

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

GABRIEL N. SMITH
(CRD No. 2950071),

Respondent.

Disciplinary Proceeding
No. 2012034568401

Hearing Officer – CC

DEFAULT DECISION

April 23, 2014

Respondent converted customer funds and failed to respond to multiple requests for information and documents. For this misconduct, Respondent is barred in all capacities.

Appearances

Mark J. Fernandez, Esq., for the Department of Enforcement,
Complainant.

No appearance by or for Gabriel N. Smith, Respondent.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”) filed the attached Complaint on December 10, 2013. Cause One of the Complaint alleges that Gabriel N. Smith (“Smith”) converted customer funds to his own use, in violation of FINRA Rules 2150 and 2010. Cause Two of the Complaint alleges that Smith failed to respond to numerous FINRA requests for information and documents, in violation of FINRA Rules 8210 and 2010.¹

¹ FINRA’s Rules are available at www.finra.org/rules.

Enforcement served Smith in accordance with FINRA's Code of Procedure, and Smith did not answer or otherwise respond to the Complaint. Consequently, on March 3, 2014, Enforcement filed a Motion for Entry of Default Decision ("Default Motion"), the Declaration of Mark J. Fernandez, Esq., in Support of Default Motion ("Fernandez Decl."), and 21 exhibits (hereafter referred to as "DX-1 through DX-21"). Smith did not respond to the Default Motion.

For the reasons set forth below, the Hearing Officer finds Smith in default, grants Enforcement's Default Motion, and deems the allegations of the attached Complaint admitted, pursuant to FINRA Rules 9215(f) and 9269(a).

II. Findings of Fact and Conclusions of Law

A. Smith's Background

Smith entered the securities industry in April 1988 as a general securities representative and investment company and variable contracts products representative.² Most recently, Smith was registered with FINRA as an investment company and variable contracts products representative and associated with FINRA member firm MML Investors Services, LLC ("MML") from March 23, 2010, through October 19, 2012.³ On October 25, 2012, MML filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") to terminate Smith's association.⁴ MML reported on the Form U5 that it terminated Smith "in connection with the violation of firm's policy pertaining to the solicitation of loans from customers."⁵

² DX-1 at 5, 7.

³ DX-1 at 6.

⁴ DX-2.

⁵ DX-2 at 2.

B. FINRA's Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4(a) of FINRA's By-Laws, because (1) Enforcement filed the Complaint within two years of FINRA's termination of Smith's registration on October 25, 2012; and (2) the Complaint alleges that Smith converted customer funds while associated with MML and that he failed, while subject to FINRA's jurisdiction during the two years following the termination of his registration, to provide information requested by FINRA pursuant to FINRA Rule 8210.⁶

C. Origin of the Underlying Investigation

FINRA commenced the investigation that led to the Complaint in this proceeding in response to the Form U5 that MML filed on October 25, 2012, stating that it had terminated Smith's employment while he was under investigation for possible violations of firm policy relating to the solicitation of loans from customers.⁷ Additionally, MML subsequently reported that Smith had referred clients to an unapproved investment fund without MML's approval.⁸

D. Respondent's Default

In December 2013, the Central Registration Depository ("CRD") indicated that Smith resided in Hendersonville, Tennessee ("CRD Address").⁹ In addition, Enforcement learned of a more current address for Smith in Nashville, Tennessee ("Nashville Address").¹⁰ On December 10, 2013, Enforcement served Smith with Notice

⁶ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁷ Fernandez Decl. ¶ 2.

⁸ *Id.*

⁹ Fernandez Decl. ¶¶ 5, 6; DX-1 at 2.

¹⁰ Fernandez Decl. ¶ 5.

of the Complaint and the Complaint by first-class and certified mail at the CRD Address and the Nashville Address.¹¹ On January 13, 2014, the United States Postal Service (“USPS”) returned both certified mailings to Enforcement marked “unclaimed.”¹² The USPS did not return the first-class mailings.¹³ Smith did not respond to the Complaint.¹⁴

On January 9, 2014, Enforcement served Smith with the Second Notice of the Complaint and the Complaint by first-class and certified mail at the CRD Address and the Nashville Address.¹⁵ On February 4, 2014, the USPS returned both certified mailings to Enforcement marked “unclaimed.”¹⁶ The certified mailing that Enforcement sent to Smith’s CRD address included the additional inscription, “Notify sender of new address,” and provided the Nashville Address.¹⁷ The USPS did not return the first-class mailings.¹⁸ The Second Notice of Complaint required Smith to file an answer to the Complaint by January 27, 2014.¹⁹ To date, Smith has not filed an answer or otherwise responded to the Complaint.²⁰

Enforcement represents that it is unaware of any other address for Smith.²¹ FINRA Rule 9134(b) provides for service on a natural person at the person’s residential address as indicated in CRD. The Hearing Officer finds that Smith received constructive

¹¹ Fernandez Decl. ¶¶ 5, 7; DX-3; DX-4.

¹² Fernandez Decl. ¶ 7; DX-5; DX-6.

¹³ Fernandez Decl. ¶ 7.

¹⁴ *Id.*

¹⁵ Fernandez Decl. ¶ 8; DX-7.

¹⁶ Fernandez Decl. ¶ 8; DX-9; DX-10.

¹⁷ Fernandez Decl. ¶ 8; DX-9.

¹⁸ Fernandez Decl. ¶ 8.

¹⁹ Fernandez Decl. ¶ 9; DX-7 at 1.

²⁰ Fernandez Decl. ¶ 9.

²¹ Fernandez Decl. ¶ 10.

notice of this proceeding.²² Accordingly, the Hearing Officer finds that Smith defaulted by failing to answer or otherwise respond to the Complaint.

E. Cause One -- Conversion of Customer Funds

On June 9, 2011, Smith solicited MML customer TS to invest in a short-term municipal bond that he indicated to TS would guarantee a 15 percent return.²³ Based on Smith's representations, TS gave Smith a personal check for \$20,000, payable to Smith.²⁴ Smith endorsed and negotiated the check.²⁵

On September 22, 2011, Smith contacted TS and offered to "extend the life" of TS's initial municipal bond investment and add a bonus interest payment to any subsequent investment.²⁶ Based on Smith's representations, TS gave Smith a second personal check for \$30,000, payable to Smith.²⁷ Smith endorsed and negotiated the check.²⁸

On December 1, 2011, and January 24, 2012, TS gave Smith two additional personal checks – one for \$100,000 and one for \$50,000, respectively – payable to Smith.²⁹ Smith endorsed and negotiated the \$50,000 check.³⁰

On October 22, 2012, Smith gave TS a personal check for \$282,273.51.³¹ Smith's check contained the notation "payment for return of money," and was drawn on an

²² See *Dep't of Enforcement v. Moore*, Complaint No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *21 (FINRA NAC July 26, 2012) (finding constructive notice of a complaint served on respondent at his last known residential address, as indicated in CRD, by first-class and certified mail).

²³ Complaint ("Compl.") ¶ 5.

²⁴ Compl. ¶ 6; Fernandez Decl. ¶ 13; DX-10 at 1.

²⁵ Compl. ¶ 7; Fernandez Decl. ¶ 13; DX-10 at 1.

²⁶ Compl. ¶ 8.

²⁷ Compl. ¶ 9; Fernandez Decl. ¶ 13; DX-10 at 2.

²⁸ Compl. ¶ 10; Fernandez Decl. ¶ 13; DX-10 at 2.

²⁹ Compl. ¶ 11; Fernandez Decl. ¶ 13; DX-10 at 3, 4.

³⁰ Compl. ¶ 12; Fernandez Decl. ¶ 13; DX-10 at 5.

account that Smith purportedly held at Bank of Perry County.³² When TS presented Smith's check for payment, the Bank of Perry County dishonored the check with the notation "Return Reason – D Closed Account."³³ Smith never invested TS's funds and has not returned any portion of TS's \$200,000.³⁴

FINRA Rule 2150(a) prohibits the improper use of a customer's funds. "An associated person makes improper use of customer funds where he or she fails to apply the funds (or uses them for some purpose other than) as directed by the customer."³⁵ FINRA's Sanction Guidelines state "conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."³⁶ The allegations of the Complaint, which are deemed admitted, are sufficient to prove that Smith converted TS's funds to his own use and benefit, in violation of FINRA Rules 2150 and 2010.

F. Cause Two -- Failure to Respond to Requests for Information and Documents

On November 5, 2012, FINRA's Preliminary Investigation Unit ("PIU") requested that Smith provide information and documents regarding the circumstances surrounding his dismissal from MML.³⁷ PIU sent a request letter to Smith at his CRD

³¹ Compl. ¶ 14; Fernandez Decl. ¶ 14; DX-11.

³² DX-11. The account that Smith purportedly held at Bank of Perry County is not the account into which Smith deposited TS's checks. Smith deposited TS's checks into an account that he held at Regions Bank. Fernandez Decl. ¶ 14; DX-10.

³³ Compl. ¶ 15; Fernandez Decl. ¶ 14; DX-11.

³⁴ Compl. ¶¶ 16, 17; Fernandez Decl. ¶ 14.

³⁵ *Dep't of Enforcement v. Patel*, Complaint No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NASD NAC May 23, 2001). The misuse of customer funds also violates FINRA Rule 2010 because it is contrary to high standards of commercial honor and just and equitable principles of trade. *Id.*

³⁶ FINRA Sanction Guidelines at 36, n. 2 (2013), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf>.

³⁷ Fernandez Decl. ¶ 17; DX-12.

Address by certified and first-class mail.³⁸ The USPS provided PIU with a certified mail delivery receipt signed by Smith and evidencing delivery on November 9, 2012.³⁹ On November 19, 2012, PIU received an email from Smith with an attached, signed statement in which Smith represented that he had offered to sell a portion of his family farm to a customer (that he did not identify), the customer did not purchase the property, and he had not received any money from the customer.⁴⁰ Smith also indicated that his address had changed, and he provided PIU with the Nashville Address, an email address, and a telephone number.⁴¹ PIU thereafter referred the matter to Enforcement for further investigation.⁴²

On April 18, 2013, Enforcement sent its first Rule 8210 request for information and documents to Smith at the CRD Address and the Nashville Address by certified and first-class mail.⁴³ Enforcement requested that Smith provide information regarding his receipt and use of TS's funds by May 2, 2013.⁴⁴ On May 10, 2013, the USPS returned marked "unclaimed" the certified mailing that Enforcement sent to the CRD Address.⁴⁵ The USPS did not return the certified mailing that Enforcement sent to the Nashville Address.⁴⁶ The USPS did not return either first-class mailing. Smith did not respond.⁴⁷

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Fernandez Decl. ¶ 18; DX-13.

⁴¹ *Id.*

⁴² Compl. ¶ 20; Fernandez Decl. ¶ 19.

⁴³ Compl. ¶ 21; Fernandez Decl. ¶ 20; DX-14.

⁴⁴ *Id.*

⁴⁵ Compl. ¶ 22; Fernandez Decl. ¶ 20; DX-15.

⁴⁶ Compl. ¶ 22; Fernandez Decl. ¶ 20.

⁴⁷ *Id.*

On May 14, 2013, Enforcement sent a second Rule 8210 request for the same information and documents to Smith at the CRD Address and the Nashville Address by certified and first-class mail.⁴⁸ Enforcement requested that Smith respond by May 28, 2013.⁴⁹ On June 3, 2013, the USPS returned to Enforcement marked “unclaimed” the certified mailings that Enforcement sent to the CRD Address and the Nashville Address.⁵⁰ The USPS did not return either first-class mailing.⁵¹ Smith did not respond.⁵²

On June 5, 2013, Enforcement sent a third Rule 8210 request for the same information and documents to Smith at the CRD Address and the Nashville Address by certified and first-class mail.⁵³ Enforcement requested that Smith respond by June 19, 2013.⁵⁴ The USPS returned to Enforcement marked “unclaimed” the certified mailings that Enforcement sent to the CRD Address and the Nashville Address.⁵⁵ The USPS did not return either first-class mailing.⁵⁶ Smith did not respond.⁵⁷

The Hearing Officer finds that Enforcement properly served Smith with three requests for information and testimony at the CRD Address and the Nashville Address, which is an address that Smith provided to Enforcement.⁵⁸ Smith failed to respond to all

⁴⁸ Compl. ¶¶ 23, 24; Fernandez Decl. ¶ 21; DX-16.

⁴⁹ *Id.*

⁵⁰ Compl. ¶ 24; Fernandez Decl. ¶ 21; DX-17; DX-18.

⁵¹ Compl. ¶ 24; Fernandez Decl. ¶ 21.

⁵² *Id.*

⁵³ Compl. ¶¶ 25, 26; Fernandez Decl. ¶ 22; DX-19.

⁵⁴ *Id.*

⁵⁵ Compl. ¶ 26; Fernandez Decl. ¶ 22; DX-20; DX-21.

⁵⁶ Compl. ¶ 26; Fernandez Decl. ¶ 22.

⁵⁷ *Id.*

⁵⁸ FINRA Rule 8210(d) states that notice under Rule 8210 shall be deemed received if it is sent by mail or other transmission to the CRD Address. Rule 8210(d) further provides that, if FINRA staff has actual knowledge that the CRD Address is inaccurate, then a copy of the notice shall be mailed or transmitted to the CRD Address and any more current address known to staff.

three requests. Accordingly, the Hearing Officer finds that Smith violated FINRA Rules 8210 and 2010.⁵⁹

III. Sanctions

For the misconduct at issue, Enforcement recommends that Smith be barred in all capacities and ordered to pay restitution to customer TS.

The FINRA Sanction Guidelines for conversion of funds recommend a bar, regardless of the amount converted.⁶⁰ Here, there is no evidence of any mitigating factors that would justify a lesser sanction. Furthermore, Smith's refusal to respond to Enforcement's information requests aggravated Smith's conversion of funds because it hindered Enforcement's ability to investigate the matter. Thus, the Hearing Officer bars Smith for the misconduct alleged in Cause One of the Complaint.

The Sanction Guidelines also recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.⁶¹ Here, Enforcement sent three requests for information to Smith's CRD Address and to an address that Smith provided to Enforcement. Smith ignored all three requests. The Sanction Guidelines recommend consideration of the importance of the information requested from FINRA's perspective.⁶² Enforcement represents that the information that it requested from Smith was central to the matter under investigation, i.e., Smith's apparent conversion of \$200,000 from customer TS.⁶³ Smith's earlier email response to PIU does not mitigate his misconduct in that his email either was unrelated (because it

⁵⁹ A violation of FINRA Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore violates FINRA Rule 2010. See *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009).

⁶⁰ FINRA Sanction Guidelines at 36.

⁶¹ Guidelines at 33.

⁶² *Id.*

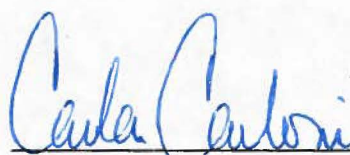
⁶³ Fernandez Decl. ¶ 25.

indicated that the customer in question never gave him money) or not truthful. There are no mitigating factors. The Hearing Officer therefore bars Smith for the misconduct alleged in Cause Two of the Complaint.

Accordingly, Smith is barred from associating with any FINRA member firm in any capacity. In addition, Smith is ordered to pay restitution to customer TS in the amount of \$200,000. All restitution shall be paid to TS with interest from the dates of TS's remittances to Smith, until paid in full.

IV. Order

For violating FINRA Rules 8210, 2150, and 2010, as outlined in this decision, Respondent Gabriel N. Smith is barred from associating with any FINRA member firm in any capacity. In addition, Smith is ordered to pay restitution to TS of \$200,000, plus interest thereon at the rate established under Section 6621(a)(2) of the Internal Revenue Code from the dates of TS's payments to Smith, until paid.⁶⁴ The bar will become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.



Carla Carloni
Hearing Officer

Copies to: Gabriel N. Smith (*by overnight courier and first-class mail*)
 Mark J. Fernandez, Esq. (*by first-class and electronic mail*)
 David B. Klafter, Esq. (*by electronic mail*)
 Jeffrey D. Pariser, Esq. (*by electronic mail*)

⁶⁴ 26 U.S.C. § 6621(a)(2). The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. The dates of TS's payments to Smith are as follows: (1) \$20,000 on June 9, 2011; (2) \$30,000 on September 22, 2011; (3) \$100,000 on December 1, 2011; and (4) \$50,000 on January 24, 2012. Customer TS is identified in the addendum to this decision, which is served only on the parties.

EXHIBIT A

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Gabriel N. Smith,
(CRD No. 2950071),

Respondent.

DISCIPLINARY PROCEEDING
No. 2012034568401

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. While associated with MML Investors Services, LLC, Gabriel N. Smith solicited and accepted funds from a firm customer to invest in municipal securities. Instead of investing the funds, Smith deposited the checks into a bank account under his control and converted the funds to his personal use without the customer's knowledge or permission, in violation of FINRA Rules 2150(a) and 2010. Smith also failed to respond to requests for documents and information, in violation of FINRA Rules 8210 and 2010.

RESPONDENT AND JURISDICTION

2. Smith entered the securities industry on April 22, 1998, as an Investment Company and Variable Contracts Products Representative of a FINRA member firm. He was

registered in that capacity from March 23, 2010 through October 19, 2012, through an association with FINRA member MML Investors Services, LLC.

3. Although Smith is not currently registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Smith's registration with MML Investors Services, LLC, namely, October 25, 2012; and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member, and with failing to respond to FINRA requests for information during the two-year period after the date upon which he ceased to be registered or associated with a FINRA member.

**FIRST CAUSE OF ACTION
Violation of FINRA Rules 2150(a) and 2010
Conversion of Funds**

4. The Department realleges and incorporates by reference paragraphs 2 and 3 above.
5. On or about June 9, 2011, while associated with MML Investors Services, LLC, Smith presented TS, a customer of MML Investors Services, LLC, but not a brokerage client of Smith, with an opportunity to invest in a short-term municipal bond that would guarantee a 15% return.
6. Based on Smith's representations, TS gave Smith a personal check made payable to "Gabriel Smith" in the amount of \$20,000.
7. The check was endorsed by "Gabriel N. Smith."

8. On or about September 22, 2011, Smith contacted TS and offered to extend the life of TS's initial municipal bond investment, and add a bonus to any subsequent investments, in addition to the 15% interest.
9. Based on Smith's representations, TS gave Smith another personal check made payable to "Gabriel Smith" in the amount of \$30,000.
10. The check was endorsed by "Gabriel N. Smith."
11. On or about December 1, 2011 and January 24, 2012, TS gave Smith two more personal checks, each made payable to "Gabriel Smith", in the amounts of \$100,000 and \$50,000, respectively.
12. The \$50,000 check was endorsed by "Gabriel N. Smith."
13. The amount of these checks totaled \$200,000.
14. On or about October 22, 2012, Smith gave TS a personal check in the amount of \$282,273.51, with a memo written notation "Payment for Return of Money."
15. Smith's check was returned by the bank with the notation "Return Reason – D - Closed Account."
16. Instead of investing the funds, Smith deposited the aforementioned checks into a bank account under his control and thereby converted the funds to his personal use without the customer's knowledge.
17. To date, Smith has failed to repay TS any of the funds and TS has not received any return on his investments.
18. As a result of the foregoing conduct, Respondent Smith violated FINRA Rules 2150(a) and 2010.

SECOND CAUSE OF ACTION
Violation of FINRA Rules 8210 and 2010
Failure to Respond

19. The Department realleges and incorporates by reference paragraphs 2 through 18 above.

20. On November 19, 2012, Smith provided an initial response to FINRA's Preliminary Investigation Unit ("PIU") which was inquiring about matters contained on Smith's Uniform Termination Notice for Securities Industry Registration Form U5. Thereafter, PIU referred the matter to the District 5 staff for further investigation.

First Request for Information

21. On or about April 18, 2013, FINRA staff sent Smith a letter (the "First Request"), pursuant to and in accordance with the provisions of FINRA Rule 8210, requesting among other things, information and documentation concerning allegations that while registered with MML Investors Services, LLC, Smith received \$200,000 from TS, failed to invest the funds and to return or to repay the funds to TS.

22. The First Request was sent via first class and certified mail to Smith's Hendersonville, Tennessee address as reflected in the records of the Central Registration Depository (the "CRD address") and to Smith at a more current address that he had earlier provided to the staff (the "Nashville, Tennessee address"). The letters sent by first class mail to both addresses and the letter sent certified mail to Smith at the Nashville, Tennessee address were not returned; and the certified letter sent to the CRD address was returned marked "Returned to Sender - Unclaimed." Smith did not respond to the First Request.

Second Request for Information

23. On May 14, 2013, FINRA staff sent another letter to Smith, pursuant to FINRA Rule 8210, requesting that Smith provide the same information requested in the April 18th Letter (the "Second Request").
24. The Second Request was sent via first class and certified mail to Smith's CRD address and to Smith at the Nashville, Tennessee address. The letters sent by first class mail were not returned; the certified letter sent to the CRD address was returned marked "Returned to Sender – Unclaimed" and the certified letter sent to the Nashville, Tennessee address was returned with a label marked "Unclaimed." Smith did not respond to the Second Request.

Third Request for Information

25. On June 5, 2013, FINRA staff sent another letter to Smith, pursuant to FINRA Rule 8210, requesting that Smith provide the same information requested in the April 18th and May 14th Letters (the "Third Request").
26. The Third Request was sent via first class and certified mail to Smith's CRD address and to Smith at the Nashville, Tennessee address. The letters sent by first class mail were not returned; the certified letter sent to the CRD address was returned marked "Returned to Sender – Unclaimed" and the letter sent to the Nashville, Tennessee address was returned with a label marked "Unclaimed." Smith did not respond to the Third Request.
27. By failing to respond to FINRA staff request letters for documents and information, Smith violated FINRA Rules 8210 and 2010.

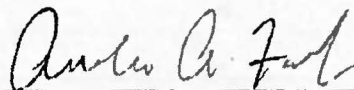
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent Smith committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that Respondent Smith be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest; and
- C. order that Respondent Smith bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: December 10, 2013



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FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

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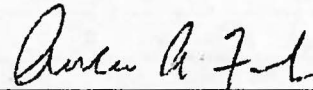
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No. 2012034568401

Date: December 10, 2013

ADDENDUM TO COMPLAINT

The initials referenced in the Complaint are identified as follows:

TS – Tony Seiber



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