

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2017054755205**

TO: Department of Enforcement  
Financial Industry Regulatory Authority (“FINRA”)

RE: John S. Simoncic, Respondent  
General Securities Representative  
CRD No. 1062932

Pursuant to FINRA Rule 9216 of FINRA’s Code of Procedure, I submit this Letter of Acceptance, Waiver and Consent (“AWC”) for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against me alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

A. I hereby accept and consent, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

**BACKGROUND**

Respondent John S. Simoncic first entered the securities industry when he associated with a FINRA member firm in 1982. In February 1992, he registered with FINRA as a General Securities Representative (GSR) and in June 2007, he became registered with FINRA as a Supervising Principal. Simoncic was registered in these capacities at several member firms until April 2014 when he became associated with Financial West Group. From May 2014 until November 28, 2016, Simoncic was registered with Financial West as a GSR and Supervising Principal.

Simoncic is not currently registered or associated with a member firm but is subject to FINRA’s jurisdiction pursuant to Article V, Section 4 of FINRA’s By-Laws. Simoncic has no relevant disciplinary history.

**OVERVIEW**

Between August 2014 and November 2016 (the “relevant period”), while registered with Financial West, Simoncic churned customer accounts, engaged in excessive trading, and made unsuitable recommendations involving transactions in non-traditional exchange

traded funds (ETFs) in five accounts held by two customers, one of whom was a senior investor. As a result, Simoncic willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5 promulgated thereunder, and FINRA Rules 2020, 2111 and 2010.

### **FACTS AND VIOLATIVE CONDUCT**

Simoncic's misconduct was identified during a routine cycle examination of Financial West that included a review of Simoncic's trading.

Section 10(b) of the Exchange Act prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security. Exchange Act Rule 10b-5 further prohibits: (a) employing "any device, scheme, or artifice to defraud," (b) making "any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made . . . not misleading," and (c) engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." FINRA Rule 2020 is similar to Rule 10b-5 and provides that a member may not "effect any transaction in, or induce the purchase or sale of, any security by any manipulative, deceptive or other fraudulent device or contrivance."

Churning is a manipulative and deceptive device that violates Section 10(b), Rule 10b-5, and FINRA Rule 2020. It is fraudulent conduct that occurs when: (1) a registered representative controls trading activity in an account, (2) the level of activity in the account is inconsistent with the customer's objectives and financial situation, and (3) the registered representative acts with intent to defraud or a reckless disregard for the customer's interests.

FINRA Rule 2111—FINRA's suitability rule—imposes a "quantitative suitability" obligation that focuses on whether the number of transactions within a given timeframe is suitable in light of the customer's financial circumstances and investment objectives. Excessive trading occurs, and is unsuitable, when a registered representative, while exercising control over a customer's account, recommends a level of trading activity that is inconsistent with the customer's investment needs and objectives. Excessive trading becomes churning when the registered representative acts with an intent to defraud or a reckless disregard for the customer's interests.

FINRA Rule 2111 also imposes a "qualitative" requirement, pursuant to which a registered representative is required to possess a reasonable basis for any recommendation made. The registered representative must conduct a two-step analysis under Rule 2111. First, the registered representative must conduct a reasonable investigation and conclude that the recommendation could be suitable for at least some customers based on the representative's understanding of the potential risks and rewards

inherent in that recommendation. Second, the registered representative must assess whether the investment recommendation is suitable for the specific customer to whom it is made and must tailor recommendations to a customer's financial profile and investment objectives.

In June 2009, FINRA issued Regulatory Notice 09-31 entitled, "Non-Traditional ETFs," which reminded firms and registered representatives of their sales practice obligations related to leveraged and inverse ETFs. The Notice states, "While such products may be useful in some sophisticated trading strategies, they are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis." The Notice further states, "Due to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective." Because of the risks and the inherent complexity of the products, the Notice advises broker-dealers and their representatives that "inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets."

Violations of FINRA Rules 2020 and 2111, as well as Section 10(b) and Rule 10b-5, are also violations of FINRA Rule 2010, which requires registered representatives to "observe high standards of commercial honor and just and equitable principles of trade."

### **Trading in Customer DW's Account**

In June 2014, customer DW transferred her entire Individual Retirement Account (IRA), containing cash and securities totaling approximately \$60,000 to Financial West with Simoncic serving as her registered representative. At the time, DW was 65 years old, married, retired from working as a self-employed hairstylist and cosmetologist, and she had limited investment experience. Her annual income was less than \$100,000, with the source of her income coming from her retired husband's pension and their monthly Social Security benefits. DW's investment objective for her account at Financial West was preservation of capital with a conservative risk tolerance.

During the period August 2014 through November 2016, Simoncic exercised *de facto* control over and made all trading decisions for investments in DW's IRA, including which specific securities to buy and sell, the quantity of securities to buy and sell, and when to buy and sell the securities. DW relied completely upon Simoncic to manage her IRA and to make all investment decisions on her behalf.

Simoncic's trading in DW's accounts was excessive and conducted with a reckless disregard for DW's interests. From August 2014 through November 2016, Simoncic executed 97 trades (53 purchases with a total principal value of approximately \$894,137 and 44 sales with a principal value of approximately \$902,940) in DW's IRA, and he charged DW commissions and fees totaling approximately \$40,000. Because of Simoncic's trading, DW sustained a complete loss of the retirement savings in her IRA, approximately \$60,000.

Simoncic's trading in DW's accounts included in-and-out trades—*i.e.*, a pattern of buying and selling the same security multiple times over a short period, which is an indicia of excessive trading—in at least 11 different securities. From August 2014 through February 2016, Simoncic repeatedly bought and sold the same three gold, mining, and oil stocks—with average holding periods ranging between seven to 11 days.

From August 2014 through November 2016, the annualized turnover rate in DW's account (the number of times per year the securities in the account were replaced by new securities) was 19.28. The annualized cost-to-equity ratio (the percentage the account had to appreciate to break even) was 84.04 percent.

Between August 2014 and March 2016, Simoncic also executed 54 of the 97 trades in DW's account in inverse and/or leveraged ETFs. DW did not have an understanding of the ETFs Simoncic traded in her account; she did not understand how inverse and leveraged ETFs worked, the risks associated with the extended time Simoncic held the ETF positions in her account, or that her account was concentrated in one particular volatility ETF, the ProShares Ultra VIX Short-Term Futures ETF (UVXY), for over nine months.

Although leveraged and/or inverse ETFs seek daily investment results, Simoncic held the ETF positions in DW's account for multiple trading sessions. For example, Simoncic executed 37 transactions in shares of the ProShares UltraShort S&P 500 (SDS), an inverse double-leveraged ETF, with holding periods generally ranging from four to 97 days. These transactions in the SDS resulted in an overall loss of more than \$15,000 for DW. Simoncic also concentrated 93 percent of DW's portfolio in shares of UVWY, the ProShares Ultra VIX Short-Term Futures—a risky, double-leveraged and speculative ETF—for 295 days, that resulted in losses that exceeded \$20,000 for DW. Thus, approximately \$35,000 of DW's total losses of approximately \$60,000 related to ETF trading.

### **Trading in Customer PN's Accounts**

In July 2014, customer PN transferred four accounts to Financial West, including her company pension plan and profit sharing plan accounts and one individual account totaling approximately \$63,000 in assets, with Simoncic serving as her registered representative. At the time, PN was 51 years old, a single parent, a self-employed business owner, and she had no investment experience other than Simoncic's handling of three small brokerage accounts for her at his prior firms dating back to 2011. In July 2015, PN's annual income was approximately \$120,000, and her individual liquid net worth was approximately \$120,000. For all of PN's accounts, her investment objective was preservation of capital and accumulation of wealth with a moderate risk tolerance.

Simoncic made all investment decisions for the trading he conducted in PN's accounts. As such, he exercised *de facto* control over all four of her accounts, including which specific securities to buy and sell, the quantity of securities to buy and sell, and when to

buy and sell the securities. Similar to DW, PN relied completely upon Simoncic to manage her accounts and to make all investment decisions on her behalf.

Simoncic's trading in PN's accounts was excessive and conducted with a reckless disregard for PN's interests. Based on Simoncic's trading in her accounts, PN lost approximately \$45,000 of the \$63,000 that she transferred to Financial West with Simoncic as her registered representative. From October 2014 through February 2016, Simoncic executed a total of 170 trades in PN's four accounts (88 purchases with a total principal value of approximately \$924,792 and 82 sales with a total principal value of approximately \$901,914), and he charged PN commissions and fees totaling approximately \$39,000.

Simoncic also conducted in-and-out trading in PN's accounts by repeatedly buying and selling over a short period of time the same three gold, mining and oil stocks he traded in DW's IRA—with average holding periods in PN's accounts ranging between 4 to 6 days. He often traded the same stocks in all four of PN's accounts, on or close to the same days, and without any diversification among the accounts.

From October 2014 through February 2016, the annualized turnover rate in PN's accounts ranged from 10.32 to 19.81 and the annualized cost-to-equity ranged from 58.64 to 76.57 percent.

During the same period, October 2014 through February 2016, Simoncic executed 78 of the 170 trades in inverse and/or leveraged ETFs. Simoncic never discussed the leveraged and/or inverse ETF transactions with PN and she had no knowledge or understanding about such products or the risks associated with them; nor was she aware of the length of time Simoncic held these ETFs in her accounts.

As noted above, although these ETFs seek daily leveraged or daily inverse investment results, Simoncic held these ETF positions in PN's accounts for multiple trading sessions. For example, across all four accounts, Simoncic executed 63 transactions in shares of the ProShares UltraShort S&P 500 (SDS) and held the positions for multiple trading sessions with some of the longest holding periods totaling over 111 and 155 days. The SDS transactions resulted in cumulative losses of approximately \$18,000 out of the total losses of approximately \$45,000 for PN.

## **The Violations**

### Churning and Excessive Trading (Quantitative Unsuitability)

As described above, the high trading volume, the in-and-out trading, the high turnover rates, and the high returns that Simoncic would have needed to generate in order for these two customers to break even in their respective accounts, demonstrate that Simoncic churned and excessively traded the above-described five customer accounts between August 2014 and November 2016. An annualized turnover rate of six or an annualized cost-to-equity ratio in excess of 20 percent generally indicates that excessive trading has

occurred. Simoncic's trading of DW's and PN's accounts resulted in annualized turnover rates ranged from 10.32 to 19.81 and annualized cost-to-equity percentages that ranged from 58.64 percent to 84.04 percent. Consequently, these two customers would have needed to earn approximately 60% to 80% per year just to break even.

In DW's IRA (from August 2014 through November 2016), Simoncic executed 97 trades with principal values of the purchases and sales totaling approximately \$1.80 million. In PN's four accounts (from October 2014 through February 2016), Simoncic executed 170 total trades with principal values of the purchases and sales also totaling approximately \$1.83 million. Simoncic charged these customers commissions and other fees totaling approximately \$79,000. In just over a two-year period, Simoncic earned approximately 88 percent of his total gross commissions solely from these customers' accounts. He earned almost \$77,000 in commissions while his customers' losses exceeded \$105,000. Simoncic's level of trading in these accounts, which he controlled, was inconsistent with the customers' investment objectives and their financial situations, and he did so with reckless disregard for their interests.

By virtue of the foregoing conduct, Simoncic willfully violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, and he also violated FINRA Rules 2020, 2111, and 2010.

#### Qualitative Unsuitability

As demonstrated by the trading he conducted in DW's and PN's accounts, Simoncic lacked a reasonable basis to recommend non-traditional ETFs to them. He did not fully appreciate or understand the products' unique features and risks, particularly the risks associated with the daily reset of the securities. These securities were not intended to be held for longer than one trading session (typically, one day). Nonetheless, Simoncic recommended that the SDS positions be maintained in both customers' accounts for extended periods, including, in some instances over 97 days, with the longest period being over 150 days. He also recommended that shares of the UVXY be held for 295 days in DW's account. Given the extended holding periods Simoncic recommended for the ETF positions in their accounts, both customers experienced substantial losses.

Based on the facts and circumstances of his ETF recommendations, Simoncic did not have reasonable grounds for believing that his recommendations of non-traditional ETFs were suitable for either DW or PN. Simoncic recommended these products to two customers who had conservative to moderate risk profiles and no experience trading complex products. Moreover, the customers did not understand the complexities and risks associated with non-traditional leveraged and inverse ETFs. The prospectuses for these ETFs highlighted the significant risks associated with investments in them, and stated that the funds may not be suitable for retail investors who plan to hold the investments for longer than one trading session and that the investments should be used only by knowledgeable investors who understand the potential consequences of seeking daily leveraged or daily inverse investment results. However, based on Simoncic's recommendations, both DW and PN held some of these double-leveraged, non-traditional

ETF positions for extended periods of time, in direct contradiction to the intended use of the products.

By virtue of the foregoing conduct, Simoncic violated FINRA Rules 2111 and 2010.

B. I also consent to the imposition of the following sanctions:

- A bar from association with any FINRA member in any capacity.

The sanctions imposed herein shall be effective on a date set by FINRA staff. A bar or expulsion shall become effective upon approval or acceptance of this AWC.

I understand that if I am barred or suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension (see FINRA Rules 8310 and 8311).

## **II.**

### **WAIVER OF PROCEDURAL RIGHTS**

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- B. To be notified of the Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, I specifically and voluntarily waive any right to claim bias or prejudice of the Chief Legal Officer, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

I further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule

9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

### **III.**

#### **OTHER MATTERS**


I understand that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
  - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
  - 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
  - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
  - 4. I may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.



I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

10/17/2018  
Date (mm/dd/yyyy)

  
John S. Simonovic  
Respondent

Accepted by FINRA:

10/24/2018  
Date

Signed on behalf of the  
Director of ODA, by delegated authority



Jill L. Jablonow  
Senior Counsel  
FINRA Department of Enforcement  
300 South Grand, Suite 1600  
Los Angeles, California 90071-3126  
Tel: 213.613.2659  
Fax: 202.721.6517