

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES RANDALL CLAY  
(CRD No. 5748560),

Respondent.

Disciplinary Proceeding  
No. 2014039775501

Hearing Officer – CC

**HEARING PANEL DECISION**

Date: September 14, 2018

**Respondent engaged in undisclosed outside business activities involving an elderly customer, in violation of FINRA Rules 3270 and 2010. After the elderly customer’s family complained to Respondent’s member firm, Respondent repeatedly lied to the firm about the outside business activities, in violation of FINRA Rule 2010, and lied to FINRA during its investigation, in violation of FINRA Rules 8210 and 2010. For this misconduct, Respondent is barred from associating with any FINRA member firm in any capacity.**

*Appearances*

For the Complainant: Kevin E. Pogue, Esq., Savvas A. Foukas, Esq., and Tiffany A. Buxton, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: James Randall Clay appeared pro se.

**DECISION**

**I. Introduction**

Respondent James Randall Clay (“Clay”) used his relationship with an elderly customer to buy real estate from the customer under terms that benefitted only himself. Clay drafted and signed a hand-written agreement to purchase the customer’s rental property for \$1 million, with the customer financing the entire amount. Under the agreement, Clay also borrowed \$500,000 from the customer to fund Clay’s down payment on the property and improvements to it. Clay established a limited liability company to manage the rental property and began collecting rent. Clay never provided written notice of this outside business to the FINRA member firm that employed him, U.S. Bancorp Investments, Inc. (“U.S. Bancorp”). After the customer’s family complained to U.S. Bancorp, Clay falsely told the firm his sister purchased the rental property,

and he was not personally involved in the purchase or subsequent management of the property. Clay repeated this falsehood to FINRA during its investigation of this matter.

## **II. Procedural History**

FINRA's Department of Enforcement ("Enforcement") filed a three-cause Complaint on October 4, 2017. Cause one alleges that, in November and December 2013, Clay engaged in outside business activities without providing prior written notice to U.S. Bancorp, in violation of FINRA Rules 3270 and 2010. Cause two alleges that, in December 2013, Clay misrepresented facts relating to his outside business activity to U.S. Bancorp, in violation of FINRA Rule 2010. Cause three alleges that, in response to FINRA's requests for information and testimony, Clay repeated his false statements to FINRA, in violation of FINRA Rules 8210 and 2010.

The parties participated in a two-day hearing in May 2018.

## **III. Facts**

### **A. Respondent's Background and FINRA's Jurisdiction**

Clay entered the securities industry in 2010.<sup>1</sup> After associating with three FINRA member firms, he exited the securities industry in June 2017.<sup>2</sup> Clay currently does not work in the securities industry.<sup>3</sup>

The misconduct alleged in the Complaint occurred in November and December 2013, during Clay's association with U.S. Bancorp from August 24, 2012, to December 16, 2013.<sup>4</sup> On January 13, 2014, U.S. Bancorp filed a Uniform Termination Notice of Securities Registration ("Form U5") reporting that the firm terminated Clay's employment because Clay violated the firm's Code of Ethics by entering into a personal transaction with a firm customer.<sup>5</sup>

FINRA maintains jurisdiction over Clay because Enforcement filed the Complaint within two years of Clay's termination from a member firm, and the Complaint alleges Clay engaged in misconduct during his association with FINRA member firm U.S. Bancorp.<sup>6</sup>

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<sup>1</sup> May 15-16, 2018 Hearing Transcripts ("Tr.") 147; April 12, 2018 Joint Stipulations of Fact ("Stip.") ¶ 1.

<sup>2</sup> Tr. 150; Joint Exhibit ("JX-") 1, at 1; Stip. ¶¶ 1, 5. Clay held Series 7 and 66 licenses and multiple state licenses and certifications to sell insurance products. Tr. 147; Stip. ¶ 2.

<sup>3</sup> Tr. 151.

<sup>4</sup> JX-1, at 1.

<sup>5</sup> Stip. ¶ 4.

<sup>6</sup> See Article V, Sec. 4, FINRA By-Laws.

## **B. U.S. Bancorp's Policies on Outside Business Activities**

U.S. Bancorp's Wealth Management Director Gina Stalzer ("Stalzer") testified that she recruited, hired, and supervised Clay during the relevant period (November and December 2013).<sup>7</sup> During that time, U.S. Bancorp's Supervisory Manual stated a supervising principal must review and approve in writing a registered representative's outside business activities before the person may engage in the venture.<sup>8</sup> The Supervisory Manual required registered representatives to provide a full description of the nature of the proposed activity and identify any conflicts of interest that may result from employment with U.S. Bancorp and the outside business.<sup>9</sup> U.S. Bancorp's Compliance Manual for the same period required associated persons to disclose in writing all proposed outside activities and receive written approval before engaging in any such activity.<sup>10</sup>

U.S. Bancorp also expected associated persons to comply with the firm's Code of Ethics.<sup>11</sup> Its Code of Ethics prohibited registered persons from engaging in financial transactions with customers and specifically prohibited registered persons and their family members from borrowing money from or lending to customers.<sup>12</sup> U.S. Bancorp's Code of Ethics also warned that a registered person's outside business activities should not compromise the firm's interests and that a manager must approve any outside business activities.<sup>13</sup>

Stalzer testified that Clay was aware of these requirements in November and December 2013, based on the policies she reviewed with him when she hired him at U.S. Bancorp.<sup>14</sup> When Clay joined the firm in August 2012, he signed two compliance attestations:<sup>15</sup> an Outside Business Activity Certification indicating his understanding that, as a registered representative of U.S. Bancorp, he was required to obtain written approval prior to entering any outside business activity, and an attestation that he would comply with U.S. Bancorp's Code of Ethics.<sup>16</sup>

On November 12, 2012, and again on December 13, 2013, Clay certified that he had reviewed, and agreed to comply with, all U.S. Bancorp's policies and procedures, its Code of

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<sup>7</sup> Tr. 45, 47; Stip. ¶ 3.

<sup>8</sup> Tr. 50-51; JX-10, at 13-14; Stip. ¶ 8.

<sup>9</sup> Stip. ¶ 9.

<sup>10</sup> JX-10, at 16.

<sup>11</sup> Tr. 51-53; JX-10, at 17-20; Stip. ¶¶ 10, 11.

<sup>12</sup> JX-10, at 19; Stip. ¶ 11.

<sup>13</sup> JX-10, at 17-19.

<sup>14</sup> Tr. 53-54.

<sup>15</sup> Stip. ¶ 12.

<sup>16</sup> Tr. 54-55; JX-11, at 1-2; Stip. ¶ 12. Clay also signed an attestation in which he agreed, as an employee of U.S. Bancorp, not to make loans to or receive loans from customers of the firm without prior approval. JX-11, at 3; Stip. ¶ 13.

Ethics, and FINRA's rules.<sup>17</sup> During Clay's association with U.S. Bancorp, he never requested approval from the firm to engage in outside business activity.<sup>18</sup>

### **C. Clay's Outside Business**

On December 7, 2013, while associated with U.S. Bancorp, Clay used an online legal service to form a limited liability company named "Clay Enterprises, LLC."<sup>19</sup> Clay intended to use Clay Enterprises to manage rental property.<sup>20</sup> On December 11, 2013, the Division of Business Services for the Tennessee Secretary of State received Articles of Incorporation for Clay Enterprises dated December 7, 2013.<sup>21</sup> Clay identified himself as the registered agent and listed his residential address as the executive offices of Clay Enterprises.<sup>22</sup> Clay Enterprises was a member-managed limited liability company with one member.<sup>23</sup> On December 12, 2013, Clay signed documents submitted to the Tennessee Secretary of State as president of Clay Enterprises, LLC.<sup>24</sup> He used his personal credit card to pay all fees associated with the formation of Clay Enterprises.<sup>25</sup> Clay did not disclose his formation of Clay Enterprises, LLC to U.S. Bancorp.<sup>26</sup>

### **D. Customer DW**

Clay met DW in September 2010, while he was associated with a firm other than U.S. Bancorp.<sup>27</sup> DW moved his account to U.S. Bancorp when Clay joined the firm.<sup>28</sup>

When DW opened his U.S. Bancorp account, he was an 85-year-old, single, retired college professor with no dependents,<sup>29</sup> although he had several daughters, who lived in other

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<sup>17</sup> Tr. 58-62; JX-12, at 4; JX-13.

<sup>18</sup> Stip. ¶ 14.

<sup>19</sup> Tr. 274-79, 291; JX-6, at 3-5; Stip. ¶¶ 30, 31.

<sup>20</sup> Stip. ¶ 29.

<sup>21</sup> JX-6, at 3-5; Stip. ¶ 31.

<sup>22</sup> Tr. 275-76; JX-6, at 4-5; Stip. ¶ 32. The Tennessee Revised Limited Liability Company Act stated that a registered agent was authorized to transact business in the state. Stip. ¶ 33.

<sup>23</sup> JX-6, at 4; Stip. ¶ 34.

<sup>24</sup> JX-6, at 6-8.

<sup>25</sup> Tr. 279.

<sup>26</sup> Stip. ¶ 36.

<sup>27</sup> Tr. 156-57.

<sup>28</sup> Tr. 63, 67, 157. DW originally held two accounts with a combined value of approximately \$900,000. Stip. ¶ 15. DW subsequently consolidated his two accounts into one account. Tr. 63, 162.

<sup>29</sup> Tr. 157-59; Stip. ¶ 15.

states, and two sons: SW, who lived nearby, and JW, who lived with him.<sup>30</sup> DW reported to Clay that he earned approximately \$150,000 annually from several sources, including pensions, a storage facility, and his many rental properties in Clarksville, Tennessee.<sup>31</sup> SW testified that rental income was DW's primary source of income.<sup>32</sup> He stated that, when DW's rental property was fully leased, he earned approximately \$16,000 to \$18,000 per month in rental income.<sup>33</sup>

At issue in this case are 49 parcels of land, most with rental dwellings on them, located near DW's home. SW testified that DW originally acquired the property in the late 1970s.<sup>34</sup> DW had sold his rental property twice before the sale at issue in this case. SW could not recall the date of the first sale.<sup>35</sup> DW financed that \$1.2 million sale, and the purchaser made a down payment of between \$150,000 and \$175,000.<sup>36</sup> Two years after the sale, DW repossessed the property.<sup>37</sup> He then sold the property a second time in the early 2000s for about \$2.1 million.<sup>38</sup> Again, DW financed the sale, and the purchaser made a down payment of approximately \$200,000.<sup>39</sup> In or around 2012, DW repossessed the property when that buyer defaulted.<sup>40</sup> For both sales, DW involved attorneys and relied on them to complete all the paperwork.<sup>41</sup>

SW testified that DW's health began deteriorating in summer 2013, and took a dramatic downturn after surgery in August 2013.<sup>42</sup> At the same time, DW's family noticed that he exhibited memory-loss, difficulty driving, and odd behavior.<sup>43</sup> A neurologist assessed DW and

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<sup>30</sup> Tr. 158, 395-96. SW appeared as a witness. He has owned and operated an insurance agency for approximately 25 years. Tr. 394-95. He also owns and manages several of his own rental properties. Tr. 468.

<sup>31</sup> Tr. 158-59; Stip. ¶ 15. Clay testified that, as of summer 2013, DW owned more than 49 rental tracts located close to his home in Clarksville, Tennessee. Tr. 167. In 2000, DW had established a property trust for all of his property. Tr. 397-98. SW was co-trustee with DW on the trust. Tr. 398.

<sup>32</sup> Tr. 398. SW was familiar with DW's finances in 2013 because he handled his father's banking. Tr. 399.

<sup>33</sup> Tr. 170-71, 399-401; JX-9.

<sup>34</sup> Tr. 401.

<sup>35</sup> Tr. 402.

<sup>36</sup> Tr. 402-03.

<sup>37</sup> Tr. 404.

<sup>38</sup> Tr. 404-05.

<sup>39</sup> Tr. 405; Stip. ¶ 17.

<sup>40</sup> Tr. 407; Stip. ¶ 16. After repossessing the property in 2012, DW wanted to liquidate some of his investments to withdraw \$500,000 to improve the rental property. Tr. 408; Stip. ¶ 18. SW enlisted Clay's help to convince DW that \$500,000 was more than he needed to improve the rental property, and Clay persuaded DW to reduce his withdrawal to \$50,000. Tr. 169-70, 408-09; Stip. ¶ 18.

<sup>41</sup> Tr. 403-04, 406-07.

<sup>42</sup> Tr. 409-10.

<sup>43</sup> Tr. 89, 410-11, 462-63.

diagnosed him with dementia.<sup>44</sup> On January 24, 2014, a Tennessee Chancery Court declared DW “a disabled person who suffers from dementia and may be easily influenced.”<sup>45</sup> The court appointed SW as DW’s conservator.<sup>46</sup> DW died on September 9, 2014, at the age of 87.<sup>47</sup>

We credit SW’s testimony that DW was exhibiting signs of dementia in November and December 2013, when Clay attempted to enter into a real estate transaction with DW. The judge’s declaration, issued just one month later, stating that DW suffered from dementia corroborates SW’s testimony. Furthermore, Stalzer testified that SW, JW, and one of DW’s daughters advised her in November 2013 that DW suffered from dementia. We also credit Stalzer’s testimony. She had no motive to misrepresent the facts, and her own detailed, contemporaneous notes support her testimony.

SW testified that his brother, JW, lived with his father in 2013.<sup>48</sup> JW now lives with him. He is disabled due to psychiatric illnesses and, since 2014, SW has served as JW’s conservator.<sup>49</sup> SW stated that his father’s death was stressful for JW, and that his medications interfere with JW’s ability to remember facts.<sup>50</sup> Consequently, SW felt it was inadvisable for his brother to testify in this matter.<sup>51</sup>

#### **E. Customer DW’s Interactions with Clay**

Clay and DW spoke monthly. Clay testified that, in early 2013, DW expressed concern his children would not be able to handle his rental business after his death.<sup>52</sup> DW also was concerned about his health, and he told Clay he wanted to sell his rental property.<sup>53</sup> According to Clay, he introduced DW to his sister, CP, because she was interested in acquiring rental property.<sup>54</sup> Clay stated that CP and DW met on several occasions in 2013 without him, although

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<sup>44</sup> Tr. 410-11. Clay denied knowing about DW’s dementia or DW’s family’s concerns about his mental acuity. Tr. 173-74.

<sup>45</sup> Tr. 440-46; JX-20, at 1.

<sup>46</sup> Tr. 440-46; JX-20.

<sup>47</sup> Tr. 395; JX-21.

<sup>48</sup> Tr. 411-13; Stip. ¶ 19.

<sup>49</sup> Tr. 411-12.

<sup>50</sup> Tr. 411-12.

<sup>51</sup> Tr. 411-13.

<sup>52</sup> Tr. 164-67.

<sup>53</sup> Tr. 172, 175-76; JX-22, at 2.

<sup>54</sup> Tr. 196-97; JX-22, at 2. At the time, CP’s circumstances did not necessarily lend themselves to supporting a significant real estate purchase. In December 2012, CP was fired from her position as chief executive officer of a credit union. Tr. 199. Clay testified at the hearing that he could not speak about the details of CP’s firing. But during on-the-record testimony on November 15, 2016, he testified that the credit union terminated CP because an audit uncovered suspicious activities and irregularities in credit card advances and transactions involving CP and her close associates. Tr. 199-205. The credit union subsequently filed a civil lawsuit against CP in August 2013. Tr. 210-11;

he arranged all of their meetings.<sup>55</sup> Clay contended that DW showed CP the rental property.<sup>56</sup> And in March 2013, DW told Clay he wanted to improve and repair the rental property before he sold it “so that he would be more confident that whoever bought the business could make a profit.”<sup>57</sup>

Clay and DW continued to speak monthly. On November 25, 2013, DW called Clay to ask if CP was still interested in purchasing the rental property.<sup>58</sup> Clay did not suggest that DW call CP directly about it.<sup>59</sup> DW advised Clay he was having surgery the next day and may have cancer.<sup>60</sup> Clay stated that he then called CP to confirm her continued interest in purchasing DW’s property.<sup>61</sup> Rather than suggest that CP call DW directly, Clay again acted as intermediary and advised DW that CP remained interested.<sup>62</sup>

DW asked Clay if CP could meet him at his home that day, and Clay stated CP could not,<sup>63</sup> so DW asked him to stop by to discuss the rental property sale. Clay agreed.<sup>64</sup> When he arrived at DW’s home, JW was there, but he was in a different room and did not participate in Clay’s discussions with DW.<sup>65</sup> DW reiterated his prior statements regarding his failing health and inability to manage the property. DW, JW, and Clay then visited the nearby property, where Clay observed that many units were in disrepair and some were uninhabitable.<sup>66</sup>

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Complainant’s Exhibit (“CX-”) 8. The state of Tennessee investigated CP for criminal wrongdoing in 2013 and indicted her in June 2014. Tr. 204-05, 214-15; CX-9; CX-10. Clay held a credit card from CP’s credit union, and he received advances on that card. Tr. 204. While Clay was associated with U.S. Bancorp, criminal investigators interviewed Clay in connection with CP’s activities and Clay’s cash advances. Tr. 205, 210. These issues notwithstanding, Clay suggested that CP was financially able to purchase DW’s property because she had received life insurance proceeds from a husband’s death. Tr. 585.

<sup>55</sup> Tr. 197-98; JX-22, at 2. Clay testified that “most of the time” CP, DW, and Clay met together. Tr. 198. In on-the-record testimony on September 18, 2015, however, Clay testified that DW and CP met three or four times before November 2013, and Clay attended only one of those meetings. Tr. 198; CX-5, at 6.

<sup>56</sup> JX-22, at 2.

<sup>57</sup> JX-22, at 2.

<sup>58</sup> Tr. 175.

<sup>59</sup> Tr. 176. Clay assumed DW had CP’s telephone number because they had met without him present but, inexplicably, he did not suggest that DW call CP directly. Tr. 179.

<sup>60</sup> Tr. 175; JX-22, at 2.

<sup>61</sup> Tr. 177.

<sup>62</sup> Tr. 177; JX-22, at 2.

<sup>63</sup> Tr. 177.

<sup>64</sup> Tr. 178; Stip. ¶ 20.

<sup>65</sup> Tr. 179; Stip. ¶ 20.

<sup>66</sup> JX-22, at 2.

Clay testified that he and DW reached an agreement for the sale of the rental property, and DW asked Clay to memorialize the deal in writing.<sup>67</sup> Clay claimed to have reminded DW that CP, not Clay, would purchase the property, but Clay nonetheless agreed to memorialize their discussions.<sup>68</sup> Clay wrote out the terms of the sale in a hand-written document on lined paper.<sup>69</sup> At the top, there are two sets of figures listed next to the words, “sale price,” “include cash,” “total,” “down payment,” and “finance.” Both sets of figures are crossed out, and below them is a line across the sheet, the date November 25, 2013, and another list of figures next to the same words. These figures, which are not crossed out, are as follows:

Sale Price	\$1,000,000	
Include Cash	\$500,000	
Total	\$1,500,000	
Down Payment	\$250,000	
Finance	\$1,250,000	20 yr. 4.50%
	\$7,908.12	monthly payment <sup>70</sup>

Clay signed the hand-written agreement on a line labeled “buyer.”<sup>71</sup> The copy of the document Clay eventually provided to Stalzer did not identify any other parties by name and contained no additional signatures, including on the line marked “seller.”<sup>72</sup> CP’s name does not appear anywhere on the document.<sup>73</sup> Clay admitted he signed the document, but contended he “didn’t think this was going to be a contractual obligation.”<sup>74</sup> Clay testified that, before entering this deal, DW did not obtain an appraisal of the rental property. He and DW arrived at a sale price of \$1,000,000 because, according to Clay, DW represented \$1,000,000 was the price for which he previously sold the property.<sup>75</sup> The line reading “Include Cash – \$500,000” referred to DW’s cash loan of \$500,000 to the buyer to improve the property.<sup>76</sup>

Clay did not take a copy of the document with him when he left DW’s home.<sup>77</sup> Clay did not indicate on the document he had signed on behalf of CP.<sup>78</sup> Prior to U.S. Bancorp’s

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<sup>67</sup> Tr. 180-81.

<sup>68</sup> Tr. 180-81.

<sup>69</sup> JX-2; Stip. ¶ 21.

<sup>70</sup> Tr. 181-82, 187-91; JX-2; Stip. ¶ 22.

<sup>71</sup> JX-2; Stip. ¶ 23.

<sup>72</sup> JX-2; Stip. ¶ 23.

<sup>73</sup> JX-2.

<sup>74</sup> Tr. 182.

<sup>75</sup> Tr. 187-88.

<sup>76</sup> Tr. 188.

<sup>77</sup> Tr. 182. Clay later obtained a copy from JW. Tr. 186.

<sup>78</sup> Tr. 183.



investigation into this matter, Clay did not disclose to anyone at the firm he had signed the document.<sup>79</sup>

After Clay's November 25, 2013 meeting with DW, Clay began collecting rent from DW's tenants.<sup>80</sup> On or around December 1, 2013, DW introduced Clay to a tenant who had been assisting DW in collecting rent and managing his rental property.<sup>81</sup> DW told the tenant "he was selling the properties and that if she had any questions, to ask [Clay]."<sup>82</sup> In early December 2013, Clay collected \$5,840 rent from tenants of the rental property.<sup>83</sup> On December 4, 2013, Clay deposited rental proceeds of \$5,840 into his personal checking account.<sup>84</sup> He testified CP did not collect the rent because she was commuting to work, which was a sizeable distance from her home, and did not have time.<sup>85</sup> Clay testified that he tried to slow down DW's transfer of the property, but DW was insistent that CP begin collecting rent immediately.<sup>86</sup> Clay did not disclose his receipt and deposit of rental income to U.S. Bancorp.<sup>87</sup>

SW's copy of the hand-written agreement included both Clay's and DW's signatures.<sup>88</sup> SW received the document when his brother, JW, contacted him and stated Clay was "trying to steal the properties."<sup>89</sup> JW faxed the document to SW. SW testified that JW was upset when they spoke, and he directed JW not to allow Clay back into the house.<sup>90</sup>

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<sup>79</sup> Tr. 222; Stip. ¶ 24.

<sup>80</sup> Tr. 221.

<sup>81</sup> Tr. 221-25.

<sup>82</sup> Tr. 223-26.

<sup>83</sup> Tr. 225; Stip. ¶ 26. Clay collected \$4,750 in cash and three money orders—payable to him—totaling \$1,090. Stip. ¶ 26.

<sup>84</sup> Tr. 247-48; Stip. ¶ 26. Clay admitted that, after December 4, 2013, he did not write a check to his sister or electronically transfer the rent proceeds to her. Tr. 248.

<sup>85</sup> Tr. 227.

<sup>86</sup> Tr. 229-31.

<sup>87</sup> Tr. 222; Stip. ¶ 27.

<sup>88</sup> Tr. 414-15; CX-1.

<sup>89</sup> Tr. 414.

<sup>90</sup> Tr. 414-15. JW also told SW that Clay was encouraging their father to endorse a check for approximately \$500,000 over to him. Tr. 415-18. The check for \$498,042, dated December 4, 2013 and payable to DW, represented funds generated from DW's liquidation of his U.S. Bancorp account. Clay had instructed the firm to issue and mail the check to DW's home. Tr. 418; Stip. ¶ 25. Clay contended he advised DW of potential conflicts of interest that could develop if Clay continued as DW's broker because DW had developed a business relationship with CP. To avoid potential conflicts, DW agreed to liquidate his U.S. Bancorp account. JX-22, at 3.

When the check arrived at DW's home, JW hid the check and told Clay it was lost. Tr. 286-88, 419-20. DW then agreed to have U.S. Bancorp deposit the funds directly into his checking account. On December 10, 2013, Clay

## F. SW's Testimony about His Father's Rental Property

SW testified that, in lieu of a management company, DW employed approximately seven individuals as hourly employees to assist with management of the rental property. Generally, these individuals maintained the property as needed, cleaned, collected rent, and performed other related tasks.<sup>91</sup> One of DW's workers, the tenant/manager he introduced to Clay, advised SW that DW had prepared a hand-written note for her to give all of the tenants.<sup>92</sup> SW testified his father had also told him about the note; several tenants showed him their copies of the note; and SW found a copy in a folder belonging to his father marked, "Jimmy Clay."<sup>93</sup> The hand-written note, which is only partially legible, stated:

To whom it may concern  
From [DW]  
Regard[ing] The houses, apartments, and cabins located at . . . have  
been sold to Mr. Jimmy Klay, Vice President of the U.S. Bank in  
Clarksville, Tennessee, this date [illegible word] (give date)  
He [is the] new owner of the property and give him your  
consideration<sup>94</sup>

Clay testified he had no knowledge of the note.<sup>95</sup>

SW testified that he spoke to his father about the property sale. DW told SW Clay had purchased the rental property and intended to build a "quad-plex" on one empty tract of land.<sup>96</sup> DW stated that given his age and health problems, he could no longer handle the business.<sup>97</sup> DW never mentioned to SW that CP was a party to the transaction.<sup>98</sup>

We credit SW's testimony that his father (DW) claimed to have sold his rental property to Clay, not CP, and that he had given the tenants a hand-written note stating as such. SW appeared in person and testified voluntarily. SW may harbor ill feelings about Clay's actions

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visited DW's home to obtain his signature on a form to enable the direct deposit, but JW refused to admit Clay into the home. Tr. 291-93.

<sup>91</sup> Tr. 421-23. These individuals reported to SW that, as of December 13, 2013, Clay had collected approximately \$11,715 in rent. Tr. 420-24; CX-15. Clay disputed this number, and Enforcement did not produce sufficient evidence to support the figure.

<sup>92</sup> Tr. 425-26.

<sup>93</sup> Tr. 425-29, 434.

<sup>94</sup> CX-2.

<sup>95</sup> Tr. 224.

<sup>96</sup> Tr. 436.

<sup>97</sup> Tr. 436.

<sup>98</sup> Tr. 436.

towards his father. The only written documentation of DW's property sale, however, which identifies Clay as the buyer and does not mention CP anywhere, corroborates SW's testimony that his father never mentioned CP. Furthermore, although SW froze all of DW's bank accounts in December 2013,<sup>99</sup> Clay successfully cashed a November 2013 check for \$725 that DW made payable to Clay for rent that DW received.<sup>100</sup> SW contended the bank teller mistakenly cashed the check.<sup>101</sup>

DW "repaid" Clay for December rent checks the tenants had paid to DW instead of Clay. The fact that several tenants paid their December 2013 rent with money orders payable to Clay supports SW's testimony about DW's hand-written note. Without the note, it is unclear how the tenants would have known about Clay. In addition, the tenant/manager contacted Clay, not CP, about retrieving rental payments from her.

At about the time of Clay's termination from U.S. Bancorp in December 2013, SW called Clay to discuss Clay's dealings with DW.<sup>102</sup> SW left several voice mail messages for Clay because he wanted to hear Clay's "side of the story," but initially received no return call.<sup>103</sup> Eventually they spoke, and Clay told SW he intended to use the money DW lent him to build a quad-plex on the empty lot and to repair and improve the existing property.<sup>104</sup> SW denied Clay ever mentioned CP or identified her as the purchaser.<sup>105</sup> Between December 4 and December 17, 2013, Clay deposited rent proceeds into his personal accounts, but did not write any checks to CP or electronically transfer funds to her.<sup>106</sup>

SW became DW's conservator in January 2014 and subsequently complained about Clay to U.S. Bancorp, Clay's prior employer, FINRA, and the Securities and Exchange Commission

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<sup>99</sup> Tr. 438-40. SW testified that he and JW were signatories on their father's bank accounts. Tr. 440.

<sup>100</sup> Tr. 231, 251-54; JX-4. Clay testified that he went by DW's house in early December 2013, and DW or JW handed him the check, already written and signed, to cover rental payments tenants remitted to DW instead of Clay. Tr. 251-56.

<sup>101</sup> Tr. 441. Clay held on to the check and did not attempt to negotiate it until after U.S. Bancorp terminated him on December 16, 2013. Tr. 256-57. Then, rather than deposit the funds into his own bank account at U.S. Bancorp, Clay went to the bank at which DW had his account and negotiated the check for \$725 cash on January 14, 2014. Tr. 257-61. 10 minutes later, Clay deposited \$500 cash into his own bank account. Tr. 261-65; JX-5, at 10; JX-7, at 23. Clay denied the cash came from DW's check, claiming to have given that cash to CP. Tr. 258-60, 263. Clay testified he cashed the check rather than depositing the funds or signing the check over to CP because (1) DW's family had already expressed concern over Clay's conduct, and (2) he thought the check could be returned for insufficient funds. Tr. 259-60. We do not find Clay's claims credible, given the timing of his cash deposit and the lack of evidence in Clay's bank records that he transferred any rent proceeds to CP.

<sup>102</sup> Tr. 459.

<sup>103</sup> Tr. 459, 466.

<sup>104</sup> Tr. 459-60.

<sup>105</sup> Tr. 460.

<sup>106</sup> Tr. 374, 528-32; JX-7; JX-8.

(“SEC”).<sup>107</sup> The land trust DW formed before his death continues to own the rental property, and SW, as trustee, manages it.<sup>108</sup>

### **G. U.S. Bancorp’s Investigation and Clay’s Representations to U.S. Bancorp**

On December 10, 2013, Stalzer was attending a meeting in Lexington, Kentucky.<sup>109</sup> During a break in the meeting, Stalzer took a call from Clay. He asked her if she had received a call from DW’s son.<sup>110</sup> Clay advised Stalzer that DW’s son, JW, was upset because Clay had liquidated DW’s account, which Clay felt obligated to do because of potential conflicts involving his sister, CP.<sup>111</sup> Clay had called Stalzer to give her a “heads up,” in case she received a call from JW.<sup>112</sup>

Stalzer next checked and discovered she had several voice mail messages from JW.<sup>113</sup> The first message sounded panicky. In it, JW stated Clay had signed a contract with his father to purchase his father’s rental property, and his family would be very upset when they learned of the sale because his father suffered from “profound dementia.”<sup>114</sup> JW also stated Clay intended to borrow \$500,000 from his father.<sup>115</sup> Stalzer’s next voice mail message was also from JW, approximately one hour after the prior message. JW stated he had spoken to Clay and understood Clay would be “backing out of the deal.”<sup>116</sup> JW requested, “Please don’t do anything to [Clay]. Everything is okay.”<sup>117</sup> JW did not mention Clay’s sister in either message.<sup>118</sup>

After listening to JW’s voice mail messages, Stalzer called JW. JW advised Stalzer that DW was very ill.<sup>119</sup> JW also advised Stalzer that Clay had signed a contract to purchase DW’s rental property, but he had agreed to back out of the contract, “so it was okay.”<sup>120</sup>

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<sup>107</sup> Tr. 449-58, 475-81; CX-7.

<sup>108</sup> Tr. 483-84.

<sup>109</sup> Tr. 70.

<sup>110</sup> Tr. 70; Stip. ¶¶ 37-38. Clay was not in his primary branch office that day, but heard through another associate in his primary branch office that a complaint about him had come in. Tr. 295.

<sup>111</sup> Tr. 70-71; Stip. ¶¶ 37-38.

<sup>112</sup> Tr. 70. During this call, Clay also requested the firm increase his commission payout percentage. JX-26, at 1.

<sup>113</sup> Tr. 71-72.

<sup>114</sup> Tr. 72-73.

<sup>115</sup> Tr. 73.

<sup>116</sup> Tr. 72.

<sup>117</sup> Tr. 72.

<sup>118</sup> Tr. 73.

<sup>119</sup> Tr. 75.

<sup>120</sup> Tr. 75.

Stalzer then called Clay. Stalzer asked Clay if he had signed a contract with DW. Clay responded he had signed a contract to agree to the terms for his sister's purchase of DW's property and to borrow money from DW.<sup>121</sup> Stalzer asked Clay if the contract provided for Clay "to borrow money from [DW]," and if there "was some kind of owner financing?"<sup>122</sup> Clay said yes, and Stalzer asked him to send her a copy of the contract.<sup>123</sup> Stalzer ended her call with Clay, and placed a call to the head of U.S. Bancorp's complaint investigation unit. While Stalzer was on that call, JW called her several more times.<sup>124</sup> She returned JW's calls,<sup>125</sup> and while Stalzer was on the telephone with JW, Clay arrived at DW's and JW's home.<sup>126</sup> Stalzer asked to speak to Clay, and Clay advised Stalzer he was there to retrieve a copy of the contract that she had requested.<sup>127</sup>

After Clay left DW's home, JW called Stalzer again and said his sister was concerned that, if the firm disciplined Clay, Clay might push DW's family to honor the contract, which DW's family did not want to do.<sup>128</sup> JW also stated Clay was visibly upset during the visit.<sup>129</sup> JW explained to Stalzer he resided with his father and suffered from "mental issues."<sup>130</sup> JW told Stalzer the entire episode was overwhelming for him.<sup>131</sup> Later that day, or the next day, Clay provided Stalzer with a copy of the hand-written agreement with DW that Clay had signed.<sup>132</sup>

After Stalzer received a copy of the hand-written agreement from Clay, she called him to talk further.<sup>133</sup> She became confused because JW told her Clay had agreed to back out of the real estate transaction, but Clay acted as if it was proceeding. Stalzer asked Clay, "Are you – is your sister moving forward with purchasing the building, because [JW] had said for me not to worry about it, that you had backed out of the deal."<sup>134</sup> Clay denied backing out, indicated he signed the

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<sup>121</sup> Tr. 76; Stip. ¶ 39.

<sup>122</sup> Tr. 76.

<sup>123</sup> Tr. 76. At that point, Stalzer also advised Clay that borrowing money from a client is a violation of FINRA Rules. Tr. 76.

<sup>124</sup> Tr. 77.

<sup>125</sup> Tr. 78.

<sup>126</sup> Tr. 78.

<sup>127</sup> Tr. 78. Stalzer questioned Clay on this point because she understood from their previous conversation that Clay had his own copy of the contract. Tr. 78. Clay did not explain. Tr. 78.

<sup>128</sup> Tr. 79.

<sup>129</sup> Tr. 79-80.

<sup>130</sup> Tr. 80.

<sup>131</sup> Tr. 80.

<sup>132</sup> Tr. 81; JX-2. The copy of the hand-written agreement Clay provided to Stalzer did not include DW's signature. JX-2.

<sup>133</sup> Tr. 83.

<sup>134</sup> Tr. 83.

agreement on his sister's behalf, and stated they were "waiting for the attorneys to type up a contract."<sup>135</sup> On December 10, 2013, Stalzer asked Clay to provide the firm with a written statement.<sup>136</sup>

On December 11, 2013, Clay provided U.S. Bancorp with a lengthy statement.<sup>137</sup> In it, he relayed his history with DW and stated he knew early on in their relationship DW owned rental property that he managed himself.<sup>138</sup> Clay stated that, on November 25, 2013, he asked DW the sale price, and DW suggested CP "take over right away," and they would resolve the details later. Clay responded that CP needed to know the details before she could commit to buying the property. Clay also stated he told DW to consult an attorney.<sup>139</sup> Clay wrote the following:

He asked me to write the proposed offer on a sheet of paper. I asked him how much he thought was needed for repairs on the property. He said he thought the property would need \$500,000 in repairs and he also mentioned he would like for [CP] to build another multi-family unit on one of the vacant lots. As per CP's direction I told him she could put down \$30,000 plus DW keep \$16,000 in tenant security deposits that he had collected and buy the property for \$1,000,000 with the balance owner financed over 20 years. DW said he didn't think she could make it if the property was not upgraded and repaired. So I called CP and she asked if he would sell the property for \$1,000,000 and loan her the \$500,000 he thought was needed for repairs. She would put down \$250,000 and use the cash loan to make the repairs and build the multi family unit, and finance the balance over 20 years.<sup>140</sup>

Clay wrote in his statement that DW agreed to the deal, and told Clay to "write it out on paper and calculate what the monthly payment would be."<sup>141</sup> DW asked Clay to draw signature lines, Clay complied and signed his name on the line marked "buyer," "as a record of what the

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<sup>135</sup> Tr. 83; Stip. ¶ 39.

<sup>136</sup> Tr. 84.

<sup>137</sup> Stip. ¶ 40.

<sup>138</sup> JX-22, at 1.

<sup>139</sup> JX-22, at 2.

<sup>140</sup> JX-22, at 2. Stalzer asked Clay if the \$500,000 generated from liquidating DW's account was intended to be used for owner financing of the property. Tr. 82. Clay told Stalzer he gave DW a choice of either transferring his assets to another registered representative or liquidating his account to avoid the conflict caused by Clay continuing to handle his account. Tr. 82. Clay indicated DW chose liquidation. Clay stated he liquidated DW's account and issued a check, which Clay believed DW subsequently lost, but JW actually had hidden. Tr. 82.

<sup>141</sup> JX-22, at 2.

offer was but [] told him that to make it legal he and CP would need to see his attorney.”<sup>142</sup> Before the December 11, 2013 statement, Clay also had not revealed the purchase agreement to anyone at U.S. Bancorp.<sup>143</sup> Clay did not mention in his December 11 statement that he had formed Clay Enterprises and collected rent from tenants.<sup>144</sup>

One day later, in the early morning hours of December 12, 2013, Clay electronically filed with the Tennessee Secretary of State to change Clay Enterprises’s mailing address to CP’s address and to identify CP as Clay Enterprises’s registered agent instead of Clay.<sup>145</sup>

Stalzer testified JW never mentioned to her CP was involved in the real estate transaction with DW. He mentioned only that Clay was involved.<sup>146</sup> On December 11, 2013, DW’s daughter contacted Stalzer to express concern over Clay’s treatment of her father.<sup>147</sup> DW’s daughter stated DW suffered from dementia and the family was in the process of requesting a court to appoint conservatorship over DW.<sup>148</sup> DW’s daughter also told Stalzer DW and Clay had already communicated to DW’s tenants that Clay had purchased the rental property. She stated she had seen a note DW gave each tenant to advise them he sold the property to Clay, and Clay had begun collecting rent.<sup>149</sup> DW’s daughter also claimed to possess a copy of the hand-written agreement that included DW’s signature in addition to Clay’s signature.<sup>150</sup>

On December 16, 2013, Stalzer met in person with Clay and members of U.S. Bancorp’s corporate security and human resources departments.<sup>151</sup> Clay reiterated it was never his intention to purchase DW’s rental property.<sup>152</sup> During the meeting, Stalzer asked Clay to contact his sister, so that she could explain her part in the real estate transaction with DW.<sup>153</sup> Clay claimed he was unable to reach CP.<sup>154</sup> At the conclusion of the meeting, U.S. Bancorp terminated Clay.<sup>155</sup>

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<sup>142</sup> JX-22, at 3.

<sup>143</sup> Stip. ¶ 24.

<sup>144</sup> Tr. 297-301.

<sup>145</sup> JX-6, at 6-8; Stip. ¶¶ 41-43.

<sup>146</sup> Tr. 85.

<sup>147</sup> Tr. 86.

<sup>148</sup> Tr. 86.

<sup>149</sup> Tr. 87.

<sup>150</sup> Tr. 87. During this conversation, DW’s daughter provided Stalzer with examples of the manifestation of DW’s dementia. Tr. 89.

<sup>151</sup> Tr. 96.

<sup>152</sup> Tr. 96-97.

<sup>153</sup> Tr. 99.

<sup>154</sup> Tr. 99.

<sup>155</sup> Tr. 99-100; JX-1, at 6.

U.S. Bancorp's corporate security department thereafter discovered deposits into Clay's personal checking account corresponding with checks made out to Clay from some of DW's tenants.<sup>156</sup> U.S. Bancorp produced from its records money orders (totaling \$1,090) dated during the first few days of December 2013 and payable to Clay.<sup>157</sup> Notations on the money orders suggest they were for December rent.<sup>158</sup> On December 4, 2013, Clay deposited \$1,090 in money orders and cash of \$4,750, resulting in a total deposit of \$5,840 into Clay's personal checking account at U.S. Bancorp.<sup>159</sup> U.S. Bancorp concluded that, because Clay claimed throughout the firm's investigation he had not purchased DW's property, it should refund these rent proceeds to DW.<sup>160</sup> On December 17, 2013, U.S. Bancorp withdrew \$5,840 from Clay's personal checking and savings accounts to refund to DW.<sup>161</sup>

Stalzer testified that Clay did not disclose to the firm his intention to form Clay Enterprises, nor did he disclose his position as president of Clay Enterprises after forming it.<sup>162</sup> Stalzer also testified Clay never requested permission from U.S. Bancorp to receive a loan from DW, or to procure a loan from DW for CP.<sup>163</sup>

#### **H. Clay's Misrepresentations to FINRA**

On November 3, 2014, Enforcement requested, pursuant to FINRA Rule 8210, that Clay provide documents and information.<sup>164</sup> In a December 1, 2014 response, Clay denied he ever entered into a personal transaction with DW. He stated he was not a party to DW's sale of property, never entered into an agreement to purchase property from DW, and did not receive or expect compensation.<sup>165</sup> Clay did not state that he collected rent directly from tenants or

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<sup>156</sup> Tr. 97.

<sup>157</sup> Tr. 98; JX-3.

<sup>158</sup> Tr. 97; JX-3.

<sup>159</sup> JX-3; Stip. ¶ 26.

<sup>160</sup> Tr. 100, 114-15; Stip. ¶ 28.

<sup>161</sup> Stip. ¶ 28.

<sup>162</sup> Tr. 101-02.

<sup>163</sup> Tr. 103-04. We find Stalzer's testimony, which is corroborated by her hand-written and typed contemporaneous notes maintained in U.S. Bancorp's records, to be credible. *See* JX-26; JX-27. Furthermore, Stalzer appeared to harbor no ill feelings towards Clay, and had no incentive to testify untruthfully. Her testimony was also consistent with SW's testimony in all material respects.

<sup>164</sup> JX-24, at 1.

<sup>165</sup> JX-24, at 6-7.



received rental payments indirectly through DW.<sup>166</sup> Clay also stated his sister purchased DW's rental property.<sup>167</sup>

On September 18, 2015, and November 15, 2016, Clay provided on-the-record testimony pursuant to Rule 8210 requests.<sup>168</sup> Clay testified that he did not purchase the rental property from DW, but rather, he merely facilitated his sister's purchase of the property. He also testified he signed the hand-written agreement to purchase the property, collected rent, deposited it into his personal bank account, and established Clay Enterprises to help his sister, not because he purchased the rental property from DW.<sup>169</sup>

Clay provided FINRA Enforcement with a sworn affidavit dated September 7, 2016, in which his sister, CP, stated Clay was "helping" her purchase real estate from DW in November 2013. She also stated:

In early December 2013, I began to take steps to take over the management of the units. I contracted with a maintenance man to complete some repairs to one of the units and paid him out of my own pocket. . . . [DW] began transferring rent checks to [Clay] to hold until I could get up and running. . . .

It was my understanding that [Clay] returned the rent checks that he received from [DW].

[Clay] cashed the \$725 check and delivered the proceeds to me to reimburse me for some of my initial expenses, including the repair costs mentioned above.

No documents were created in the transfer of the funds from [DW].<sup>170</sup>

Clay listed CP as a witness in pre-hearing submissions and indicated she would testify at the hearing. At the end of the first day of hearing, however, Clay indicated he would not be calling his sister as a witness.

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<sup>166</sup> Tr. 309-10.

<sup>167</sup> JX-24, at 6.

<sup>168</sup> CX-5; CX-6.

<sup>169</sup> CX-5; CX-6.

<sup>170</sup> CX-13; Stip. ¶ 44.

#### IV. Findings of Violation

##### A. Cause One – Engaging in Outside Business Transactions without Providing the Firm with Prior Written Notice

Cause one of the Complaint alleges that, in November and December 2013, Clay entered into an agreement to purchase rental property from DW, established and operated Clay Enterprises to manage the rental property, and collected rent from tenants. Cause one alleges that, in doing so, Clay engaged in an outside business transaction which, under U.S. Bancorp’s procedures, Clay was required to disclose in writing before proceeding with the transaction. Cause one further alleges that U.S. Bancorp’s procedures required Clay to identify potential conflicts of interest to the firm. Clay neither advised the firm of the transaction before proceeding, nor identified potential conflicts of interest, in violation of FINRA Rules 3270 and 2010.

FINRA Rule 3270, as it read in November and December of 2013, prohibited registered individuals from engaging in business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member firm in the form specified by the firm’s procedures. Specifically, Rule 3270 prohibited a registered individual from acting as an employee, independent contractor, sole proprietor, officer, director or partner of another person or entity. It also prohibited registered individuals from being compensated, or having the reasonable expectation of compensation, from any other person or entity as a result of any outside business, without providing prior written notice.

FINRA Rule 3270 is a prophylactic rule designed to protect member firms and the investing public by ensuring all of a registered person’s business conduct is subject to firm oversight.<sup>171</sup> Indeed, the rule requires registered persons to report *any* kind of business activity engaged in away from the firm and calls for disclosure when the registered person takes steps to commence the outside activity.<sup>172</sup> “Failing to disclose outside business activities deprives

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<sup>171</sup> See *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at \*31-32 (Sept. 30, 2016) (holding that applicant’s failure to provide firm with prior written notice of outside business activity “frustrated [the firm’s] ability to assess the risks that his outside business activities may cause harm to potential investors and to manage those risks by taking appropriate action”); *Dep’t of Enforcement v. Connors*, No. 2012033362101, 2017 FINRA Discip. LEXIS 2, at \*32 (NAC Jan. 10, 2017) (“[Rule 3270] address[ed] the securities industry’s concern about preventing harm to the investing public or a firm’s entanglement in legal difficulties based on an associated person’s unmonitored outside business activities.”).

<sup>172</sup> See *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at \*16 (July 1, 2008) (holding that associated persons are required to report any kind of business activity engaged in away from their firms); *Dep’t of Enforcement v. Mathieson*, No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at \*16 (NAC Mar. 19, 2018) (“An associated person is required to disclose any outside business activity ‘at the time when steps are taken to commence a business activity unrelated to his relationship with his firm.’”) (citing *Dep’t of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at \*13-14 (NAC Dec. 7, 2005)).

customers of the oversight and supervision provided by an employer member firm.”<sup>173</sup> A violation of FINRA Rule 3270 is also a violation of Rule 2010.<sup>174</sup>

### 1. Clay Engaged in Outside Business Activities

We find that Clay entered an agreement to purchase DW’s property, formed Clay Enterprises to manage the property, and began collecting rent on the property. We find Clay engaged in this conduct on his own behalf, and reject Clay’s contention that he was merely acting as a conduit for his sister.

Clay’s November 25, 2013 meeting with DW supports our finding. Clay negotiated with DW and wrote the terms of the sale without his sister present.<sup>175</sup> Clay admitted he did not encourage DW to call CP.<sup>176</sup> Clay did not contact CP himself so she could participate by telephone in his meeting with DW. Nor did he refuse to proceed without CP. Rather, he agreed to the terms of the sale himself.<sup>177</sup> He wrote the terms on a piece of paper and signed the paper as the buyer.<sup>178</sup> Clay did not identify CP as the buyer anywhere on the document and did not indicate he signed the document as agent or intermediary for CP.<sup>179</sup> He simply signed as buyer. Clay did not explain why, if he was truly acting on CP’s behalf, the document *he drafted* does not support his claim.

Clay’s collection of rent proceeds also supports our finding. On November 25, 2013, when Clay negotiated his real estate purchase from DW, his checking account balance was \$640.<sup>180</sup> In early December 2013, Clay collected \$5,840 rent from tenants—\$4,750 in cash and three money orders totaling \$1,090, made payable to Clay. Clay deposited the proceeds directly into his own bank account and used the money in his account for personal spending.<sup>181</sup> Clay also accepted a \$725 check from DW in early December 2013. Clay testified this check represented proceeds that tenants erroneously paid to DW for December rent.<sup>182</sup> Clay successfully negotiated

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<sup>173</sup> *Connors*, 2017 FINRA Discip. LEXIS 2, at \*32.

<sup>174</sup> *Mathieson*, 2018 FINRA Discip. LEXIS 9, at \*16.

<sup>175</sup> Tr. 178-85; Stip. ¶ 20.

<sup>176</sup> Tr. 176-77.

<sup>177</sup> Tr. 180-81.

<sup>178</sup> Tr. 181-91; JX-2; Stip. ¶¶ 21, 22.

<sup>179</sup> JX-2.

<sup>180</sup> JX-7, at 21. At the same time, the balance in Clay’s savings account was less than one dollar. JX-8, at 4. Clay had no brokerage or securities accounts. Stip. ¶ 7.

<sup>181</sup> Tr. 360-74; JX-3; JX-7, at 15; Stip. ¶ 26.

<sup>182</sup> Tr. 251-56; JX-4.

this check for cash.<sup>183</sup> Five minutes later, he deposited \$500 cash into his bank account.<sup>184</sup> Clay claims to have collected rent on behalf of CP, but the documentary evidence belies this assertion. Clay's bank records do not show that he paid any of the rent he collected to sister.<sup>185</sup>

Clay's other actions also support our findings. Clay formed Clay Enterprises, admittedly for managing the rental property.<sup>186</sup> Clay claimed he formed it for his sister, to help her manage the rental property. We do not find this claim credible. Clay claimed he established Clay Enterprises for his sister because he had experience "with setting up businesses and things like that."<sup>187</sup> In 2012, however, Clay's sister was the chief executive officer of a credit union, and she most likely was capable of completing paperwork with an online legal service to form a limited liability company.<sup>188</sup> Clay started the process for forming Clay Enterprises on December 7, 2013, within weeks of executing the hand-written agreement with DW.<sup>189</sup> In the December 7, 2013 Articles of Incorporation for Clay Enterprises, Clay identified himself as registered agent and president, and listed his residential address as the executive offices of Clay Enterprises.<sup>190</sup>

Clay could have listed CP as president and registered agent and could have used her address. But he did not involve CP in Clay Enterprises until December 12, 2013, one day after U.S. Bancorp began its investigation, and two days after Clay provided the firm with a written explanation of his business dealings with DW that failed to mention Clay Enterprises.<sup>191</sup> Clay used his personal credit card to pay all fees associated with the formation of Clay Enterprises, and he named the entity "Clay" Enterprises, notwithstanding that his sister's last name was not Clay.<sup>192</sup> Finally, CP's precarious situation with her former employer casts doubt on the claim

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<sup>183</sup> Tr. 231, 251-54; JX-4.

<sup>184</sup> JX-5, at 10; JX-7, at 23.

<sup>185</sup> Tr. 242-48; JX-7.

<sup>186</sup> Stip. ¶ 29.

<sup>187</sup> Tr. 280.

<sup>188</sup> Clay admitted as much in his testimony:

Q: I mean, your sister, we saw, was like a CEO of a credit union, right? I mean, she wasn't someone who had no idea what she was doing?

A: Correct.

Q: So she's, I think, perfectly capable, you'd agree, of going into LegalZoom and setting up a company for herself isn't she?

A: She could have done it on her own. Yes.

Tr. 280-81.

<sup>189</sup> Tr. 274-79, 291; JX-6, at 3-5; Stip. ¶¶ 30, 31.

<sup>190</sup> Tr. 275-76; JX-6, at 4-5; Stip. ¶ 32.

<sup>191</sup> Tr. 298-301; JX-6, at 6-8; JX-22.

<sup>192</sup> Tr. 279, 284-85.

that she planned to take on a one million dollar property purchase.<sup>193</sup> In August 2013, the credit union filed a civil lawsuit against CP, seeking to recover more than \$240,000, based on her alleged fraud and misrepresentations.<sup>194</sup> CP was also under criminal investigation related to her conduct at the credit union.<sup>195</sup>

DW's actions also buttress our conclusions. Clay admitted that, in early December 2013, DW introduced him to the tenant/manager who assisted with rent collection and told her to direct all questions to Clay.<sup>196</sup> DW drafted a hand-written letter he provided to all the tenants to announce Clay as the new owner, and several tenants produced copies of the letter.<sup>197</sup> Finally, SW credibly testified he never heard about CP from his father, and his father told him Clay bought the rental property.<sup>198</sup> Stalzer similarly testified DW's family complained about Clay, not his sister, purchasing DW's rental property.<sup>199</sup>

In contrast, no evidence supports Clay's testimony he negotiated the property purchase and entered the transaction on behalf of his sister.<sup>200</sup> Clay pointed to an August 5, 2013 email he sent to his sister to support his story. Clay attached to the email a spreadsheet he obtained from DW listing the 49 rental properties, their current tenants, the vacancies, and the amount of rent collected in July 2018.<sup>201</sup> This email is not sufficient to overcome the overwhelming evidence that Clay, not CP, purchased DW's property, established a management company, and collected rent. In so doing, he engaged in a business activity away from U.S. Bancorp.

## **2. Clay Did Not Provide Prior Notice to U.S. Bancorp**

U.S. Bancorp's policies and procedures during the relevant period, which Clay certified he understood and with which he agreed to comply, clearly addressed outside business activity. They required registered representatives to disclose, in writing, any outside business activities prior to engaging in the activity.<sup>202</sup> They also warned that outside business activities should not

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<sup>193</sup> Tr. 199-205, 214-15; CX-8; CX-9; CX-10.

<sup>194</sup> CX-8.

<sup>195</sup> Tr. 204-05.

<sup>196</sup> Tr. 223.

<sup>197</sup> Tr. 425-29, 434; CX-2.

<sup>198</sup> Tr. 436.

<sup>199</sup> Tr. 75-80, 85.

<sup>200</sup> Clay listed CP as a witness but chose not to call her during the hearing. We therefore did not hear CP's testimony.

<sup>201</sup> Tr. 192-95; JX-9, at 1-4.

<sup>202</sup> Tr. 50-51; JX-10, at 13-15; Stip. ¶¶ 8, 9, 12.

compromise the firm's business, a registered principal must approve of all outside activities, and U.S. Bancorp employees may not engage in financial transactions with customers.<sup>203</sup>

Clay never advised U.S. Bancorp of his intention, nor requested permission, to enter into a business transaction with DW and conduct business away from the firm, as required by FINRA Rule 3270 and U.S. Bancorp's procedures.<sup>204</sup> Accordingly, we find Clay violated FINRA Rules 3270 and 2010 as alleged in cause one of the Complaint.

## **B. Cause Two – Making Misrepresentations to U.S. Bancorp**

Cause two of the Complaint alleges that Clay violated FINRA Rule 2010 by misrepresenting facts repeatedly to U.S. Bancorp.

Providing false information to an associated person's member firm is conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and violates FINRA Rule 2010.<sup>205</sup> Member firms rely on the accuracy of the information contained in their records to supervise their associated persons and protect their customers. By misrepresenting information to U.S. Bancorp, Clay interfered with the firm's ability to do both. An associated person's failure to provide truthful information to his or her member firm contravenes ethical business practices and hinders supervision and customer protection.<sup>206</sup>

On December 10, 2013, Clay telephoned Stalzer. He told her she should expect a complaint from JW. He also stated his sister had entered into an agreement to purchase rental property from DW.<sup>207</sup> Later on December 10, 2013, after speaking with JW several times, Stalzer called and spoke to Clay again. Clay repeated his claim that CP had entered into an agreement to purchase property from DW, and he had signed the agreement to purchase property and receive a loan from DW on CP's behalf.<sup>208</sup>

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<sup>203</sup> JX-10, at 17-19; Stip. ¶¶ 10, 11.

<sup>204</sup> Tr. 101-02.

<sup>205</sup> See *Mathieson*, 2018 FINRA Discip. LEXIS 9, at \*17-19 (“FINRA Rule 2010 includes the obligation to disclose truthfully material information to an associated person's firm.”); *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 FINRA Discip. LEXIS 2, at \*16 (NAC Mar. 9, 2015) (holding that registered representative who misleads his member firm by providing false information violates FINRA Rule 2010); *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at \*90 (NAC Oct. 1, 2013) (same).

<sup>206</sup> See *Mathieson*, 2018 FINRA Discip. LEXIS 9, at \*19 (finding that a registered representative's false representations to his member firm called into question “the registered representative's ability to comply with regulatory requirements necessary for the proper functioning of the securities industry and the protection of the public”) (citing *Dep't of Enforcement v. Mullins*, Nos. 20070094345, 20070111775, 2011 FINRA Discip. LEXIS 61, at \*30 (NAC Feb. 24, 2011), *aff'd*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464 (Feb. 10, 2012)).

<sup>207</sup> Tr. 70-71; Stip. ¶ 38.

<sup>208</sup> Tr. 76; Stip. ¶ 39.

As detailed above, we find that Clay, not CP, entered into an agreement to purchase DW's property, and he signed the written agreement as the buyer, not on behalf of CP. We find Clay's representations to Stalzer during two telephone conversations on December 10, 2013 were false.

Stalzer thereafter asked Clay to provide a written statement explaining the purchase of DW's rental property. On December 11, 2013, Clay stated in writing, for a third time, that he entered into an agreement to purchase DW's property on behalf of CP.<sup>209</sup> In the December 11, 2013 statement, Clay did not mention forming Clay Enterprises, collecting thousands of dollars of rent, and depositing the proceeds into his personal bank account.<sup>210</sup> We find that Clay's representations and omissions made his December 11, 2013 email untrue.

Accordingly, we find Clay violated FINRA Rule 2010 as alleged in cause two of the Complaint.

**C. Cause Three – Falsely Responding to FINRA Rule 8210 Requests for Information**

Cause three of the Complaint alleges that Clay violated FINRA Rules 8210 and 2010 by falsely representing to Enforcement, in response to Rule 8210 requests for information and testimony, that CP, not Clay, purchased rental property from DW.

FINRA Rule 8210 requires member firms and associated persons to provide information to FINRA in the course of an investigation. Because FINRA does not have subpoena power, it “must rely on [FINRA] Rule 8210 to obtain information . . . necessary to carry out its investigations and fulfill its regulatory mandate.”<sup>211</sup> It is well settled that “[a]n associated person who provides false or misleading information to [FINRA] in the course of an investigation violates [FINRA] Rule[s] 8210” and 2010.<sup>212</sup>

On December 1, 2014, Clay responded in writing to Enforcement's Rule 8210 request for information and documents.<sup>213</sup> Clay represented to Enforcement that (1) he did not enter into an agreement to purchase DW's rental property; (2) he was not a party to a proposed real estate

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<sup>209</sup> JX-22.

<sup>210</sup> Tr. 296-99; JX-22. In the early morning hours the following day, December 12, Clay changed Clay Enterprises' agent of record to CP and changed its address of record to CP's address. JX-6, at 6-7.

<sup>211</sup> *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*15 (Jan. 30, 2009).

<sup>212</sup> *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at \*23 (Aug. 22, 2008); *see also Dep't of Enforcement v. Merrimac Corp. Sec.*, No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at \*11-12 (NAC May 26, 2017) (affirming a violation of FINRA Rules 8210 and 2010 where an associated person made false statements during on-the-record testimony), *appeal pending*, No. 3-18045 (June 26, 2017); *Dep't of Enforcement v. Walker*, No. C10970141, 2000 NASD Discip. LEXIS 2, at \*26-27 (NAC Apr. 20, 2000) (same).

<sup>213</sup> JX-24, at 5-8.

transaction with DW; (3) he did not receive compensation related to the transaction; and (4) his sister purchased rental property from DW.<sup>214</sup> DW repeated these untruths on two additional occasions during sworn testimony.<sup>215</sup> During on-the-record testimony, Clay contended he signed the real estate agreement, collected rent, deposited rent into his personal account, and formed Clay Enterprises solely to help his sister.<sup>216</sup>

As detailed above, we find that Clay, not CP, entered into an agreement to purchase DW's property, signed the agreement as buyer, not on behalf of CP, collected rent for himself, and formed Clay Enterprises so he could manage the rental property. We find Clay's representations to Enforcement in a written response to a Rule 8210 request and during two sessions of sworn testimony to be false. Accordingly, we find Clay violated FINRA Rules 8210 and 2010 as alleged in cause three of the Complaint.

#### **D. Clay's Other Arguments**

##### **1. Denial of Fair Process**

Clay argued this matter should be dismissed because he was denied a fair process. Clay stated Enforcement's "mishandling of evidence severely damaged [Clay's] ability to provide an appropriate defense to the allegations."<sup>217</sup>

Securities Exchange Act Section 15A(b)(8) requires FINRA to provide litigants a fair process. FINRA Rule 9251(a)(1) requires Enforcement to make available to a respondent for inspection and copying documents prepared or obtained by interested FINRA staff in connection with the investigation that led to the institution of proceedings. Rule 9251(b) permits Enforcement to withhold certain categories of documents. Enforcement must, however, produce documents that fall within these categories if they contain "material exculpatory evidence." Rule 9251(a)(3) provides for Enforcement to make available to a respondent other relevant materials obtained by Enforcement after the filing of the Complaint. Rule 9251(g) states, in the event Enforcement does not make available a document that the rule requires to be made available, rehearing of a case or reconsideration of a decision shall be required only if Respondent demonstrates Enforcement's failure "was not harmless error."

On May 2, 2018, 13 days before the hearing started on May 15, 2018, Enforcement filed a motion to amend its proposed exhibit list to (1) correct a photocopying error that obscured portions of proposed exhibit CX-2; and (2) add new proposed exhibits CX-14, CX-15, and CX-16. CX-2 is a copy of DW's hand-written note to tenants. The original CX-2, Enforcement produced to Clay during discovery, did not include the top line of the note, which reads, "To

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<sup>214</sup> JX-24, at 6-7.

<sup>215</sup> CX-5; CX-6.

<sup>216</sup> CX-5, at 18, 49; CX-6.

<sup>217</sup> Clay post-hearing brief (pages not numbered).



Whom it May Concern.”<sup>218</sup> CX-14 is a copy of a U.S. Bancorp check for \$498,041.40, payable to DW and dated December 4, 2013.<sup>219</sup> CX-15 is an email from “PropManager [DW]Properties@gmail.com,” dated December 13, 2013, to SW regarding the total amount of rent Clay collected.<sup>220</sup> CX-16 is a January 6, 2014 email to SW from the same email address.<sup>221</sup>

Enforcement represented in its May 2, 2018 motion that these documents were in SW’s possession until he provided them to Enforcement in April 2018. Enforcement provided copies of the documents to Clay before filing the motion on May 2, 2018, but stated that the documents were not part of its Rule 9251 production. On the first day of the hearing, however, Enforcement represented that, other than CX-14, it timely produced under Rule 9251 all proposed exhibits.<sup>222</sup> Thus, Enforcement failed to produce only CX-14 timely.

During the hearing, another issue arose as to Enforcement’s production of discovery. On the second day of the hearing, Enforcement stated that, in light of its late production of CX-14, it re-reviewed its Rule 9251 production to Clay. It found it inadvertently failed to produce 10 emails during its Rule 9251 production to Clay.<sup>223</sup> Enforcement immediately produced the documents to Clay before the second day of the hearing.<sup>224</sup> Enforcement represented that five of the documents were emails between Enforcement and Clay’s former attorney, and five were scheduling emails between Enforcement and SW, discussing when he could appear for his hearing testimony.<sup>225</sup>

Clay argued Enforcement’s actions, while not appearing to be malicious, should call into question the adequacy of the entire case.<sup>226</sup> I ordered the parties to address Enforcement’s late production of documents in their post-hearing briefs.<sup>227</sup>

The record does not reflect Enforcement engaged in willful misconduct, exhibited bad faith, or intentionally endeavored to deprive Clay of documents during discovery. Enforcement uncovered its failure to produce CX-14, and rectified its failure before May 2, 2018. Clay did not object to the admission into evidence of CX-14.<sup>228</sup> To ensure it had not failed to produce other

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<sup>218</sup> CX-2, at 1.

<sup>219</sup> CX-14.

<sup>220</sup> CX-15.

<sup>221</sup> Enforcement did not offer CX-16 into evidence, and it therefore is not part of the record in this matter.

<sup>222</sup> Tr. 137-38.

<sup>223</sup> Tr. 388-89.

<sup>224</sup> Tr. 388-89.

<sup>225</sup> Tr. 388-89.

<sup>226</sup> Tr. 389-90.

<sup>227</sup> Tr. 390.

<sup>228</sup> Tr. 418.

documents, Enforcement continued to search its records and found 10 emails it had not produced to Clay. Enforcement then immediately provided copies of the emails to Clay.<sup>229</sup> Clay made no effort to admit the emails into the record to demonstrate the relevance of their content or that he was prejudiced by Enforcement's late production. Nor did he dispute that the five emails were between Clay's former counsel and Enforcement, and five were emails related to scheduling SW's testimony. Neither suggests the emails include information relevant to this proceeding. Clay has not demonstrated that Enforcement's tardy production of 10 emails and CX-14 was anything other than harmless error.<sup>230</sup>

Accordingly, we reject Clay's request to dismiss this matter based on Enforcement's discovery lapses.

## 2. Unfair Delay

Clay stated in his Answer he "invoke[d] the Doctrine of Laches as the Claimant waited too long to file this enforcement action."

"[T]here are no 'bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings.'"<sup>231</sup> In assessing fairness, the NAC and the SEC have considered the entirety of the record, including time lags.<sup>232</sup> Both the SEC and the

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<sup>229</sup> Tr. 389.

<sup>230</sup> See Rule 9251(g) ("In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to make the document available was not harmless error, applying applicable FINRA, SEC, and federal judicial precedent."); *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at \*82 (Dec. 10, 2009) (rejecting applicants' argument that they were denied a fair process because they failed to demonstrate prejudice); *Dep't of Enforcement v. Rebecca Amy Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18, at \*33-34 (NAC July 21, 2011) (rejecting argument of unfair process because "[respondent] failed to establish what documents in Enforcement's possession were necessary to her defense and how the denial of such documents prejudiced her case").

<sup>231</sup> *Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at \*88 (NAC July 23, 2015).

<sup>232</sup> See *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at \*14-16 (Feb. 13, 2004) (rejecting fairness argument where Enforcement filed a complaint almost seven years after the first act of alleged misconduct, more than six years after the last act of alleged misconduct, nearly four years after discovery of the alleged misconduct, and three years and six months after Enforcement commenced its investigation); *William D. Hirsh*, Exchange Act Release No. 43691, 2000 SEC LEXIS 2934, at \*17-19 (Dec. 8, 2000) (rejecting argument that delay was unfair where the time between the first act of alleged misconduct and the filing of the complaint was nearly nine years, the time between the last act of alleged misconduct and the filing of the complaint was eight years, the time between discovery of the alleged misconduct and the filing of the complaint was 20 months, and the time between the commencement of the investigation and the filing of the complaint was one year); *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at \*39-42 (NAC Feb. 12, 2007) (rejecting argument that proceeding was fundamentally unfair where the period of time from the first act of alleged misconduct to the filing

NAC have held that, to demonstrate unfairness, a respondent must show that his ability to mount a defense was harmed by a delay in the filing of the complaint.<sup>233</sup> Furthermore, the NAC and the SEC consider whether Enforcement's dilatory actions added to the delay. "A successful laches defense requires a lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense."<sup>234</sup>

Here, three years and 10 months elapsed between U.S. Bancorp's filing of a Form U5 and FINRA's filing of a Complaint. Clay has not demonstrated that he was prejudiced by the delay, nor shown that Enforcement was less than diligent in pursuing this matter. DW died less than a year after the events at issue, and his testimony would not have been reliable because he suffered from dementia. Although Clay contends the delay negatively affected him, he has provided no evidence to support this claim. Nor has he shown any evidence that Enforcement did not diligently investigate and pursue this matter. Accordingly, we reject Clay's laches argument.

## V. Sanctions

We begin our consideration of sanctions by consulting the FINRA Sanction Guidelines ("Guidelines").<sup>235</sup>

The Principal Considerations in Determining Sanctions apply to all types of rule violations. Here, we find several aggravating and no mitigating factors. First, we find it aggravating that Clay concealed his activity from his firm and misled the firm and FINRA during

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of the complaint was six years and two months, from the last act of alleged misconduct to the filing of the complaint was five years and 10 months, and from Enforcement's discovery of the alleged misconduct and the start of its investigation to the filing of the complaint was four years and one month).

<sup>233</sup> See *Love*, 2004 SEC LEXIS 318, at \*13-16 (rejecting argument that delay caused proceeding to be unfair where applicant failed to prove he suffered prejudice); *Edward John McCarthy*, Exchange Act Release No. 48554, 2003 SEC LEXIS 3165, at \*35 (Sept. 26, 2003) (rejecting argument that NYSE unfairly and unreasonably delayed disciplinary action where respondent failed to demonstrate negative effect of delay on his defense); *Dep't of Enforcement v. The Dratel Group, Inc.*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at \*102 (NAC May 2, 2014) ("The proponent of the [fairness] defense must demonstrate that the alleged undue delay caused prejudice."), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016).

<sup>234</sup> *Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at \*29 (July 20, 1999). See also *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at \*34 (Mar. 19, 2003) (holding that to succeed with a laches defense, respondent must demonstrate "a lack of diligence by [FINRA] and that he has been prejudiced"); *Larry Ira Klein*, Exchange Act Release No. 37835, 1996 SEC LEXIS 2922, at \*20 (Oct. 17, 1996) (same).

<sup>235</sup> FINRA Sanction Guidelines (2018), [http://www.finra.org/industry/sanction\\_guidelines](http://www.finra.org/industry/sanction_guidelines). In May 2018, FINRA revised its Guidelines by amending General Principle No. 2 to instruct adjudicators in disciplinary proceedings to consider customer-initiated arbitrations that result in adverse arbitration awards or settlements when assessing sanctions. These revisions apply only to complaints filed on or subsequent to June 1, 2018. See Guidelines at 2-3. FINRA made no other revisions to the Guidelines in May 2018. See FINRA Regulatory Notice 18-17 (May 2, 2018), <http://www.finra.org/industry/notices/18-17>. Accordingly, we rely on General Principle No. 2 as it read prior to the May 2018 revision.

their investigations.<sup>236</sup> Clay did not accept responsibility and in fact devoted significant effort to concealing his actions, changing the registered agent and mailing address of Clay Enterprises and fabricating a story about CP. Clay had several opportunities to disclose to Stalzer that he formed Clay Enterprises and collected and deposited rent proceeds. He took advantage of none of them and instead repeated a false story. While misleading the firm and providing false information to FINRA are independent violations in their own right, they also aggravate Clay's outside business violation.

We also find it aggravating that Clay acted to benefit himself at the expense of his client and that DW stood to suffer financially from Clay's actions.<sup>237</sup> Clay saw an opportunity to profit, and he took it. He knew DW was anxious to sell and willing to provide financing to a buyer. He also knew DW often chose not to involve his children in financial matters. Clay negotiated a deal, whereby he did not even need to fund his down payment or property improvements because DW agreed to loan him the money for both. U.S. Bancorp withdrew rental proceeds from Clay's account to make DW whole, and DW's children stopped the sale of the rental property before it could occur. If U.S. Bancorp and DW's children had not intervened, however, DW stood to lose and Clay to gain financially. We find Clay took unfair advantage of DW, an 86-year-old client in ill health who trusted him.

We also conclude Clay acted intentionally.<sup>238</sup> DW was ill and anxious to sell his property. Clay knew this and used DW's infirmity to his own benefit. He also knew the firm required registered representatives to provide prior written notice of outside business activities and to refrain from borrowing from customers. He ignored these proscriptions and intentionally took advantage of a customer anxious to sell his property. We find it aggravating that Clay's misconduct was intentional.

We also have considered, as directed by the General Principles Applicable to All Sanction Determinations, that U.S. Bancorp terminated Clay for the misconduct at issue. The General Principles state that respondent has the burden of demonstrating the mitigative value of his prior termination, "keeping in mind the goals of investor protection and maintaining high standards of business conduct."<sup>239</sup> For a termination to be mitigative, a respondent must demonstrate that his or her termination "materially reduced the likelihood of misconduct in the future."<sup>240</sup> We find that U.S. Bancorp's termination of Clay does not guarantee that he will change his behavior. Clay concealed from his firm an outside business that involved a firm customer, including borrowing money from a firm customer, and was willing to take unfair advantage of a customer. His conduct posed a danger to an investor, and placed the firm's

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<sup>236</sup> Guidelines at 7 (Principal Consideration Nos. 2, 10).

<sup>237</sup> *Id.* at 7-8 (Principal Consideration Nos. 11, 16).

<sup>238</sup> *Id.* at 8 (Principal Consideration No. 13).

<sup>239</sup> *Id.* at 5 (General Principle No. 7).

<sup>240</sup> *Id.*

interests at risk. The mitigative value of U.S. Bancorp's termination is not enough to overcome our concern that Clay poses a continuing danger to investors and would-be employers if he continues in the securities industry.<sup>241</sup>

#### **A. Outside Business Activities**

The Guidelines applicable to outside business activities recommend a fine of \$25,000 to \$73,000. They also recommend suspending a respondent in any or all capacities for 10 business days to three months. Where aggravating factors exist, they recommend considering a suspension of up to one year. Where, as here, aggravating factors predominate, they recommend a suspension of up to two years or a bar.<sup>242</sup>

The principal considerations unique to outside business activities support our finding that aggravating factors predominate. First, the outside activity involved a customer of the firm.<sup>243</sup> Second, the outside activity resulted in injury to DW, which the firm rectified, but which could have been significantly worse if DW's family had not intervened.<sup>244</sup> Third, the dollar value of Clay's business deal with DW was significant.<sup>245</sup> DW self-financed Clay's one-million-dollar purchase price and lent Clay the money for a down payment and for improvements to the property. It is difficult, if not impossible, to discern what, if any, benefit accrued to DW from the proposed deal. Fourth, Clay concealed his outside business from his employer, and then misled the firm during its investigation.<sup>246</sup> Finally, Clay played a key role in the business enterprise, and took advantage of an elderly client.<sup>247</sup> All of these factors aggravate the significance of Clay's misconduct.

In light of our conclusion that Clay's actions, while three separate violations, are part of one continuing course of misconduct—beginning with undisclosed outside business activities and ending with misleading U.S. Bancorp and FINRA about those activities—we have determined to impose one sanction. Considering the many aggravating factors listed above, including Clay's willingness to take unfair advantage of an elderly, ill customer for his own benefit, we bar Clay from associating with any FINRA member firm in any capacity.

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<sup>241</sup> See *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at \*17-18 (Sept. 3, 2015) (finding that mitigative value of firm's termination is outweighed by the risk to market participants and the investing public posed by respondent).

<sup>242</sup> Guidelines at 13 (Outside Business Activities – Failure to Comply with Rule Requirements).

<sup>243</sup> *Id.* (Outside Business Activities Consideration No. 1).

<sup>244</sup> *Id.* (Outside Business Activities Consideration No. 2).

<sup>245</sup> *Id.* (Outside Business Activities Consideration No. 3).

<sup>246</sup> *Id.* (Outside Business Activities Consideration No. 5).

<sup>247</sup> *Id.* (Outside Business Activities Consideration No. 6).

## **B. Providing False Information to U.S. Bancorp**

There are no Guidelines directly applicable to providing false information to a member firm. The Guidelines direct that, for misconduct for which they do not recommend specific sanctions, we consider the Guidelines for analogous violations.<sup>248</sup> Here, we considered the Guidelines for providing false information in response to a Rule 8210 request for information, which recommended a fine of \$25,000 to \$73,000, and a bar.<sup>249</sup>

We find Clay's misconduct under cause two to be egregious. Clay intentionally misled U.S. Bancorp, both when he proceeded with an outside business involving a firm customer without notifying the firm, and when he misled the firm during its investigation.<sup>250</sup> We also find aggravating the importance of the false information Clay provided to U.S. Bancorp.<sup>251</sup> By keeping the firm in dark as to his dealings with DW, misrepresenting his property purchase, and hiding his rental business, Clay prevented U.S. Bancorp from carrying out its supervisory responsibilities and interfered with the firm's ability to protect its customers. Proper supervision is a cornerstone of the securities industry's self-regulatory system.<sup>252</sup> Clay's misconduct undermined U.S. Bancorp's supervision of his activities. For this misconduct, along with our other findings of misconduct, we bar Clay from associating with any FINRA member firm in any capacity.

## **C. Providing False Information to FINRA**

As noted above, the Guidelines for Rule 8210 violations recommend a fine of \$25,000 to \$73,000, and a bar.<sup>253</sup> As the Rule 8210 Guidelines direct, we have considered the importance from FINRA's perspective of the inaccurate information Clay provided to Enforcement.<sup>254</sup> Clay misrepresented that (1) he had not entered into an agreement to purchase DW's rental property; (2) he was not a party to a real estate transaction with a firm customer; (3) he had not borrowed from the customer; (4) he had not received money related to the transaction; and (5) his sister purchased rental property from DW. This information was pivotal to Enforcement's investigation, and Clay's misrepresentations were designed to conceal his misconduct and divert Enforcement's investigation away from him.

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<sup>248</sup> *Id.* at 1.

<sup>249</sup> *Id.* at 33 (Failure to Respond Truthfully to Requests Made Pursuant to FINRA Rule 8210).

<sup>250</sup> *Id.* at 8 (Principal Consideration No. 13).

<sup>251</sup> *Id.* at 33 (Failure to Respond Truthfully Principal Consideration No. 1).

<sup>252</sup> *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at \*33 (Dec. 19, 2008) ("Assuring proper supervision is a critical component of broker-dealer operations."); *Rooney*, 2015 FINRA Discip. LEXIS 19, at \*59 (same).

<sup>253</sup> Guidelines at 33 (Failure to Respond Truthfully to Requests Made Pursuant to FINRA Rule 8210).

<sup>254</sup> *Id.* at 33 (Failure to Respond Truthfully Principal Consideration No. 1).

Clay had many opportunities to do the right thing. He chose instead to take unfair advantage of an elderly customer through an outside business transaction, conceal his conduct from his firm, mislead his firm during its investigation, and misrepresent facts to FINRA. For these actions, we find a bar in all capacities is necessary to protect the investing public and other participants in the industry. As outlined above, we find numerous aggravating factors and no mitigating factors. For failing to respond truthfully to Rule 8210 requests for information and documents, and Clay's other misconduct which aggravates his Rule 8210 violation, we bar Clay from associating with any FINRA member firm in any capacity.

## **VI. Order**

We find James Randall Clay engaged in outside business activities without providing prior written notice to U.S. Bancorp, provided false information to U.S. Bancorp during its investigation, and provided false information to Enforcement in response to Rule 8210 requests for information and documents, in violation of FINRA Rules 2010, 3270, and 8210.<sup>255</sup> For these violations, we bar Clay from associating with any FINRA member firm in any capacity. The bar imposed in this decision shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding.

Clay is also ordered to pay the costs of the hearing in the amount of \$5,483.79, which includes a \$750 administrative fee and \$4,733.79 for the cost of the hearing transcript. The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.



Carla Carloni  
Hearing Officer  
For the Hearing Panel

Copies: James Randall Clay (*by email, overnight courier, and first-class mail*)  
Savvas A. Foukas, Esq. (*by email and first-class mail*)  
Kevin E. Pogue, Esq. (*by email*)  
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Jeffrey D. Pariser, Esq. (*by email*)

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<sup>255</sup> The Hearing Panel considered and rejected without discussion all other arguments by the parties.