to transfer to First Investors some additional funds RM had invested in a Prudential Financial annuity policy.<sup>28</sup> The first page of the document consists of a First Investors form with RM’s signature dated May 24, 2006, and shows her date of birth,

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<sup>23</sup> Tr. 2, pp. 279-280; CX-4A, Att. E, p. 2 of 2.

<sup>24</sup> CX-4A, Att. E, p. 2 of 2; Tr. 3, p. 186.

<sup>25</sup> The four new documents were: (i) a Confidential Suitability Questionnaire (“CSQ”), CX-2B, dated April 12, 2006, signed by RM on April 19, 2006, and by Willard and DeMarco on April 24, 2006; (ii) a Master Account Agreement (“MAA”), CX-2A, signed by RM on April 19, 2006, and by Willard and DeMarco on April 24, 2006; (iii) a New Account Form, CX-2C, signed by RM on April 20, 2006, and by Willard and DeMarco on April 24, 2006; and (iv) a Non-Retirement Account Transfer Form, CX-2H, signed by RM, Willard and Demarco on May 24, 2006.

<sup>26</sup> The four pre-existing documents were: (i) a Customer Service Form (“CSF”), CX-2D, signed by RM on July 9, 2003; (ii) an MAA, CX-2E, signed by RM on July 10, 2003; (iii) a CSQ, CX-2F, signed by RM on July 10, 2003; and (iv) a CSF, CX-2G, which appears to have been signed by Willard and DeMarco on December 15, 2004.

<sup>27</sup> They were a new MAA and new CSQ. Tr. 2, pp. 213-214.

<sup>28</sup> Tr. 2, pp. 136, 138; CX-4C. This transfer was not consummated.

incorrectly, as “6/20/39;” the “3” in the “39” appears to have been superimposed over a “1.”<sup>29</sup>

The remaining three pages of the document consist of a Prudential Financial Annuity Full Surrender Request, not generated by First Investors; on the last page, RM’s date of birth appears, correctly, as 6/20/1919.<sup>30</sup>

DeMarco noticed the 20-year discrepancy between RM’s date of birth reflected on the first and last pages of the document. At the time, Willard was away from the office.<sup>31</sup> DeMarco asked Willard’s assistant, Heather Gardner (“Gardner”), to check RM’s age. Gardner told DeMarco that Willard had recently mentioned to her that RM was 87 years old.<sup>32</sup> Gardner also checked a computer database showing that RM was born in 1919.<sup>33</sup> DeMarco then saw that RM’s year of birth had been changed from 1919 to 1939 on a number of other account documents in RM’s file.<sup>34</sup> This prompted DeMarco to notify her supervisor, James Stainsby (“Stainsby”), Senior Vice President and regional manager in Buffalo, NY, and to send him copies of the documents by facsimile.<sup>35</sup> She did so early on the morning of May 25, 2006, a date on which Willard had a previously set appointment with Stainsby in Buffalo.<sup>36</sup>

#### **d. Willard’s Meeting with Stainsby**

At the meeting in Buffalo, Stainsby asked Willard about RM’s age.<sup>37</sup> When Stainsby confronted Willard with the documents from DeMarco, Willard denied misrepresenting RM’s

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<sup>29</sup> CX-4C, p. 2 of 5.

<sup>30</sup> CX-4C, p. 5 of 5.

<sup>31</sup> Tr. 2, p. 154.

<sup>32</sup> On May 26, 2006, Gardner signed a statement summarizing what Willard said regarding RM’s age of 87. CX-4A, Att. 4D.

<sup>33</sup> Tr. 2, pp. 141-142.

<sup>34</sup> *Id.*, pp. 143-144.

<sup>35</sup> *Id.*, p. 145.

<sup>36</sup> *Id.*, pp. 152-153. The original purpose of the meeting, however, was to discuss other matters. Tr. 1, p. 49.

<sup>37</sup> Tr. 2, pp. 59-60.

age on the documents<sup>38</sup> and insisted that RM was in fact 67 years old.<sup>39</sup>

At the conclusion of the meeting, Stainsby directed Willard to prepare a written explanation of his conflicting representations of RM's age on the account documents.<sup>40</sup> Willard sent Stainsby a memorandum the next day.<sup>41</sup> It comported with what Willard had said in their meeting.<sup>42</sup> In the memorandum, Willard claimed he believed RM was 67 years old until he was informed otherwise by Stainsby at their meeting.<sup>43</sup>

**e. The First Investors Investigation**

After his interview with Willard, Stainsby reported to his supervisor and to First Investors' compliance manager Denise Rall ("Rall") that Willard had altered RM's age on her account documents.<sup>44</sup> On July 25, 2006, Rall and Robin Katz ("Katz"), an attorney for First Investors, interviewed Willard about the matter at his Binghamton office.<sup>45</sup>

Katz and Rall wanted to interview Gardner as well, but she was initially unavailable. When Gardner became available, Katz and Rall interrupted the Willard interview to speak with Gardner separately.<sup>46</sup> When Katz and Rall resumed their interview of Willard, his demeanor

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<sup>38</sup> Tr. 1, pp. 60, 113.

<sup>39</sup> *Id.*, pp. 66-70.

<sup>40</sup> Tr.1, p. 60.

<sup>41</sup> CX-4A, Att. C.

<sup>42</sup> Tr. 1, p. 65.

<sup>43</sup> CX-4A, Att. C, p. 4.

<sup>44</sup> *Id.*, pp. 77-78.

<sup>45</sup> CX-4D, p. 1.

<sup>46</sup> Tr. 2, pp. 323-324.

changed dramatically.<sup>47</sup> In the first segment of the interview, Willard appeared confident and in control, but in the second segment was emotionally upset.

Willard announced that he wanted to say something before the questioning resumed. He said, “I screwed up.” He began to cry. He then said, “I don’t know why I did it. I shouldn’t have done it. My career is probably over.”<sup>48</sup> He stated that on April 12, 2006, he knew RM was well over 70 years old. He had called DeMarco because under Firm policy, RM’s age required managerial approval of the transaction.<sup>49</sup> He admitted telling DeMarco, falsely, that RM was under 70.<sup>50</sup> Willard told Katz and Rall that he changed RM’s year of birth from 1919 to 1939 on the account documents after RM signed them.<sup>51</sup> Willard admitted that he had lied to Stainsby in the meeting and in the memo, when he wrote that the first time he learned RM was 87 years old was at the meeting on May 25, 2006.<sup>52</sup> Willard also told Katz and Rall that at the time he had been under great stress because of family crises.<sup>53</sup> At the conclusion of the interview, when Katz asked if Willard wanted to add anything further, he said, “guilty as charged.”<sup>54</sup>

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<sup>47</sup> Tr. 2, pp. 90-91, 319, 324-325. The first part of the interview with Willard, and the entirety of the Gardner interview, were recorded. The Willard transcript is found at CX-4D; the Gardner transcript is CX-27. Unknown to Katz and Rall, however, the recorder malfunctioned at the outset of the second part of the Willard interview. Both Katz and Rall took notes and prepared detailed summaries of Willard’s interview (CX-4D). Their hearing testimony concerning the interview was unchallenged by Willard. When he testified, however, Willard claimed he could not recall what he said to Katz and Rall on July 25. Tr. 4, pp. 183-184.

<sup>48</sup> Tr. 2, pp. 324-325.

<sup>49</sup> *Id.*, pp. 327-328; CX-11, Att. A..

<sup>50</sup> *Id.*, p. 328.

<sup>51</sup> *Id.*, pp. 328-330. This admission directly contradicts Willard’s claim in the memo wrote for Stainsby, that “on four different appointments, she [RM] signed paperwork with her date of birth listing her at 67 years old.” CX-4A, Att. C, p. 4.

<sup>52</sup> Tr. 2, p. 332.

<sup>53</sup> The crises Willard identified at this point were (i) his mother was seriously ill, (ii) his young daughter was experiencing a serious crisis, and (iii) a business partner had left him. *Id.*, pp. 326-327.

<sup>54</sup> *Id.*, p. 333. Rall corroborated Katz’s description of the Willard interview. *Id.*, pp. 91-92.

## **2. Suitability**

### **a. RM's Wachovia Account**

Peter Smith ("Smith") was the broker who had handled RM's Wachovia account before Willard transferred it to First Investors.<sup>55</sup> He testified that the Wachovia account accurately reflected RM's conservative investment objectives.<sup>56</sup>

### **b. RM's First Investors' Profile**

In 1994, when RM was in her seventies and became Willard's customer, the account documents he submitted to First Investors described her investment profile as 75 percent conservative and 25 percent moderate.<sup>57</sup> By 2003, RM's investment profile at the Firm changed, as Stainsby observed, from "very conservative" to "very aggressive."<sup>58</sup> This was contrary to the Firm's conservative approach to aging clients.<sup>59</sup> Account documents submitted by Willard in 2003, 2004, and 2006, described RM's investment profile as 50 percent aggressive, 25 percent conservative, and 25 percent moderate.<sup>60</sup> Willard admitted making the changes in RM's investment profile.<sup>61</sup>

### **c. Willard's Recommendation**

According to Willard, RM had several investment objectives in April 2006. First, she wanted to earn more money to pay living expenses; second, she wanted to enlarge her estate; and

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<sup>55</sup> Tr. 2, pp. 287-288.

<sup>56</sup> Tr. 2, pp. 291-294. Smith testified that RM's account consisted of 60 percent in fixed income investments, 20 percent in a mutual fund she purchased through someone else, and the remainder in stocks, e.g., IBM and AT&T. Willard disagreed with Smith's characterization of the account as conservative. He testified that RM's Wachovia account was "aggressive" because RM was invested in individual securities. Tr. 3, pp. 187-188.

<sup>57</sup> CX-4B, p. 2; Tr. 1, p. 212.

<sup>58</sup> Tr. 1, pp. 58, 84.

<sup>59</sup> *Id.*, p. 181.

<sup>60</sup> *Id.*, pp. 58-59; CX-4B, pp. 3-7.

<sup>61</sup> Tr. 3, pp. 216-218.

third, she wanted to direct the proceeds of her estate to specific beneficiaries.<sup>62</sup> Willard described RM as having both a “short and long-term perspective,” including income and growth.<sup>63</sup>

Willard recommended that RM invest the proceeds of her Wachovia account in three First Investors Funds: Growth and Income, Value, and Total Return.<sup>64</sup> RM followed his recommendation.<sup>65</sup> On the new Master Account Agreement form Willard filled out and RM signed on April 19, 2006, Willard described RM’s investment objectives as (i) growth, (ii) income, and (iii) estate planning.<sup>66</sup>

Willard claimed that the combination of funds he recommended met RM’s goals: the funds would (i) pay RM dividends; (ii) give her regular capital gains; and (iii) provide her with the potential for growth, enabling her to leave money to heirs upon her death.<sup>67</sup>

#### **d. The Firm’s Suitability Review**

Robert Morabito (“Morabito”), a surveillance analyst and compliance manager for First Investors at the time, interviewed RM in July 2006.<sup>68</sup> RM told him, as she had Willard, that she wanted to increase the income from her investments.<sup>69</sup> Noting that to do so would expose RM to more risk,<sup>70</sup> Morabito testified that in implementing his recommendation, Willard had not observed the “checks and balances” First Investors had in place for such an elderly client. First

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<sup>62</sup> *Id.*, pp. 205-207.

<sup>63</sup> Tr. 3, p. 214.

<sup>64</sup> Tr. 3, p. 211.

<sup>65</sup> *Id.*, p. 213.

<sup>66</sup> RX-24; Tr. 3, pp. 207-208.

<sup>67</sup> Tr. 3, pp. 214-215.

<sup>68</sup> Tr. 1, pp. 178-179.

<sup>69</sup> *Id.*, pp. 184, 198-199.

<sup>70</sup> *Id.*, p. 199.

Investors would have prevented RM from making the investments Willard recommended unless a third party reviewed them and the Firm's Elderly Client Checklist had been submitted and approved.<sup>71</sup>

Morabito further testified that RM did not understand the aggressive nature of the investments Willard recommended and was unaware of the charges she had been assessed.<sup>72</sup>

Morabito also testified that RM told him that Willard had not explained the risk profile sections of the forms she signed to implement his recommendation.<sup>73</sup>

DeMarco testified that based upon RM's age, Willard's recommendation was unsuitable because of both the nature of the funds and the front-end fees charged.<sup>74</sup> According to DeMarco, had RM's actual age been known, and had the First Investors review process been followed, there was no reasonable possibility that the Firm would have approved Willard's recommendation.<sup>75</sup>

At the conclusion of its review, First Investors found that Willard's recommendation to RM was not suitable and offered to rescind the investments RM had made relying on Willard. The Firm did so because of RM's advanced age, the increase in her risk level from 2003 to 2006, and the concentration of equity funds in her portfolio. RM accepted the offer.<sup>76</sup> Consequently, the Firm returned to RM the total amount of the funds that had been transferred from Wachovia,

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<sup>71</sup> Tr. 1, p. 199; CX-4A, p. 3 of 8.

<sup>72</sup> Tr. 1, p. 183.

<sup>73</sup> CX-4A, Att. G, p. 3 of 3; CX-4A, p. 4 of 8.

<sup>74</sup> Tr. 2, pp. 265-266.

<sup>75</sup> *Id.*, pp. 270-271.

<sup>76</sup> Tr. 1, p. 85.

allowing her to recover a loss of approximately \$9,500 in the account, of which she had been unaware, that occurred in the two months following the transfer.<sup>77</sup>

Willard insisted in his testimony that his recommendation was suitable for RM regardless of whether she was 67 or 87 years of age, and that if he had known her actual age at the time, it would not have affected his recommendation. Willard testified that despite his uncertainty about RM's age, he did nothing to obtain clarity. Instead, he made his recommendation without calling or visiting RM to ask her age and without checking his client file to see what the historical account documents showed her age to be.<sup>78</sup>

### **3. The September 2006 and December 2007 Forms U4**

The Form U4 provides space on the Disclosure Reporting Page ("DRP") that allows a registered representative to provide an explanation of the circumstances surrounding a prior termination. It is optional. In Form U4 filings made when he moved to Cadaret and then to NFP, Willard exercised his option to include a comment about his discharge from First Investors. Cadaret filed the first Form U4 on September 21, 2006;<sup>79</sup> NFP filed the second on December 7, 2007.<sup>80</sup>

In the space provided, both of Willard's Forms U4 contain an identical comment: "I made an error listing the client's DOB, realized the error, immediately corrected the DOB and notified my manager of the error."<sup>81</sup> The comment is untrue.

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<sup>77</sup> Tr. 1, pp. 182-184. The rescission included the sales charges that had been assessed as well as \$1,122.49 in interest earned on her investment. CX-14.

<sup>78</sup> Tr. 4, pp. 98, 101-103.

<sup>79</sup> CX-1C.

<sup>80</sup> CX-1D.

<sup>81</sup> CX-1C, p. 14; CX-1D, p. 15.

Willard testified that Cadaret's Chief Compliance Officer, Beda Johnson ("Johnson"), suggested entering the comment, composed it, and that he did not review the language before the forms U4 were filed.<sup>82</sup> Despite disclaiming authorship, Willard testified that the facts in the comment are true.<sup>83</sup>

In contrast, Johnson did not recall suggesting that Willard provide the comment, but clearly remembered writing it down in the course of a telephone conversation she had with him. She testified that the facts in the comment, the wording, and the sequence of events described, all came from Willard.<sup>84</sup>

#### **4. Failure to Amend and Disclose Material Information on Forms U4**

FINRA staff sent a letter ("Wells notice") to Willard's attorney, with copies to Cadaret and to Willard, dated April 13, 2007, notifying Willard that he was the subject of an investigation concerning misrepresentations of his customer's age on RM's account forms.<sup>85</sup> Receipt of this notification required Willard to amend his Form U4 within 30 days to reflect the fact of the investigation.<sup>86</sup> Willard did not do so.

On December 7, 2007, Willard submitted a Form U4 to be filed through NFP on which he answered "no" in response to a question asking whether he was the subject of any investigation.<sup>87</sup>

FINRA staff sent Willard an amended Wells notice on December 31, 2007, informing him that he was now also being investigated for Form U4 violations, as well as for making

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<sup>82</sup> Tr. 4, pp. 5-11.

<sup>83</sup> *Id.*, pp. 10-11.

<sup>84</sup> Tr. 1, pp. 233, 234, 259, 271; CX-23, p. 15.

<sup>85</sup> CX-30A.

<sup>86</sup> FINRA By-Laws, Article V, Section 2(c).

<sup>87</sup> CX-1D, p. 9.

unsuitable recommendations.<sup>88</sup> On January 15, 2008, Willard amended his Form U4 through NFP, finally disclosing the fact that he was being investigated.<sup>89</sup>

Willard testified that he had relied on others to amend his Forms U4. He testified that his attorney gave him the April 13, 2007, Wells notice<sup>90</sup> and he immediately informed Robert Sedor (“Sedor”), his supervisor.<sup>91</sup> Willard testified that on the following day Sedor said he would handle the matter,<sup>92</sup> and that a week later, Sedor told him that the matter had been taken care of.<sup>93</sup> Willard acknowledged, nonetheless, that he was personally responsible for amending his Form U4 to reflect that he was under investigation by FINRA,<sup>94</sup> but explained that he believed Sedor had done what was necessary.<sup>95</sup>

Sedor denied telling Willard that he would handle filing an amended Form U4 for him,<sup>96</sup> and did not recall telling Willard that Cadaret would do so.<sup>97</sup> Contradicting Willard, Sedor testified that he did not tell Willard that his Form U4 had been updated.<sup>98</sup>

In July 2007, Willard prepared to follow Sedor to NFP. In the process of applying for registration through NFP, Willard filled out a Representative Candidate Profile. On it, he accurately indicated that he was the subject of an investigation by a regulatory body or by his

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<sup>88</sup> CX-30B.

<sup>89</sup> CX-1E, p. 9.

<sup>90</sup> RX-12; Tr. 3, pp. 146-147; Tr. 4, p. 31.

<sup>91</sup> Tr. 3, p. 148.

<sup>92</sup> *Id.*, p. 155.

<sup>93</sup> *Id.*, p. 158. Willard persisted in asserting Sedor told him the matter had been taken care of, Tr. 4, p. 34, even after Sedor testified that he did not say so. Tr. 3, p. 290.

<sup>94</sup> Tr. 3, p. 158.

<sup>95</sup> *Id.*, p. 159.

<sup>96</sup> *Id.*, pp. 288-289.

<sup>97</sup> Sedor testified, however, that he expected Cadaret would file an amended Form U4. *Id.*, p. 239.

<sup>98</sup> *Id.*, p. 290.

current firm.<sup>99</sup> After submitting the Representative Candidate Profile to NFP, Willard was informed he must update his Form U4. Willard testified that he printed out a draft of his Form U4 and provided it to Sedor, who continued to be his supervisor at NFP, asking Sedor to review it for accuracy.<sup>100</sup> Willard testified that Sedor made corrections on it and returned it; Willard stated “I took exactly what he told me to do,” and submitted the Form U4 to NFP.<sup>101</sup>

In it, however, Willard answered “no” to the question asking if he was the subject of an investigation. Willard admits that the answer was incorrect. He acknowledges that he was responsible for the incorrect answer, but argues that it was not willful because he relied on Sedor and NFP to ensure that the Form U4 was properly filled out.<sup>102</sup>

### **C. Violations**

#### **1. Willard Violated Conduct Rules 2110, 2310, and IM-2310-2 When He Made an Unsuitable Recommendation**

Conduct Rule 2310 requires a registered representative to fashion recommendations based upon reasonable grounds to believe they are suitable and tailored to the customer’s financial situation, needs and objectives.<sup>103</sup> This obligation flows from the requirement that a broker act in the best interests of the client.<sup>104</sup> Even if a customer expresses interest in increased returns, a registered representative may only make recommendations that are consistent with the customer’s needs and financial condition, particularly when, as here, safety of the investments is

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<sup>99</sup> CX-25, p. 4.

<sup>100</sup> Tr. 3, pp. 172-173.

<sup>101</sup> *Id.*, p. 174.

<sup>102</sup> *Id.*, p. 175.

<sup>103</sup> See *Larry Ira Klein*, Exch. Act Rel. No. 37835, 1996 SEC LEXIS 2922, \*18-\*19 (Oct. 17, 1996); *Dist. Bus. Conduct Comm. v. Vaughan*, No. C07960105, 1998 NASD Discip. LEXIS 47, \*11-\*12 (NAC Oct. 22, 1998) (brokers are required to determine suitability and only recommend investments that fit a customer’s financial profile, including age and income, and investment objectives).

<sup>104</sup> *Dep’t of Enforcement v. Dunbar*, No. C07050050, 2008 FINRA Discip. LEXIS 18, \*20 (NAC May 20, 2008).

paramount and the unsophisticated customer is inadequately informed of the nexus between risk and return.<sup>105</sup>

Here, Willard understood that First Investors, based primarily on RM's age, would not have approved the investments he recommended to RM in April 2006. The Hearing Panel rejects Willard's claim that RM's age, whether she was 67 or 87 years old, was irrelevant to the suitability of his recommendation. Certainly her age, at the very least, raised the question, as DeMarco pointed out, of whether RM should assume the front-end costs she incurred by accepting Willard's recommendation,<sup>106</sup> and also of whether her investment profile was insufficiently conservative.

The Hearing Panel finds that the preponderance of the evidence supports Enforcement's allegation that Willard's recommendation was unsuitable, and violated Conduct Rules 2110, 2310, and IM-2310-2, especially given RM's age and the front-end costs she incurred.

## **2. Willard Violated Conduct Rules 2110 and 3110 When He Knowingly Misrepresented the Age of His Customer in Firm Records**

Conduct Rule 2110 requires registered persons to "observe high standards of commercial honor and just and equitable principals of trade." Conduct Rule 3110 requires registered persons to maintain accurate books and records, including customer account information. It is well-established that falsification of documents and entering inaccurate dates on required records are "inconsistent with the high ethical requirements of Conduct Rule 2110."<sup>107</sup>

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<sup>105</sup> *Klein, supra*, \*17-\*18 (registered representative claiming to act in good faith to achieve customers' objectives should not have made recommendations with a degree of risk incompatible with customers' overriding need for safety of principal).

<sup>106</sup> Tr. 2, p. 269.

<sup>107</sup> *Dep't of Enforcement v. Cuzzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, \*22-\*23 (NAC Feb. 27, 2007); *see also Dep't of Enforcement v. Kapara*, No. C10030110, 2005 NASD Discip. LEXIS 41, \*21 (NAC May 25, 2005).

The Hearing Panel rejects Willard's claims that RM told him during their April 2006 meeting that she was 67 years old and that shortly thereafter, on May 12, 2006, he discovered the discrepancy in RM's dates of birth in her file and promptly brought the "problem" to the attention of his assistant and his manager, DeMarco.<sup>108</sup> The Hearing Panel bases its findings upon careful consideration of the evidence and its assessment of the credibility of the witnesses, including Willard.

The Hearing Panel finds that it was DeMarco who discovered inconsistent dates of birth in the paperwork submitted to her by Willard on May 24, 2006, and immediately notified Stainsby.

Despite Willard's claim that he was under great personal emotional stress on May 25, 2006, the written statement he prepared immediately following his meeting with Stainsby is clear, coherent, and contains significant, albeit self-serving and untruthful, detail about the genesis of his "belief" that RM was born in 1939. Notably, the statement contains no reference to his having discovered an innocent "mistake" and having brought it immediately to DeMarco's attention earlier in May.<sup>109</sup> In fact, Willard claimed in the statement that it was not until his May 25, 2006, meeting with Stainsby that he learned that RM was 87 years old.<sup>110</sup>

The Hearing Panel credits the testimony of Rall and Katz describing their interview with Willard on July 25, 2006. Both Rall and Katz testified clearly, unequivocally, and consistently

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<sup>108</sup> Tr. 4, pp. 94-98, 191.

<sup>109</sup> In the statement, Willard wrote that he discovered contradictory documentation concerning RM's age after April 24, 2006, the date DeMarco approved and processed the transfer of RM's account to First Investors, and that he began to "correct" the dates of birth by changing "1919" to "1939," but did not complete the task. CX-4A, Att. C, p. 3.

<sup>110</sup> *Id.*, p. 4.

with their contemporaneous notes that Willard admitted that when he met with RM on April 12, 2006, he knew she was over 70 years of age.<sup>111</sup> Willard said nothing to Rall and Katz about discovering the “discrepancy” in RM’s age in May and bringing it to DeMarco’s attention.<sup>112</sup>

For all of the reasons noted above, the Hearing Panel finds that Willard intentionally misrepresented RM’s age on RM’s First Investors’ account documents, in violation of Conduct Rules 2110 and 3110.

### **3. Willard Violated Conduct Rule 2110 and IM-1000-1 by Willfully Reporting False Information on Form U4 Filings**

Applicants for registration must fully and accurately disclose the information they provide on a Form U4 and must keep the disclosed information current by amending the Form U4 within 30 days of a change in reportable information.<sup>113</sup> Failure to do so may violate Conduct Rule 2110 and IM-1000-1.<sup>114</sup> The responsibility for ensuring that the Form U4 is maintained accurately and amended timely rests with the individual registered representative.<sup>115</sup> All reportable information is considered material.<sup>116</sup>

The Hearing Panel finds that Willard was responsible for the content and inclusion of the optional comment on the Form U4 DRP he filed with both Cadaret and NFP. The information in

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<sup>111</sup> Tr. 2, pp. 327-328 (Katz); p. 91 (Rall).

<sup>112</sup> The Hearing Panel does not credit Gardner’s hearing testimony by telephone that Willard brought the conflict in RM’s age in her account records to DeMarco’s attention on May 12, 2006. When Rall and Katz interviewed Gardner, she made no mention of Willard doing so. The Hearing Panel finds Gardner’s statements to Rall and Katz more credible than her telephone testimony at the hearing. Gardner told Rall and Katz that Willard informed her in May, after meeting with RM, that RM was an 87-year old widow. Gardner also told Rall and Katz that she and DeMarco discovered the records showing inconsistent birthdates for RM when Willard was out of the office, in Buffalo. CX-27, p. 3 of 12.

<sup>113</sup> Article V, Section 2, FINRA By-Laws.

<sup>114</sup> *Rosario R. Ruggiero*, Exch. Act Rel. No. 37070, 1996 SEC LEXIS 990 (Apr. 5, 1996).

<sup>115</sup> *Daniel Howard*, Exch. Act Rel. No. 46269, 2002 SEC LEXIS 1909 (July 26, 2002); *Frank R. Rubba*, Exch. Act Rel. No. 40238, 1998 SEC LEXIS 1499 (July 21, 1998).

<sup>116</sup> *Dep’t of Enforcement v. Mathis*, No. C10040052, 2007 FINRA Discip. LEXIS 12, \*19-\*20 (NAC Dec. 19, 2007) *aff’d*, *Scott Mathis*, Exch. Act Rel. No. 61120 (Dec. 7, 2009) (slip opinion).

the optional comment was material because it purportedly described the conduct that led to his discharge by First Investors. The comment inaccurately described that conduct. Because Willard intentionally included the optional comment on the Form U4 DRP, he willfully violated Conducted Rule 2110 and IM-1000-1.<sup>117</sup>

**4. Willard Violated Conduct Rule 2110 and IM-1000-1 by Willfully Failing to Report Material Information on Forms U4**

The Hearing Panel also finds that Willard willfully failed to amend his Form U4 when he was registered through Cadaret after receiving the April 13, 2007, Wells notice from FINRA. Although the Wells notice was sent to Cadaret and to Willard's attorney, who also represented Cadaret, and thus put them on notice of the investigation, Willard did not amend his Form U4 filed through Cadaret, as he was obligated to do. The Hearing Panel finds, further, that on December 7, 2007, Willard filed a Form U4 through member firm NFP that he knew contained an incorrect answer to the question asking whether he was the subject of an investigation at that time.

Willard argues his failure to amend the Form U4 was not willful because he relied on Sedor, his manager, and others at Cadaret who had also received the Wells notice. The responsibility, however, was his, and Willard cannot shift it to his Firm or his supervisors.<sup>118</sup> Furthermore, the evidence establishes clearly that it was Willard who personally filed the Form U4 through NFP knowing it contained a material, false statement, thereby willfully violating Conduct Rule 2110 and IM-1000-1.

The Sanction Guideline for filing false or inaccurate information on a Form U4, in violation of Conduct Rule 2110, recommends a fine of \$2,500 to \$50,000, and a suspension in

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<sup>117</sup> *Dep't of Enforcement v. Toth*, No. E9A2004001901, 2007 NASD Discip. LEXIS 25, \*32 (NAC July 27, 2007).

<sup>118</sup> *Toth, supra*, \*32-\*33; *Rafael Pinchas*, 54 S.E.C. 331, 338 (1999) (for reviewing and correcting an inaccurate Form U4, a registered representative is "responsible for his actions and cannot shift that responsibility to the firm or his supervisors").

any or all capacities for five to 30 business days. In egregious cases, the Guideline recommends consideration of a suspension for up to two years, or a bar.<sup>119</sup>

### **III. Sanctions**

#### **A. First Cause of Action: Unsuitable Recommendations**

The FINRA Sanction Guidelines recommend a suspension from associating with any FINRA member firm in any or all capacities for a period of ten business days to one year, and a fine from \$2,500 to \$75,000, for making unsuitable recommendations in violation of Conduct Rules 2110 and 2310.<sup>120</sup>

For his unsuitable recommendation to RM, Enforcement recommends imposition of a fine of \$25,000 and suspension in all capacities for one year. Enforcement argues that it is an aggravating factor that Willard was motivated to make his unsuitable recommendation in order to enrich himself. Willard argues that no sanction should be imposed because he believes his recommendation was suitable.

The evidence suggests that Willard considered his recommendation appropriate but knew his Firm would not approve it. The Hearing Panel does not conclude that Willard's motive in making the unsuitable recommendation was personal enrichment. Rather, the evidence supports the conclusion that if Willard had made a different, suitable recommendation for RM to invest in other, more conservative First Investor mutual funds with the Firm's approval, his remuneration would have been the same.<sup>121</sup>

For these reasons, the Hearing Panel concludes that, for making the unsuitable recommendation to RM, a fine of \$5,000 and a suspension from associating with any FINRA

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<sup>119</sup> Sanction Guidelines, supra, pp. 73-74.

<sup>120</sup> FINRA Sanction Guidelines, p. 99 (2007).

<sup>121</sup> Tr. 1, p. 196.

member firm in any capacity for 30 business days will serve the remedial interests promoted by FINRA's Sanction Guidelines and will sufficiently deter Willard, and others, from future similar misconduct.

**B. Second Cause of Action: Misrepresentation of Customer's Age and Falsification of Firm Records**

Enforcement recommends a bar for Willard's misrepresentations of RM's age.

Enforcement stresses as aggravating factors Willard's failure to accept responsibility for his misconduct and the fact that Willard made multiple misrepresentations, entering a false year of birth and altering the year of birth on a number of RM's account documents. Enforcement characterizes this misconduct as egregious. In its analysis, Enforcement refers to the Sanction Guideline applicable to Forgery/Falsification of Documents, in violation of Conduct Rule 2110. Enforcement notes this Guideline calls for a fine of \$5,000 to \$100,000, and a suspension in all capacities for up to two years, or a bar in egregious cases.<sup>122</sup>

The Second Cause of the Complaint, however, alleges Willard violated the recordkeeping obligations imposed by Conduct Rules 2110 and 3110 rather than the prohibition against forgery.<sup>123</sup> The Hearing Panel finds the Guideline for violations of Rule 3110, Recordkeeping Violations,<sup>124</sup> to be more relevant to Willard's misconduct than the Guideline for Forgery/Falsification of Documents. For recordkeeping violations of Conduct Rules 2110 and 3110, the Sanction Guideline suggests a fine of \$1,000 to \$10,000, and a suspension for up to 30 business days. In egregious cases, the Guideline recommends a fine of \$10,000 to \$100,000 and a suspension of up to two years or a bar. Adjudicators are to take into consideration factors such

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<sup>122</sup> Sanction Guidelines, *supra*, p. 39.

<sup>123</sup> Complaint, ¶ 15.

<sup>124</sup> Sanction Guidelines, *supra*, p. 30.

as the nature and materiality of the inaccurate information entered in the firm's records. Here, the misinformation was material to critical account documents.

The Hearing Panel finds that Willard's falsifications of records by misrepresenting RM's age constitute serious misconduct. Several Principal Considerations in Determining Sanctions are relevant to the sanctions analysis for these violations.

First, Willard did not accept responsibility and did not acknowledge his misconduct to Stainsby when initially asked about the discrepancies in the records concerning RM's year of birth. It is true that he later admitted to Rall and Katz that he misrepresented RM's age. However, he subsequently contended, unconvincingly, that he had been confused about RM's age. The Hearing Panel finds that Willard has failed fully to accept his responsibility for this misconduct.<sup>125</sup> Second, Willard's misrepresentations of RM's age in Firm documents constituted a course of misconduct over a period of several weeks.<sup>126</sup> Third, Willard attempted to conceal his misconduct from the Firm.<sup>127</sup> Similarly, in his effort to avoid responsibility, Willard failed to provide substantial assistance to FINRA in its investigation.<sup>128</sup> Finally, the Hearing Panel finds Willard's misconduct was intentional.<sup>129</sup>

The Hearing Panel finds that one Principal Consideration applies in mitigation. Willard was disciplined by the Firm when he was discharged, prior to the FINRA disciplinary action.<sup>130</sup>

Taking into consideration all of the circumstances, the Hearing Panel finds that a fine of \$75,000 and a suspension from associating with any FINRA member firm in any capacity for

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<sup>125</sup> Principal Consideration No. 2, *Sanction Guidelines, supra*, p. 6.

<sup>126</sup> Principal Consideration No. 9, *id.*

<sup>127</sup> Principal Consideration No. 10, *id.*

<sup>128</sup> Principal Consideration No. 12, *id.*, p. 7.

<sup>129</sup> Principal Consideration No. 13, *id.*

<sup>130</sup> Principal Consideration No. 14, *id.*

two years is sufficiently severe, and will serve to deter Willard and others from engaging in such misconduct in the future.

**C. Third Cause of Action: Willfully Filing Misleading Information on Forms U4**

Enforcement considered both Willard's violations relating to misleading information and failures to update his Forms U4 together. Enforcement argues that by providing false information and omitting to provide accurate information in Forms U4, Willard engaged in an intentional, willful pattern of misconduct designed to mislead member firms about material and important facts relating to his discharge from First Investors and his status as a subject of a FINRA investigation. For these reasons, Enforcement recommends that the Hearing Panel suspend Willard from associating with any member firm in any capacity for nine months and impose a fine of \$15,000 for the Forms U4 violations alleged in the Third and Fourth Causes of the Complaint.

The Hearing Panel chooses to consider the violations alleged in the Third and Fourth Causes of Action separately. The violations alleged in each Cause of Action differ in the nature of the inaccurate information Willard provided, or withheld, and its significance to member firms that rely upon a registered person's Form U4 when contemplating hiring or retaining that person.

The Sanction Guideline for filing false or inaccurate information on a Form U4, in violation of Conduct Rule 2110, recommends a fine of \$2,500 to \$50,000, and a suspension in any or all capacities for five to 30 business days. In egregious cases, the Guideline recommends consideration of a suspension for up to two years, or a bar.<sup>131</sup>

With regard to his provision of inaccurate information that was filed in the optional DRP comment section of the Forms U4 filed through Cadaret on September 21, 2006, and through

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<sup>131</sup> Sanction Guidelines, *supra*, pp. 73-74.

NFP on December 7, 2007, Willard contends that Cadaret's Chief Compliance Officer, Johnson, composed the optional comment, which merely provided his version of the events leading to his dismissal by First Investors, and that the version presented in the comment is truthful.

Taking into consideration all of the circumstances surrounding Willard's willful provision of the inaccurate information Johnson filed, as well as the optional nature of the DRP comment, the Hearing Panel concludes that the imposition of a fine of \$2,500 will serve the appropriate remedial and deterrent purposes required for the violations alleged in the Third Cause of the Complaint.

**D. Fourth Cause of Action: Willful Failure to Disclose Material Information on Forms U4**

Willard concedes that he failed in a timely manner to file amendments to his Form U4 to reflect the Wells notices he received from FINRA notifying him that he was being investigated. However, he denies his conduct was willful, claims that he had no intent to conceal the fact of the investigation from his firms, and asserts that he believed others were taking care of the amendment.<sup>132</sup>

The Hearing Panel finds violations in the Fourth Cause of Action of the Complaint more serious than those alleged in the Third Cause of the Complaint. The evidence demonstrates that even though Willard did not conceal his receipt of the Wells notice dated April 13, 2007, from his supervisor, he waited until January 15, 2008, to make the appropriate amendment to his Form U4.<sup>133</sup> This was after Willard received an amended Wells notice informing him that he had now become the subject of an investigation for failing to update his Form U4 to reflect his receipt of the original Wells notice. And, as noted above, on December 7, 2007, Willard personally filed

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<sup>132</sup> Tr. 4, pp. 303-304.

<sup>133</sup> CX-1E.

the Form U4 through NFP that incorrectly answered “no” to the question of whether he was the subject of an investigation. Willard knew that he was the subject of an investigation and that this fact would be important for inclusion in his Form U4 to inform member firms. His submission to NFP of a false answer to the question was therefore willful,<sup>134</sup> as well as material.

Taking all of these factors into consideration, for Willard’s willful failure to disclose material information on a Form U4 in violation of Conduct Rule 2110, and his provision of false information regarding his investigative status, the Hearing Panel finds that a suspension from associating from any FINRA member firm in any capacity for six months and a fine of \$10,000, are sufficient to serve the appropriate purposes of deterrence and remediation.

#### **E. Willard’s Claims Concerning Mitigation**

During the hearing, Willard claimed, as a defense and in mitigation, that a series of crises in his personal life placed him under severe emotional stress impairing his judgment and behavior during the period of misconduct alleged in the Complaint.<sup>135</sup> He also testified that the stress he was under at the time rendered him incapable of remembering what he told Stainsby, and what he wrote in his memorandum, on May 25, 2006, and what he told Katz and Rall in his July 2006 interview with them.<sup>136</sup>

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<sup>134</sup> To be willful, a respondent need not be aware that he is violating a Conduct Rule, but merely that he intended to complete the Form U4 incorrectly. *Dep’t of Enforcement v. Toth, supra*; *Wonsover v. SEC*, 205 F.3d 208, 414 (D.C. Cir. 2000), *cited in Scott Mathis, supra*, p. 9; *Dep’t of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, \*10 (NAC Apr. 27, 2004).

<sup>135</sup> The crises Willard repeatedly described were: (i) his mother’s diagnosis of a serious illness requiring surgery and treatments to which he drove her, Tr. 3, pp. 128-129; (ii) a number of serious problems affecting his 11-year old daughter, including a personal crisis she experienced on May 25, 2006, the day of the Stainsby interview; and (iii) a breakdown suffered by his wife shortly thereafter. Tr. 3, pp. 131-132. Finally, Willard testified he learned of his best friend’s death the day prior to his interview with Katz and Rall on July 25, 2006. Tr. 3, p. 132. In addition, Willard testified that throughout this period, responsibility for caring for his six year old son fell to him. Tr. 3, pp. 116, 132.

<sup>136</sup> Tr. 4, pp. 182-186, 191-193.

There is authority that it may be appropriate, in some instances, to consider the circumstances of a respondent's personal emotional distress as potential mitigation.<sup>137</sup> As Enforcement acknowledged at the hearing, Willard's family situation in the spring of 2006 as he described it was stressful.<sup>138</sup> Even severe personal problems and resultant distress, however, may be insufficient to excuse or mitigate serious misconduct.<sup>139</sup>

Although the problems about which Willard testified invite sympathy, the Hearing Panel finds that in this case, Willard's personal circumstances did not justify, excuse, or significantly mitigate his misconduct, did not overcome his ability to function rationally, and did not render him unable to appreciate what he was doing.<sup>140</sup> Further, the Hearing Panel also does not credit Willard's testimony that stress rendered him incapable of remembering what he admitted to Katz and Rall in the July 2006 interview, what he told Stainsby, and what he wrote in the memorandum, on May 25, 2006.

#### **IV. Order**

Respondent James Richard Willard, III, is: (i) suspended from associating with any FINRA member firm in any capacity for 30 business days and fined \$5,000 for making unsuitable recommendations to a customer, in violation of Conduct Rules 2110, 3110, and IM-

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<sup>137</sup> *Dist. Bus. Conduct Comm. v. Klein*, No. CO2940041, 1995 NASD Discip. LEXIS 229, \*13 (NBCC June 20, 1995) (respondent suffered from depression, anxiety, was undergoing psychiatric therapy and had been hospitalized for alcohol and prescription drug abuse, had experienced severe financial reversals, foreclosure of his home and personal bankruptcy, but despite these circumstances, the NAC stated: "... we believe that mitigation is present, due to Klein's problems and his previously clean disciplinary record" but nonetheless upheld imposition of a bar with the right to apply for association after five years).

<sup>138</sup> Tr. 4, pp. 276-277.

<sup>139</sup> *Klein, supra*; *Joel Eugene Shaw*, Exch. Act Rel. No. 34509, 1994 SEC SEXIS 2493, 51 S.E.C. 1224 (Aug. 10, 1995) (severe financial problems, ill-health of children and parents insufficient to justify conversion of customer funds); *Dist. Bus. Conduct Comm. v. Tammy S. Kwikkel-Elliott*, CO4960004, 1998 NASD Discip. LEXIS 4 (Jan. 16, 1998) (the fact that respondent was under "a great deal of personal and work-related stress" did not excuse her obtaining funds from firm under false pretenses, for which a bar was imposed).

<sup>140</sup> For example, as noted above, at a time he described as particularly stressful, Tr. 3, pp. 131-132, following the Stainsby interview, Willard wrote a clear, detailed, well-organized memorandum in defense of his alteration of RM's date of birth on her account records.

2310-2; (ii) suspended from associating with any FINRA member firm in any capacity for two years and fined \$75,000 for falsifying records of his member firm employer, in violation of Conduct Rules 2110 and 3110; (iii) fined \$2,500 for willfully reporting false information on Forms U4, in violation of Conduct Rule 2110 and IM-1000-1; and (iv) suspended from associating with any FINRA member firm in any capacity for six months and fined \$10,000 for willfully reporting false information on a Form U4 and failing to report material information on Forms U4, in violation of Conduct Rule 2110 and IM-1000-1. The suspensions are imposed concurrently.

In addition, Willard is ordered to pay the costs of the hearing, in the amount of \$8,732.30, which includes an administrative fee of \$750 and the cost of the hearing transcript.

If this Decision becomes FINRA's final disciplinary action, the two-year suspension shall become effective on the opening of business on Monday, February 16, 2010, and shall end at the close of business on Wednesday, February 15, 2012. The fines shall be due and payable on Willard's return to the securities industry.<sup>141</sup>

**HEARING PANEL.**

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By: Matthew Campbell  
Hearing Officer

Copies to:

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<sup>141</sup> The Hearing Panel has considered and rejects without discussion all other arguments of the parties.