FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. JOHN CHERRY III (CRD No. 1891720), Respondent.	Disciplinary Proceeding No. 20110269351 Hearing Officer – LOM **HEARING PANEL DECISION** December 17, 2013

As charged in the First Cause of Action, Respondent converted customer funds for his own personal benefit. Instead of using the funds as the customers intended (to invest in a portfolio of securities), Respondent had the funds deposited in his family-owned business and used the bulk of them to purchase a home. This misconduct violated FINRA Rules 2150(a) and 2010. For the conversion, Respondent is barred from associating with any FINRA member firm in any capacity. He is also ordered to pay to his customers $174,000 in restitution for their outstanding losses, plus pre-judgment interest, and to pay FINRA $300,000 in disgorgement of his remaining ill-gotten gains. Respondent is further ordered to pay costs.

The First Cause of Action also charged Respondent with securities fraud in willful violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and FINRA Rule 2020. The Hearing Panel finds that Respondent committed securities fraud, as alleged, and that the violation is a separate, alternative basis for the sanctions imposed.

As alleged in the Second Cause of Action, Respondent used family-owned business entities to obtain the customers' funds. In so doing, he engaged in outside business activities for compensation without the requisite notice to his firm. This misconduct violated NASD Rule 3030 to the extent that it occurred prior to December 15, 2010, and violated FINRA Rules 3270 and 2010 to the extent that it occurred on or after that date. Respondent is separately barred from associating with any FINRA member firm in any capacity for the outside business activities violations.

Appearances

Gary Jackson, Manuel Yanez, and James J. Nixon, Rockville, Maryland, representing the Department of Market Regulation.

John Cherry III, representing himself.

HEARING PANEL DECISION

I. INTRODUCTION

This is a Hearing Panel decision in a disciplinary proceeding of the Financial Industry Regulatory Authority ("FINRA").[1] FINRA's Department of Market Regulation ("Market Regulation" or the "Department") brought the proceeding against Respondent, John Cherry III ("Cherry" or "Respondent"), for alleged misconduct while Cherry was registered through FINRA member firm World Group Securities, Inc. ("WGS" or the "Firm"), which is affiliated with World Financial Group, Inc. ("World Group"). Market Regulation alleges that Cherry

[1] FINRA is a self-regulatory organization that is responsible for regulatory oversight of securities firms and associated persons who do business with the public. It was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange ("NYSE"). FINRA is developing a new "Consolidated Rulebook" of FINRA Rules that includes NASD Rules. The first phase of the new Consolidated Rulebook became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA's Procedural Rules apply to the proceeding. The applicable FINRA and/or NASD Conduct Rules are those that existed when the conduct in issue occurred. FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

This decision constitutes the findings and conclusions of the Hearing Panel after a two-day hearing held on June 25 and June 26, 2013, in Boca Raton, Florida, and post-hearing briefing that was completed on October 18, 2013.

The following witnesses testified at the hearing: two customers ("BD" and "DD"); the WGS Chief Compliance Officer during the relevant period, Marilyn Pitts ("Pitts"); a FINRA Regulatory Specialist, Gina Shabana (referred to here as "Regulatory Specialist"); and the Respondent, Cherry. Each exhibit admitted into evidence is signified either by the pre-fix "CX" (for Complainant, Market Regulation) or the pre-fix "RX" (for Respondent) and an individual identifying number.

The post-hearing briefs bear the following titles, which are abbreviated here as shown in parentheses: (i) Department of Market Regulation's Post-Hearing Brief ("MR PH Br."); (ii) Respondent's Post-Hearing Brief ("Resp. PH Br."); (iii) Department of Market Regulation's Post-Hearing Reply Brief ("MR PH Reply Br."); and Respondent's Reply Brief to the Department of Market Regulation's Post Hearing Reply Brief ("Resp. PH Sur-Reply").

converted customer funds[2] and engaged in outside business activities for compensation without giving his Firm the required written notice.[3]

The Panel concludes that Cherry converted customer funds and that the most stringent sanction—a bar from the industry—is warranted, along with other relief designed to restore to the victims of his wrongdoing their outstanding losses (restitution) and to deprive Cherry of the remainder of his ill-gotten gains (disgorgement). There are no mitigating factors that would suggest that a lesser sanction is appropriate. The Panel further concludes that Cherry engaged in outside business activities without the requisite notice to his Firm, and that he should be separately barred for this violation.

Cherry abused the trust two customers placed in him as a registered representative of WGS and World Group employee. Cherry used his position to gain the confidence of an elderly widow (referred to here as "BD") and her adult daughter ("DD"). The two women sought advice from Cherry on how to invest the proceeds from the sale of a commercial real estate property and other funds from a family business ("Home Sales") that had been founded and operated by BD's husband. Neither BD nor DD had ever had a securities account before consulting Cherry about how to invest their funds.

[2] The First Cause of Action alleges conversion in violation of FINRA Rules 2150(a) and 2010.

In addition to conversion, the First Cause of Action alleges that the same conduct constituted willful deceit and fraud in violation of Section 10 of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 promulgated thereunder, and the similar FINRA Rule, Rule 2020. As discussed below, the Hearing Panel finds that Respondent converted customer funds, and the finding of conversion supports the sanctions here, without more. As a consequence, it is unnecessary to address the securities fraud charge included in the First Cause of Action. To the extent the securities fraud charge might be an alternative basis for the sanctions, the Hearing Panel also finds that Cherry committed securities fraud.

[3] The Second Cause of Action alleges outside business activities in violation of NASD Rules 3030 and 2110 (for conduct prior to December 15, 2010) and FINRA Rules 3270 and 2010 (for conduct on or after December 15, 2010). NASD Rule 3030 required "prompt" written notice. FINRA Rule 3270 requires "prior" written notice.

Using World Group marketing tools and account forms, Cherry led BD and her daughter to believe that he would invest their money in a securities portfolio designed to provide a steady income stream for BD and protect the principal for the ultimate benefit of her daughter. Instead, however, he funneled close to half a million dollars into a family-owned business that he operated, Cherry Group Unlimited LLC ("Cherry Group"). He then used the bulk of the customers' funds to purchase a home that he had been using in Florida.

Cherry concealed from BD and DD what he had done with their funds and made it appear that they were earning a return on a portfolio of securities investments. For the span of about a year, from October 2009 through November 2010, he made sporadic payments in varying amounts to them from his personal bank account and two business accounts, one belonging to the Cherry Group and the other belonging to CAJ Marketing, Inc. ("CAJ Marketing"), another family-owned business that Cherry operated. In this manner, he paid BD and her daughter less than $36,000. Then he stopped making those payments and gave them various false excuses for the end of the payment stream. He made it appear that the funds were locked into a third-party investment that he did not control.

Cherry failed to give his Firm either "prompt" (NASD Rule 3030) or "prior" (FINRA Rule 3270) written notice of his outside business activities involving Cherry Group and CAJ Marketing. To the extent that Cherry did disclose to his Firm in 2007 that he was doing some work with the Cherry Group, his disclosure did not cover his activities in connection with BD and DD. He expressly stated in that 2007 disclosure that he had not marketed, solicited, or sold the products and services of the Cherry Group to any World Group customer and that he had made sure that everyone understood that World Group had no relation or affiliation with Cherry Group. In 2009, when he began dealing with BD and her daughter, Cherry was marketing the

Cherry Group to World Group customers, contrary to his earlier representation to his Firm. He did not make BD and DD aware that Cherry Group was not affiliated with World Group. When the Cherry Group began receiving money from BD and DD, Cherry did not disclose that fact to his Firm, either "prior" to receipt or "promptly" after. As to CAJ Marketing, Cherry failed to make any disclosure at all to his Firm of his activities in connection with that family-owned business.

Eventually, the customers complained to World Group, which conducted an investigation and terminated Cherry for a lack of cooperation with the inquiry. The customers filed an arbitration claim against the Firm and received from the Firm in settlement of the claim reimbursement for a portion of their losses.

Cherry asserts that BD and her daughter were not customers and that they knew they were investing in real estate, not securities. He further asserts that he had nothing to do with the use of the funds to purchase the Florida home. He maintains that the home is in his wife's name, that the transaction involved her alone, and that Cherry Group and CAJ Marketing are his wife's companies, not his.

Cherry is not credible. His arguments are not supported by the record. The evidence shows that Cherry purposely evaded his responsibilities as a registered representative and deceived BD and her daughter in order to enrich himself.

II. FINDINGS OF FACT

A. Jurisdiction

Cherry was first registered with FINRA in February 2002. Shortly after that, on April 12, 2002, he became employed with WGS. He was registered through WGS during the relevant period until the Firm terminated his registration on April 18, 2011, for a failure to be "fully

forthcoming" with regard to the Firm's investigation of the complaint made by BD and her daughter. Since then, Cherry has not been registered.[4]

Although Cherry is not currently registered with any FINRA member firm, FINRA has jurisdiction over this disciplinary proceeding pursuant to Article V, Section 4 of FINRA's By-Laws. That provision of the By-Laws specifies that FINRA retains jurisdiction with respect to conduct that occurs while a person is registered for two years after that person's registration is terminated. The Complaint in this proceeding was filed on July 25, 2012, within two years of the termination of Cherry's registration, and it charges him with misconduct committed while he was registered with a FINRA member firm.

B. Respondent Deceives BD And DD

(1) Respondent Presents World Group "Dream Maps" To The Two Women, And DD Opens An Account With The Firm

According to their testimony at the hearing, BD and DD combined their financial resources, and together had a bank account under the name of Home Sales, the real estate business BD's husband had founded and operated. After BD's husband died, BD and DD continued to operate that real estate business. However, in early 2009, the real estate market was not doing well, and BD and her daughter were looking for ways of supplementing their monthly income and diversifying their investments. They also sought to invest their assets in a way that would protect them in the future, because BD was planning to retire.[5]

[4] CX-8 (CRD for John Cherry III as of April 11, 2013); Tr. (Regulatory Specialist) 249-51.

[5] Tr. (DD) 34-35, 39, 41-42, 50-51, 82-83; Tr. (BD) 182-84.

In the spring of 2009, a childhood friend of DD joined World Group as part of a team working under Cherry.[6] A week or two later, DD's friend introduced DD to Cherry by telephone.[7] In early April 2009, DD met with Cherry at his house on Kettle Drive in Orlando, Florida. BD also met with Cherry at the Kettle Drive house later in April.[8] In addition, the two women met with Cherry at a Brooklyn, New York office of WGS.[9] BD and her daughter worked and lived part of the time in Brooklyn, New York, and part of the time in Florida.[10] Cherry likewise lived and worked both in New York City and Florida.[11]

Although Cherry contends that BD and DD were not customers, Cherry acted in his capacity as a registered representative in advising BD and DD on investment options. He worked with them on a document used by World Group as a marketing tool. This document was called a "Dream Map." It was designed to set forth in detail a customer's assets and liabilities and the customer's goals for the future. The information collected in the Dream Map would then be analyzed in order to make appropriate recommendations of products and services offered by World Group and its affiliates, including WGS, the securities broker-dealer with which Cherry was registered.[12]

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[6] Tr. (DD) 36-37.

[7] Tr. (DD) 78, 81.

[8] Tr. (DD) 37-40; Tr. (BD) 184-86.

[9] Tr. (DD) 40; Tr. (BD) 189-90. Cherry admitted that he met with BD and DD at the World Group Securities branch office in Brooklyn, although he said he did not remember meeting with them at his home in Florida. Tr. (Cherry) 307-08.

[10] Tr. (DD) 34; Tr. (BD) 184.

[11] Tr. (Cherry) 307-08; Tr. (DD) 40; Tr. (BD) 185-86, 189-190.

[12] CX-18 (DD Dream Map) 88; Tr. (DD) 40-41, 45-46, 167-70.

Cherry presented a separate Dream Map to each woman.[13] He was identified on each page of each Dream Map as the "presenter" for "World Financial Group, Inc."[14] Each Dream Map indicated that it was a World Group document and provided the address of the Brooklyn branch of World Group.[15] Each Dream Map also provided Cherry's email address at World Group.[16] The disclosures in each Dream Map specified that the document was developed "to identify products and services offered through World Financial Group's affiliates."[17] The document provided that it could "serve as guide for discussions with your insurance agent or registered representative."[18] Each Dream Map described World Group and its affiliates, stating that they offered a broad array of financial products and services, including securities.[19] WGS was expressly identified as an affiliate.[20]

Although Cherry contends that BD and DD knew that their funds were going to be used to purchase real estate, and not securities,[21] the Dream Maps Cherry presented to BD and DD did not mention real estate as a product or service that World Group offered. Nor did the Dream Maps refer to the Cherry Group or CAJ Marketing.

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[13] Tr. (DD) 167-170; Tr. (BD) 187-190. Cherry denied that he had anything to do with preparing the Dream Map for BD and suggested that other people with access to his back office may have created it. Tr. (Cherry) 310-13. He did acknowledge that his name appeared as presenter and that securities were one of the offerings covered by a Dream Map. *Id.*

[14] CX-18 (BD and DD Dream Maps) 62-110.

[15] CX-18, (BD and DD Dream Maps) 62, 88.

[16] *Id.*

[17] CX-18 (BD and DD Dream Maps) 63, 89.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Tr. (Cherry) 337-38.

BD's Dream Map was dated April 20, 2009.[22] DD's was dated May 26, 2009.[23]

On June 3, 2009, DD signed a Client Account Form to open an account at WGS, the securities broker-dealer affiliate of World Group. Cherry signed the document on June 3, 2009, as a registered representative of WGS, and a registered representative code for Cherry appears on the document. Two days later, on June 5, 2003, a Firm supervisor signed the document. On the Client Account Form, WGS is identified as a securities firm and a member of FINRA. DD's investment objectives are marked on the form. Those objectives indicate a goal of growth and income, a moderate risk tolerance, and a long-term horizon.[24]

The Client Account Form indicates that DD had no prior investment experience. The Form asked whether the account holder had experience with mutual funds, stocks, bonds, a 401(k), or other kinds of investments. The box saying "none" is marked.[25] Neither DD nor BD had ever had a securities brokerage account before consulting with Cherry.[26]

At the same time that DD signed the Client Account Form, she applied for a Variable Universal Life policy, as reflected by an "Order Ticket & Disclosure Form" accompanying the Client Account Form. The Order Ticket also identifies WGS as a securities firm and member of FINRA. Cherry is identified as the Registered Representative involved in the transaction. He signed the document in that capacity. DD initialed a number of disclosures, including one that

[22] CX-18 (BD Dream Map) 63; Tr. (DD) at 169-70; Tr. (BD) 190.

[23] CX-18 (DD Dream Map) 89; Tr. (DD) at 168.

[24] CX-1 (Client Account Form for DD); Tr. (DD) 46-48; Tr. (Pitts) 280-82 (the Firm concluded that DD was a customer of the Firm).

[25] CX-1 (Client Account Form for DD).

[26] Tr. (DD) 48; Tr. (BD) 196.

states that she had reviewed her insurable needs and financial objectives with her WGS Representative.[27]

DD did not obtain a policy, however. Her application was denied for medical reasons.[28] Cherry contends, as a result, that she never became a customer.[29] Nevertheless, her name was in the Firm's customer database.[30]

The two women trusted Cherry completely. DD testified at the hearing that she considered him a mentor.[31] She testified in an On-The-Record ("OTR") interview that she viewed Cherry as a "financial guru."[32] She testified that her mother was "ecstatic" that they had found Cherry to advise them.[33] DD portrayed her mother as "upset" after losing her husband and as wanting to find the male guidance that her husband had provided.[34] DD said, "It was like: Okay, this is what God sent for us, we are out of our fog, … , we felt like this guy is going to help us get back on track, life is going to be good again."[35]

[27] CX-1 (Order Ticket & Disclosure Form); Tr. (Pitts) 281-82.

[28] Tr. (DD) 123-24.

[29] Tr. Cherry examination of DD 123-24; Tr. (Cherry) 323; CX-19 (Cherry OTR, May 9, 2011) at 55-58 of OTR (According to Cherry, BD and DD were never his clients, and they never invested any money with him at WGS).

[30] Tr. (Pitts) 282.

[31] Tr. (DD) 158-59, 162-63.

[32] CX-6 (DD OTR) at 28 of OTR.

[33] CX-6 (DD OTR) at 32 of OTR.

[34] CX-6 (DD OTR) at 27-30 of OTR.

[35] CX-6 (DD OTR) at 33 of OTR.

BD described Cherry as "professional and charismatic." She told him all the details about her financial situation, including, "finance, real estate, debt and taxes and [her] immediate worries and concerns about each of those subjects."[36]

(2) The Customers Deposit Funds With The Cherry Group

Following their discussions with Cherry, BD transferred funds from the Home Sales bank account she shared with DD to the Cherry Group.[37] BD and her daughter both testified that they did so at Cherry's instruction.[38] They thought that the money would be invested in a portfolio of securities chosen by Cherry.[39]

In his OTR interview, Cherry denied knowing that they had deposited their funds with the Cherry Group, but at the hearing Cherry said that his earlier testimony was incorrect. At the hearing, he testified that he knew at the time of the transaction that BD and DD had deposited their funds with the Cherry Group.[40] That could only have happened if, as BD and DD testified, Cherry instructed them to deposit their funds with the Cherry Group.

The first payment to the Cherry Group was a $100,000 cashier's check drawn on the Home Sales account and dated April 23, 2009.[41] This was a few weeks after DD first met with Cherry and three days after Cherry presented the Dream Map to BD. The second payment was made by a regular bank check drawn on the Home Sales account and dated June 12, 2009, for

[36] CX-18 (email to Pitts regarding Cherry) 28-29.

[37] Tr. (DD) 50-52, 54-56; Tr. (Cherry) 314.

[38] Tr. (DD) 53, 55, 87; Tr. (BD) 193.

[39] Tr. (DD) 87, 148-50.

[40] Tr. (Cherry) 313-18, 329.

[41] CX-25 (cashier's check); Tr. (DD) 54-55; Tr. (BD) 192-93.

$250,000 payable to the Cherry Group.[42] The third payment of $74,000 was done by wire transfer from the Home Sales account dated June 30, 2009, to the Cherry Group.[43] These second and third payments were made after Cherry presented the Dream Map to DD and she opened an account with WGS to apply for a Variable Universal Life insurance policy.

Later, when the returns on their investments were not as substantial or as regular as the two women had expected, BD and her daughter had financial difficulties. With Cherry's assistance, BD entered into a reverse mortgage on her house in an effort to realize some immediate cash to cover expenses.[44] BD also made an additional payment to Cherry with a portion of the proceeds. In December 2009, she gave Cherry a fourth deposit of $50,000.[45] This fourth deposit brought the total that BD and DD invested through Cherry to $474,000.

(3) Respondent Creates An Appearance That The Customers' Funds Were Invested As They Instructed – In A Portfolio Of Securities

Cherry contended that he did not convert his customers' funds because they intended that their money be invested in real estate.[46] Both BD and DD testified, however, that they intended

[42] CX-2 (Home Sales bank records) 2, 4; CX-7 (Home Sales bank records) 2-3; CX-16 (Cherry Group bank statement for June1, 2009, through June 30, 2009) 33; Tr. (Regulatory Specialist) 255-56.

[43] CX-2 (Home Sales bank records) 2; CX-7 (Home Sales bank records) 3; CX-16 (Cherry Group bank statement for June1, 2009, through June 30, 2009) 33; Tr. (Regulatory Specialist) 255-56.

[44] BD and DD testified that Cherry recommended the reverse mortgage. Tr. (DD) 68; Tr. (BD) 202. Cherry asserted that he did not. Tr. (Cherry) 332. Cherry did acknowledge, however, that he assisted BD by introducing her to the person who gave her the reverse mortgage and by accompanying her when the paperwork was done to finalize the reverse mortgage. Tr. (Cherry) 333-34.

[45] Tr. (DD) 68-69; Tr. (BD) 202-04, 207-08.

[46] Cherry said in his opening statement at the hearing, "I will evidence that there never was a conversion, it was used for the purpose that it was intended for." Tr. (Cherry opening statement) 32.

that their money be invested in securities, not real estate.[47] The evidence was consistent with their testimony, not his.

As DD pointed out, she and her mother were real estate professionals and did not need Cherry's help to invest in real estate.[48] They did seek help in making other types of investments, and Cherry presented the Dream Maps to them in his role as a registered representative and financial services professional.[49] The Dream Maps that he used to solicit their business did not mention real estate as an option.[50]

Respondent also created the appearance that BD and her daughter had invested in a portfolio of securities, and not real estate. After the initial $100,000 payment by cashier's check, DD asked Cherry for documents evidencing the investment.[51]

Cherry acted as though he had invested the funds of BD and DD with a third-party money manager separate from himself. BD received by email a document dated July 31, 2009, purporting to be from an entity called Equitable Investment Strategies ("Equitable Strategies").[52] The July 31, 2009, Equitable Strategies document "welcome[d]" BD as a "preferred client." It said: "Your investment on April 27th, 2009 of $100,000 is a five-year quarterly yielding plan." It was purportedly signed by a person named Gary Vincent.

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[47] CX-3 (correspondence from Equitable Strategies); Tr. (DD) 60-61, 87, 148-50, 174-75; Tr. (BD) 206-07.

[48] Tr. (DD) 75.

[49] Tr. (DD) 41-45, 174-75; Tr. (BD) 186-92.

[50] CX-18 (BD Dream Map) 63; CX-18 (DD Dream Map) 89.

[51] Tr. (DD) 56-59.

[52] CX-3 (correspondence from Equitable Strategies, portion dated July 31, 2009) 2-3; Tr. (DD) 57-59, 146-50. The document came as an attachment to an email from an AOL account without any reference to Cherry. At the hearing Cherry made much of the fact that the document did not bear his name and did not come from him. Tr. (BD) 147-150. However, Cherry prompted the sending of the Equitable Strategies receipt, and it was for the purpose of reflecting and memorializing the investment that Cherry purported to have sold BD and DD.

BD received a similar document dated September 30, 2009, acknowledging the second payment, the $250,000 check to Cherry Group. It also was purportedly signed by Gary Vincent.[53] The second document again "welcome[d]" BD as a "preferred client," and told her that although her investment was a "quarterly yielding plan," the company had honored her request to receive a monthly distribution. The document said that her waiting period had ended and that her "first yield" was issued on October 31, 2009.[54]

Each of these Equitable Strategies receipts described the account as follows: "Asset alloc -- 60 month distribution, aggressive growth, auto re-newable account, non-distribution." Both of these receipts labeled the plan type as "Equity Builder" and indicated that "applied interest" was to be paid. Each document established an "account anniversary" for the investment.[55] Neither receipt mentioned real estate or an investment in real estate.

As noted above, BD and DD intended their money to be invested in a portfolio of securities to generate a steady stream of income. They viewed the Equitable Strategies documents as evidencing such an investment.

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[53] CX-3 (correspondence from Equitable Strategies, portion dated September 30, 2009) 5-6; Tr. (DD) 59-61. Vincent did not testify. When Cherry's Firm investigated this matter, the Firm's Chief Compliance Officer asked for Vincent's contact information but Cherry failed to provide it. He claimed that Vincent had directed the Firm to talk to his lawyer, but Cherry did not provide the lawyer's contact information. Tr. (Pitts) 289-90.

Cherry disclosed to his Firm a connection to Equitable Strategies on an Outside Business Activity form. He claimed that he spoke on real estate at seminars and represented that he had not discussed his affiliation with Equitable Strategies with any WGS customer. He further represented that he had not marketed, solicited, or sold any products of Equitable Strategies to any WGS customer. CX-18 (outside business disclosure form for Equitable Investment Strategies) 12-16.

[54] CX-3 (correspondence from Equitable Strategies, portion dated September 30, 2009) 5; Tr. (DD) 59-61.

[55] CX-3 (correspondence from Equitable Strategies) 2-6; Tr. (DD) 147.

There is no evidence that Cherry ever told BD and DD that their funds were used instead to purchase the house on Kettle Drive where he presented the Dream Maps to them.[56] Cherry

[56] CX-18 (email correspondence from Cherry to BD and DD, dated May 21, 2010) 44-45; Tr. (DD) 57-61; Tr. (Cherry) 324.

At the hearing, Cherry relied upon another Equitable Strategies document that does mention real estate. The Hearing Panel has substantial doubt as to the authenticity of that document.

The document purports to be an April 1, 2009 agreement between DD and Equitable Strategies regarding a one-year loan of $100,000, with interest payable monthly at the rate of 20%. Two signatures appear on the document, one an illegible initial and the other DD's signature. One paragraph of the document refers to an investment in real estate. It says, "The undersigned and all guarantors acknowledge the funds are invested in real estate, mortgages, real estate, tax liens and as the company determines…." CX-7 (collection of documents) 1.

DD testified that she received that document from Cherry as an attachment to an email after she asked for proof of the investment she and her mother had made. Although the document purports to contain her signature, she testified that her signature appeared to her to be cut and pasted. She also testified that she had never seen the language regarding real estate and tax liens. She pointed out that there was no reason that she would have signed the document, because it was supposed to be a receipt provided to her. Tr. (DD) 92-104.

Cherry apparently contends that he did not solicit BD and DD to engage in any securities transactions. He asked DD, "Were you given any brochures, any documentation for solicitation of any securities?" She answered, "No." However, she went on to explain in detail why she thought the documents from Equitable Strategies were evidence that she and her mother had invested in securities. She said, "That was my understanding that this was proof of an investment in securities along with the page … that shows account activity and a transaction showing interest applied and a balance. And underneath it said account asset allocation, 60-month distribution, aggressive growth, auto renewable account. That's what gave me the impression that my money was in a securities account." Tr. (DD) 148-49.

Cherry attempted to draw a distinction between what the women had received after making the investment—the Equitable Strategies receipts—and what they had received in the way of documentation from him prior to the investment—no documents at all. He pointed out that the Equitable Strategies receipts "are dated and you received them you say after your investment." He then asked DD again, "[W]as there any documentation of any sort prior to you putting out the money that indicated that it would be a security?" She said, "No, we went based on what you told us." He asked, "And you're saying that I told you prior to those letters, that you were investing in an unknown security?" She responded, "In securities, yes. Unknown to myself and my mother. Known to you." Tr. (DD) 149-50.

The Hearing Panel finds that Cherry is not credible, as discussed below. Given that conclusion and the doubtful circumstances of this document, the Hearing Panel finds that this document must be disregarded.

Furthermore, there are reasons that all the correspondence from Equitable Strategies may be suspect and may not have been produced by an independent third party. Most of the correspondence has no address for the firm, as pointed out by DD when she described it as looking "bogus." Tr. (DD) 136-37. On at least one Equitable Strategies document, however, an address does appear. CX-3 (account statement dated July 31, 2009) 3. On that document, the building address for Equitable Strategies is the same building address as for the Cherry Group: "Empire State Building, 350 5th Avenue, New York, New York, 10118." *Id*.; CX-18 (brochure for Cherry Group Unlimited, LLC) 10.

As noted above, Cherry failed to provide his Firm with contact information for Gary Vincent so that the Firm could inquire into the role of Equitable Strategies in this matter.

admitted at the hearing that there are no documents showing that they had any ownership or security interest in the house on Kettle Drive.[57]

(4) Cherry Makes A Few Interest Payments

Cherry made sporadic payments to BD for about a year.[58] The payments began on October 19, 2009, and continued to November 23, 2010. The amounts varied. The first payment was for $1,700. It was followed a few days later by a check for $3,000. In November 2009, the payment was for only $1,700. In December, two payments totaling $4,700 were made. In January 2010, no payments were made. The single largest payment was in April 2010 for $4,700. Subsequent lesser payments were made in July, August, and September 2010. The payments petered out with a $1,500 check in October and a $2,930.84 check in November 2010.[59] In this fashion, BD and DD received a total of $35,764.17 in purported interest payments on their investment.[60]

None of the monthly payments came from WGS, World Global, or Equitable Strategies. One of the payments (dated April 29, 2010) was made from Cherry's personal bank account. Other payments came from the Cherry Group. Still other payments came from CAJ Marketing.[61]

Both the Cherry Group and CAJ Marketing are family-owned businesses in which both

[57] Tr. (Cherry) 319-23. Cherry at first suggested that there was some "documentation" contained in materials he produced to FINRA staff or that he had in his possession but failed to bring to the hearing. When questioned closely, however, he said "No, I don't know of any documents showing any ownership" by BD and DD, and that he did not know of any documents evidencing a loan from them to Patsy Cherry. *Id.* at 321-23.

[58] Tr. (DD) 61-62. DD testified that the payments "came into the bank via John Cherry…." *Id.* at 62. The payments were supposed to be monthly but they were "scattered." *Id.* at 61. CX-4 (summary of payments to BD and DD).

[59] CX-4 (summary of payments to BD and DD); Tr. (Regulatory Specialist) 268-70.

[60] CX-4 (summary of payments to BD and DD).

[61] CX-4 (summary of payments to BD and DD); CX-5 (BD Bank Statements); CX-17 (Cherry's personal bank account statement for April 13, 2010, through May 12, 2010) 126; Tr. (DD) 61-68; Tr. (Regulatory Specialist) 268-270.

Cherry and his wife, Patsy Cherry, appear to be involved. Documentary evidence shows that Cherry and his wife have had different nominal roles in the companies at different times. Cherry contends that his wife was in charge of the two companies at the time he was dealing with BD and DD.[62]

The Cherry Group is a New York State limited liability company. New York's records show that the entity first filed in New York in 2002 under the name Amplusmall, LLC, and then it became Cherry Group Unlimited LLC on January 3, 2007. Cherry was the registered agent for purposes of service of process at least through the time of the records put into evidence, April 9, 2011.[63] Cherry was "elected" and "qualified" as a member of that company on August 1, 2007. At that time his wife, Patsy, was identified as a "manager."[64] The record contains no indication that Cherry and his wife have ever changed their roles within the Cherry Group.[65] Consequently, Cherry was a member of the limited liability company at the time he had BD and her daughter deposit their investment funds with Cherry Group.

CAJ Marketing is a Florida company that Cherry incorporated on April 30, 2009, shortly after he presented BD and her daughter with their Dream Maps. When the company was incorporated, Cherry was one of only two directors. The other director was not Cherry's wife,

[62] Tr. (Regulatory Specialist) 257-58. The Regulatory Specialist explained that Cherry takes the position that the Cherry Group and CAJ Marketing are not in his "custody or control" because they are owned by Patsy Cherry, his wife. Because Patsy Cherry was never registered with FINRA or associated with a FINRA member firm, FINRA has no jurisdiction over her. As a result, FINRA cannot compel her to produce the relevant documents or give testimony.

[63] CX-9 (information from NYS Division of Corporations, current through April 9, 2011); Tr. (Regulatory Specialist) 251-52.

[64] CX-17 (Consent of Managers of Cherry Group Unlimited, LLC, as of August 1, 2007) at 4.

[65] Cherry testified that his wife was always the sole owner of the company named Amplusmall, LLC that became Cherry Group. He characterized his role as acting as a consultant. Tr. (Cherry) 363-64. He acknowledged, however, that he was also elected a "member" of the Cherry Group. Tr. (Cherry) 368-69.

but rather another person named Raymond Saylor.[66] Cherry was CAJ Marketing's registered agent as well.[67] The principal address for CAJ Marketing is the house on Kettle Drive where BD and DD met with Cherry.[68]

A document bearing the date May 14, 2009, purports to show that Cherry elected his wife as the sole director of CAJ Marketing on May 14, 2009, and made her 100% owner of it. This was only two weeks after Cherry incorporated the company. Cherry signed the document in two capacities, as director and as secretary. The other director at the time of incorporation, Raymond Saylor, is not mentioned on the document and did not sign it. The document specifically resolves that "Patsy D. Cherry is authorized to open bank accounts at a bank of her choosing."[69]

Cherry asserted at the hearing that the payments made to BD and DD from his personal bank account and the accounts of Cherry Group and CAJ were made by his wife, and that he had nothing to do with those payments. He claimed that he had no access to the accounts of Cherry

[66] CX-10 (Articles of Incorporation for CAJ Marketing as of April 30, 2009) 6; Tr. (Regulatory Specialist) 253-54.

[67] CX-17 (Cherry's Acceptance of Appointment as Registered Agent, dated April 30, 2009) 5; CX-17 (Articles of Incorporation of CAJ Marketing, dated April 30, 2009) 8.

[68] CX-10 (Articles of Incorporation for CAJ Marketing as of April 30, 2009); Tr. (Regulatory Specialist) 253-54.

[69] CX-17 (Minutes of Special Meeting of Direc[t]ors of CAJ Marketing, Inc.) 3.

Cherry testified that he had formed the corporation without understanding that signing as a director would make it appear that he was "part of it." He said, "When you form a corporation that doesn't mean you own it." He explained the May 14, 2009, document as a correction to make it clear that he was not involved with CAJ Marketing. He said, "We later discovered the way it was set up it appeared that I was a part of it and being in the financial industry, knowing I can't be a part of it, we made the correction. . . . I appeared to be the owner. No, I'm not the owner. I made sure it went the right direction." Tr. (Cherry) 376-77.

Cherry made statements to his Firm in the conduct of its investigation that were inconsistent with the circumstances surrounding CAJ Marketing. Although CAJ Marketing only came into being at the end of April 2009, he told the Firm's compliance officer that the company should have been shut down and it was just an oversight that it was not. CX-18 (notes by compliance officer on justification for Cherry's termination) 19. Tr. (Pitts) 288. Cherry offered no explanation why the company should have been closed or for the oversight.

Group and CAJ, and that his wife had access to his personal account.[70] His wife did not testify. There is nothing in the record to corroborate Cherry's assertions. There also is no evidence regarding who were the signatories on the company accounts. As to Cherry's personal bank account, his bank statement shows it as his personal account and not a joint account with Patsy Cherry.[71] He provided no evidence as to whether she was nevertheless a signatory on the account. Nor is there any documentary evidence to show who initiated the payments from the three different bank accounts, Cherry or his wife. Bank statements provided by Cherry to his Firm when it conducted its investigation had critical information redacted.[72]

(5) Respondent Stops Making Payments And Gives Varying Excuses

Cherry stopped making payments to BD and DD after the November 2010 payment. DD tried to reach him every day by telephone, email, and text.[73] BD called him and sent emails.[74]

Cherry provided shifting excuses for why the payments had stopped. He first told DD that the person in charge of releasing the funds had had a heart attack and that the office was in a

[70] Tr. (Cherry) 335-36, 346-47. Cherry testified that the payment from his personal bank account "was made through my account, not by me." Tr. (Cherry) 336.

[71] CX-17 (Cherry bank statement in the name of John Cherry III) 14.

[72] CX-18 (notes by compliance officer on justification for Cherry's termination) 19.

In his "Wells submission," Cherry said a number of things inconsistent with his testimony at the hearing. Among these inconsistencies was his representation that he had "been estranged from Patsy Cherry" since 2006. CX-23 (Wells submission on behalf of Cherry) 3. It seems unlikely that a person would give his estranged wife access to his personal bank account or that he would cede control of his companies to her for no apparent reason.

[73] Tr. (DD) 68-69.

[74] Tr. (BD) 204. BD testified, "I called him to find out what was going on. He gave me explanations and told me that it would be coming. I waited. It didn't come. I called. I sent e-mails. It was just a series of my calling, asking, begging, crying, pleading, begging and running into all sorts of situations." She continued, "Well, he gave me explanations, promises, explanations, promises and then he just stopped answering." *Id.* The depth of her anxiety is readily apparent from her emails to the Firm's compliance officer when she complained about Cherry to the Firm, "The end of 2010 found us without money, ruined credit and property going into foreclosure and tax issues and now higher blood pressure, a nervous condition and pure stress for [DD]." CX-18 (email to compliance officer regarding Cherry) 29.

state of confusion.[75] Then, around a month later, he told her that the IRS had frozen the account of the company and there was no way to know when the freeze would be lifted.[76] He claimed that he also had invested money with the same people and that he was trying to get his own money back, along with theirs.[77]

When DD suggested that they might get a lawyer to help, Cherry discouraged her from doing so.[78] He claimed that the desire of BD and DD to obtain immediate and full repayment was making it more difficult for him to exercise influence to get them repaid[79] and was causing him personal difficulties.[80] He made it seem they were naïve and unaware of the complexity of what they were asking him to do.[81]

(6) Cherry Uses The Customers' Money To Purchase The Florida Home

It is undisputed that at least some of the money belonging to BD and DD was used to purchase the home on Kettle Drive that Cherry had previously used as a renter.[82] Cherry simply

[75] CX-7 (email dated May 21, 2010, from Cherry to BD and DD) 20-21; Tr. (DD) 69-70.

[76] Tr. (DD) 69-70.

[77] CX-7 (email dated May 21, 2010, from Cherry to BD and DD) 20-21. Cherry wrote, "Remember I have $25,000 in this and I am not earning on it or anything it is just out there."

[78] Tr. (DD) 70.

[79] CX-7 (email dated May 21, 2010, from Cherry to BD and DD) 20-21. Cherry wrote, "They brought to my attention that the request [f]or favors … they firmly disapprove of them. They have taken a position to review the account which they have been doing recently. I have been chastised greatly."

[80] CX-7 (email dated May 21, 2010, from Cherry to BD and DD) 20-21. Cherry wrote, ""[T]hey sent me rather than the check a document to hold me responsible for any loss they suffer due to your request, which I had to have redrafted because I cannot take their loses [sic] for early withdrawals and for any other reason."

[81] CX-7 (email dated May 21, 2010, from Cherry to BD and DD) 20-21. Cherry wrote, "Your request as simple as it may seem is not simple." He explained later, "After [DD] expressed urgency I put in the request for a total refund and that has further diminished my influence. What it seems you and [DD] do not understand it does not matter how badly you want or need the funds they have it invested. Imag[in]e Chase calling you [BD] and say the loan they I gave you we want all our money back, this is not a simple process nor easy to do."

[82] Tr. (Cherry) 337-39.

disclaims any involvement in the transaction.[83]

Cherry's explanation for how the money came to be used to purchase the home on Kettle Drive is confusing. During the investigation, he asserted that BD and her daughter had invested their money with Equitable Strategies and Gary Vincent for the purpose of lending their money in real estate transactions, and that his wife then obtained those funds from Vincent as a loan to purchase the home on Kettle Drive without Cherry's knowledge or involvement.[84] At the hearing, however, Cherry testified that he knew about his wife's purchase of their home with funds from BD and her daughter.[85] He continued to maintain, however, that he was not involved in the transaction by which his wife gained title to the Kettle Drive house. Rather, he testified that the transaction was accomplished through the Cherry Group and that Patsy Cherry controlled that entity.[86] This version of the story fails to account for what role Equitable Strategies and Gary Vincent had to play.

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[83] Tr. (Cherry) 318-19. *See also* Tr. (Regulatory Specialist) 262-68.

Various documents relating to the purchase of the house on Kettle Drive were admitted into evidence. It appears from them that Patsy Cherry purchased the home from Raymond Saylor and his wife in a short sale with cash. Saylor held a mortgage for over $700,000, but the Cherrys purchased the house for roughly half that amount. CX-13 (Saylor 2006 mortgage, witnessed by Cherry); CX-14 (satisfaction of mortgage executed by both John and Patsy Cherry acknowledged); CX-15 (emails, HUD forms, memo ostensibly from Patsy Cherry); CX-16 (emails and mortgage company forms relating to financing of Kettle Drive property) 3-13.

As discussed below, Cherry testified that the plan was to refinance the house after the purchase. Tr. (Cherry) 371-74. A June 24, 2010, mortgage on the Kettle Drive house is signed by both Patsy Cherry and John Cherry. CX-21 at 52-58.

A document purporting to be "From the Desk of: Patsy D. Cherry" and dated July 22, 2009, was apparently part of the refinancing plan. It indicates that the house was purchased for $323,000. After the purchase, Cherry's wife was trying to obtain $115,000 cash back. Interestingly, the signature on this document misspells the name "Patsy" as "Pasty." This inexplicable discrepancy suggests a forgery. It illustrates the suspect nature of many of the documents provided by Cherry. CX-15(emails, HUD forms, memo ostensibly from Patsy Cherry) 8.

[84] Tr. (Cherry) 323-26.

[85] Tr. (Cherry) 326-27, 329.

[86] Tr. (Cherry) 318-19, 337-39.

In any event, Cherry maintains that he received no benefit from the use of the customers' funds to pay off the mortgage, and that he has no control over what happened to the customers' money. He emphasizes that the house on Kettle Drive is titled in his wife's name and not his.[87] For example, when asked whether the house could be sold even today to pay back BD and her daughter, Cherry responded, "I don't own the house."[88] Similarly, when asked if he resides at the house, he evasively answered, "I do stay there sometimes."[89]

Cherry provided a federal income tax return that he and his wife jointly filed. In the tax return the two of them claimed a first-time home buyer credit for the purchase of the home on Kettle Drive.[90] This alone constitutes a benefit to Cherry stemming from the use of the customers' funds to purchase the home.

BD and her daughter testified that they did not intend to invest in real estate through Cherry, and they did not know that their funds were used to purchase the home on Kettle Drive.[91] They testified that Cherry told them that their money would be invested in a portfolio of securities, and that they relied on him to determine what securities would be in the portfolio.[92]

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[87] Tr. (Cherry) 373-75.

[88] Tr. (Cherry) 373-74. Although Cherry claimed not to be involved in the mortgage transaction, at the hearing he explained in detail the plan for refinancing the house on Kettle Drive to pay back the widow and her daughter. He said that his wife had purchased the house in a short sale for less than half the outstanding mortgage and that she had intended to refinance 90% immediately to obtain the funds to repay the loan from BD and DD. Cherry explained that the plan could not be carried out because "the market dropped precipitously so low that every effort to get that 90 percent financing failed." Tr. (Cherry) 372.

[89] Tr. (Cherry) 327.

[90] RX-24 (Cherry tax return); Tr. (Cherry) 374-75.

[91] Tr. (DD) 74-75; Tr. (BD) 206-07.

[92] Tr. (DD) 148-50; Tr. (BD) 206-07.

Neither BD nor DD had any separate dealings with Cherry's wife about anything, much less an arrangement to finance her purchase of a house. DD said that she may have said hello to Patsy Cherry at some point.[93]

C. Respondent Fails To Make Prior Written Disclosures To His Firm Of His Outside Business Activities

In 2007, Cherry disclosed to his Firm his involvement with Cherry Group as an outside business activity. In that disclosure, Cherry identified himself as a "member" or "partner" of the company, although he also checked the box for acting as an independent contractor. He expressly stated in the disclosure that he had not discussed his affiliation with the Cherry Group with any WGS customers. He represented that he had not marketed, solicited or sold the products and services of the Cherry Group to any WGS representative or customer. He said that he had taken steps to ensure that "everyone" understood that Cherry Group had no affiliation with WGS.[94]

When the Firm later investigated, Cherry claimed that he was not responsible for Cherry Group in 2009 and only took control in 2010. The Firm pointed out that his explanation of his role was not consistent with the disclosure form he submitted to WGS in 2007.[95]

At the hearing, Cherry admitted that he did not disclose to WGS that Cherry Group had obtained funds from the BD and DD. He asserted that Cherry Group did not "raise" or "solicit" the funds, only that it had "obtained" the funds.[96]

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[93] Tr. (DD) 75.

[94] CX-18 (OBA disclosure for Cherry Group) 6-11.

[95] CX-18 (email from Pitts to Cherry regarding his unsatisfactory and inconsistent responses to inquiries) 20-21.

[96] Tr. (Cherry) 341-43.

Cherry never disclosed to his Firm his activities in connection with CAJ Marketing. He contended at the hearing that he did not need to make any disclosure because the company belonged to his wife.[97]

Notably, Cherry disclosed a relationship with Equitable Strategies as an outside business activity to his Firm in 2006, and that disclosure, like the Cherry Group disclosure, does not accurately reflect Cherry's activities in connection with the subject company. In the Equitable Strategies disclosure, Cherry represented that he was hired by Equitable Strategies as a speaker at real estate seminars. He disclosed $200 in compensation. He also represented that he had not discussed his affiliation with Equitable Strategies with any WGS customers. He further represented that he had not marketed, solicited or sold the products or services of Equitable Strategies to any WGS representative or customer. Cherry certified that he was aware that WGS required all outside business activities to be approved by his immediate supervisor prior to his involvement or participation. He signed the disclosure.[98]

Contrary to the disclosure, Cherry involved his WGS customers with Equitable Strategies. The record shows that Cherry prompted Equitable Strategies to correspond with BD and DD about their investment with Cherry, and that Cherry purported to act as a go-between for BD and DD in dealing with Equitable Strategies. He also testified that he had introduced the women to the person who signed the Equitable Strategies receipts.[99]

[97] Tr. (Cherry) 344-47, 354, 361.

[98] CX-18 (OBA disclosures for Cherry Group) 11-15; Tr. (Pitts) 286.

[99] Tr. 324.

D. Respondent's Termination And The Customers' Partial Recovery

(1) The Customers Complain And, After Investigation, World Group Terminates Respondent

After Cherry stopped returning her calls, DD contacted World Group about Cherry and was put in touch with the Firm's Chief Compliance Officer, Marilyn Pitts.[100] Pitts testified at the hearing that she had conducted an investigation of the complaint by DD and her mother. In the investigation, she looked for their names in the Firm's customer database and found DD's name and account documentation.[101] She then discussed the matter with Cherry four or five times and sought various documents from him. She also sought to speak to his wife. Cherry failed to provide all the documents sought and redacted information from documents that he did produce. Cherry attributed the redactions to his wife's attorney. He said that his wife refused to talk to Pitts because his wife was too upset. Pitts also sought to talk to Gary Vincent of Equitable Strategies. She could not locate contact information for him and asked for it from Cherry. Cherry told her that Vincent wanted her to speak to his attorney, but he never provided contact information for Vincent or the attorney. On April 19, 2011, Pitts sent Cherry an email telling him he was terminated and discussing the reasons for his termination.[102] On the Uniform Termination Notice for Securities Industry Registration (Form U5) the Firm later filed on Cherry's behalf, the Firm stated that it had terminated Cherry because he had not been "forthcoming" in connection with the investigation.[103]

[100] Tr. (DD) 70-72; Tr. (Pitts) 278-79.

[101] Tr. (Pitts) 280-82.

[102] Tr. (Pitts) 282-97; CX-18 (email from Pitts to Cherry regarding his unsatisfactory and inconsistent responses to inquiries) 20-22.

[103] CX-18 (notes of compliance officer on justification for Cherry termination) 19; CX-8 (Cherry's Form U5) 8.

(2) The Customers Settle Arbitration Claim Against World Group But Are Still Owed Money

BD and her daughter filed an arbitration claim against World Group and Cherry. They reached a settlement with the Firm, which paid $300,000 to settle the matter. The claim against Cherry has not been resolved.[104]

E. Respondent Is Not Credible

The Hearing Panel finds that Cherry is not credible. Accordingly, his uncorroborated assertions contradicting the sworn testimony of BD and her daughter are not accepted by the Hearing Panel.

The Hearing Panel's credibility finding is based on the following considerations.

First, many of Cherry's uncorroborated assertions are, on their face, contrary to commonsense. For example, it is not credible that Cherry's wife could have determined to purchase the home on Kettle Drive and could have secured financing from Cherry's customers without Cherry's involvement. Cherry met with BD and DD at that home and acknowledges that he "sometimes" stays there. Similarly, it is not credible that Cherry lacked access to the bank accounts of the two family-owned businesses, Cherry Group and CAJ Marketing, given his role as a member of Cherry Group and as the incorporator and director of CAJ Marketing. Nor is it credible that his wife had access to his personal account and made a payment to DD and BD from it without his knowledge—particularly if, as he at one point claimed, he had been estranged from his wife for several years.

Second, the absence of corroboration is significant because Cherry erected barriers to obtaining any corroborating evidence. For example, the only reason he is ostensibly unable to obtain corroborating evidence from CAJ Marketing is that he put his wife in control of that

[104] Tr. (DD) 72-73.

company. There is no evidence that there was any reason for him to do that except to create the false appearance that the company was separate from Cherry and to impede the collection of relevant evidence in FINRA's investigation.

Third, Cherry's hair-splitting approach to the facts and their significance suggests that he purposely pursued a course of conduct focused on technicalities in the hope that he could immunize himself from charges of conversion and fraud while still allowing himself to take advantage of his position with World Group and WGS. One example of his approach is the emphasis he put on the fact that the Kettle Drive house is titled in the name of his wife alone. He argues on that basis that he received no benefit from the use of customer funds to purchase his house. He ignores the benefit he received in using the house and in obtaining a tax credit in connection with the purchase.

Another example is the emphasis Cherry put on the fact that BD and her daughter received no brochures from him indicating that their money would be invested in securities before they made their investment. He discounts the receipts from Equitable Strategies because they were received after the investment and did not appear to come from him. He ignores that the Equitable Strategies receipts only came after DD asked Cherry for a receipt, and that their purpose was to evidence the investment that Cherry had marketed and sold. Cherry may not have had his "fingerprints" on the receipts, but it is reasonable to infer that he was involved in their creation and use. Thus, the fact that the Equitable Strategies receipts led BD and DD to think they were invested in securities, and the fact that they viewed those receipts as consistent with their understanding from their discussions with Cherry, support the conclusion that Cherry solicited BD and DD for an investment in securities. It does not matter that Cherry did not give

them a document reflecting that solicitation prior to their depositing the funds with the Cherry Group.

Fourth, documents that Cherry relies upon to corroborate his assertions do not in fact provide the kind of independent verification and support required to constitute corroboration. For example, Cherry created, signed, and provided the document designed to show that he had ceded all control over the CAJ Marketing to his wife. No one else appears to have been involved, even the other person named a director in the articles of incorporation. In any case, even if the document did make Cherry's wife the sole owner of CAJ Marketing, the document did not prohibit Cherry from acting on behalf of the company or accessing the company's bank account.

Fifth, the Hearing Panel is concerned that Cherry may have altered or manufactured some of the documents that he relies upon in his defense. While the Panel cannot be certain, there are many anomalies and suspicious circumstances surrounding the documents produced by Cherry. In particular, the document in which Patsy Cherry's name is misspelled in a signature as "Pasty" is likely a forgery.

Sixth, Cherry has made conflicting statements under oath. Cherry maintained during his OTR interview that he knew nothing about the money BD and her daughter deposited with the Cherry Group until after the transaction. According to Cherry, BD and her daughter worked with Gary Vincent of Equitable Strategies on finding some real estate deals they could fund, and, unbeknownst to Cherry, Vincent happened to lend the two women's money to Cherry's wife for the house on Kettle Drive. Cherry testified that he learned this a month or two after the July

2009 purchase of the house on Kettle Drive, but he did not disclose this odd connection to BD and DD.[105]

At the hearing, however, Cherry changed his story. He admitted that he was aware at the time that BD and DD had deposited funds with the Cherry Group and that the funds were to be used to purchase the Kettle Drive house.[106] Cherry asserted in his hearing testimony that BD and DD deposited the money with Cherry Group, that Cherry group had discretion to use it for real estate, and that Cherry Group "allowed" the funds to be used for Patsy Cherry to purchase the home on Kettle Drive.[107]

Cherry may have changed his sworn testimony because of record evidence demonstrating his involvement in arranging for the purchase of the house. A series of emails between Cherry and a mortgage broker on June 29, 2009, was entered into evidence.[108] The email string shows that Cherry was deeply involved in providing information to the mortgage broker and shepherding the application for financing along, even though Patsy Cherry's name was typed on forms relating to the transaction. On the assumption that Patsy Cherry was Cherry's wife, the mortgage broker even requested Cherry's credit information.[109]

In sum, both Cherry's testimony and much of his proffered documentary evidence lack credibility.

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[105] Tr. (Cherry) 324-27, 329; CX-19 (Cherry OTR dated May 9, 2011) 61-65, 68, 89-108, 111.

[106] Tr. (Cherry) 324-27, 329. Cherry continued to maintain that BD and DD had intended to invest in real estate, not securities. He also continued to maintain that the two women's money had found its way to his wife without his involvement, and that he had received no benefit from the transaction.

[107] Tr. (Cherry) 337-39.

[108] CX-16 (emails and documents provided by Cherry's lawyer concerning purchase of house on Kettle Drive) at 2-5.

[109] CX-16 (emails and documents provided by Cherry's lawyer concerning purchase of house on Kettle Drive) 4-13.

III. CONCLUSIONS OF LAW

A. Respondent Converted The Customers' Funds For His Own Benefit

The First Cause of Action alleges conversion in violation of FINRA Rules 2150(a) and 2010. The Hearing Panel concludes that Cherry engaged in conversion and violated these rules.

FINRA Rule 2150(a)

FINRA Rule 2150(a) (formerly NASD Conduct Rule 2330(a)) prohibits the "improper use of a customer's securities or funds." An associated person makes improper use of customer funds and violates this provision whenever he or she fails to apply the customer's money as the customer has directed.[110] All kinds of misuse are covered by the prohibition, including mistaken application of funds or delay in repaying funds owed to the customer.[111] Misuse rises to the level of conversion when there "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.[112]

[110] *Dep't of Enforcement v. Patel*, No. C02990052, 2001 NASD Discip. LEXIS 42, at *24-25 (NAC May 23, 2001) (citing cases); *Dep't of Enforcement v. Triggs*, No. C04020006, 2002 NASD Discip. LEXIS 20, at *8 (Dec. 13, 2002) (use of customer funds for any purpose not directed by the customer violates Rule 2330(a)).

[111] *See Alderman v. SEC*, 104 F.3d 285, 289 (9th Cir. 1997) (misuse found where funds mistakenly transferred to wrong account were then deliberately withheld for two months); *Bernard D. Gorniak*, Exchange Act Rel. No. 35996, 52 S.E.C. 371 (July 20, 1995) (misuse found when representative retained customer funds indefinitely without applying them to intended purpose); *Robert L. Johnson*, Exchange Act Rel. No. 33217, 51 S.E.C. 828 (1993) (misuse found where principal failed to apply funds for intended purpose or to return them for almost two years).

[112] FINRA Sanction Guidelines (2011) ("Sanction Guidelines") 36 n.2, available at www.finra.org/sanctionguidelines. *See also Dep't of Enforcement v. Patel*, No. C02990052, 2000 NASD Discip. LEXIS 43, at *29 n.21 (OHO June 27, 2000) (collecting cases discussing conversion); *aff'd*, 2001 NASD Discip. LEXIS 42 (NAC May 23, 2001).

The record here establishes conversion. The customers intended an investment in securities. Cherry used their funds for other purposes, as though the funds were his own. It is plain that he intentionally took their money and used it for his own benefit without authority.

As a threshold matter, and contrary to Cherry's contention, BD and her daughter were Cherry's customers. He dealt with the two women in his capacity as a registered representative of his Firm. They were seeking investment advice and financial services. He worked with them using World Group documents such as the Dream Map. DD opened an account at WGS and applied for a Variable Universal Life insurance policy. Cherry caused Equitable Strategies receipts to be sent to them that appeared to acknowledge their investment in a securities portfolio. Cherry acted as an intermediary when they sought the return of their money and represented that he also had money invested in the same Equitable Strategies investment. Whether or not Cherry handed BD and her daughter a brochure expressly describing an investment as a security, his conduct throughout his dealings with them established a customer relationship involving securities.[113]

Cherry intentionally used the customers' funds for his own benefit without their authorization. He had the customers deposit their funds with the Cherry Group, his family-owned business. The Cherry Group had nothing to do with WGS, World Group, or the financial services and products they offered. Cherry then arranged for the bulk of the funds to be used to purchase the home on Kettle Drive that he had been using. He not only purchased the home but

[113] Cherry presented himself to BD and DD as a registered representative of WGS and financial advisor offering World Group financial services and products. He is held accountable in that capacity because he presented himself in that capacity. Similarly, a promoter who leads a would-be investor to believe he is investing in a security when the security does not exist can still be liable for securities fraud. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (citing *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967) and *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943) (securities-related offerings should be judged on the basis of what they are represented to be)).

he and his wife claimed a tax benefit as first-time home buyers. Thus, Cherry improperly treated the customers' funds as his own and used them for his own benefit.

FINRA Rule 2010

FINRA Rule 2010 (formerly NASD Conduct Rule 2110) is commonly referred to as the "J&E" Rule. The J&E Rule requires that business conduct be consistent with "high standards of commercial honor and just and equitable principles of trade." This is an ethical rule that applies whenever another violation of law or rule is found, but which also covers other misconduct regardless of whether another violation is found.[114] It represents an "industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession. . . . [The J&E Rule sets] forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[115] Even conduct that does not involve a security can be a violation of the J&E Rule where business-related conduct is inconsistent with the ethical principles embodied in the J&E Rule.[116] Because Cherry's conduct violated FINRA Rule 2150(a), he violated the J&E Rule.[117]

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[114] *Heath v. SEC*, 586 F. 3d 122, 132 (2d Cir. 2009) (citing with approval SEC decision rejecting argument that J&E Rule can only be violated if other rules of legal conduct have been violated).

[115] *Dep't of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *22 (NAC Mar. 4, 2013) (citation and quotations omitted).

[116] *Id.*

[117] In addition, the First Cause of Action alleges that Cherry committed a willful violation of Section 10(b) of the Exchange Act, Rule 10b-5 promulgated thereunder, and the similar anti-fraud provision, FINRA Rule 2020. Because the Hearing Panel finds that Cherry converted customer funds and that violation supports the sanctions discussed below, it is unnecessary to address the securities fraud claim.

Nevertheless, the Hearing Panel briefly addresses the securities fraud claim as an alternative basis for the sanctions imposed here. The Hearing Panel finds that Cherry willfully committed securities fraud, as alleged.

Cherry's emphasis on the lack of brochures and documentation of particular misrepresentations by him regarding particular securities is of no moment. Although it is common for false statements and misleading omissions to be pled in a securities fraud complaint, the U.S. Supreme Court has made it clear that there can be so-called "scheme"

B. Respondent Violated The Outside Business Activities Rule

NASD Rule 3030 prohibits registered persons from engaging in business activities without promptly notifying their FINRA member employer in writing. It provides in pertinent part, "No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a

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liability under Rule 10b-5 without proof of a specific oral or written misstatement or omission. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008). In that decision, the Court expressly stated that it would be "erroneous" to think that "there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5." The Court declared, "Conduct itself can be deceptive." *See also SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (securities fraud requires either false or misleading material misstatements or use of a fraudulent or deceptive device); *SEC v. PIMCO Advisors Fund Management LLC*, 341 F. Supp. 2d 454, 463-64 (S.D.N.Y. 2004) (same).

The Hearing Panel concludes that Cherry's *conduct* was deceptive and violated Section 10(b) and Rule 10b-5(a), which prohibits use of any device, scheme, or artifice to defraud, and Rule 10b-5(c), which prohibits any act, practice, or course of business that does or would operate as a fraud or deceit. Cherry led his customers to believe that they were investing in securities. Instead, Cherry used their funds for his own purposes and concealed what he had done. That is securities fraud regardless of whether any securities were actually traded.

See SEC v. Zandford, 535 U.S. 813, 819-21 (2002) where the Court said that the "in connection with" element of federal securities fraud can be met as long as the fraudulent activity "touches" or "coincides" with a securities transaction. The Court even noted that that element can be satisfied even if securities were never actually purchased or sold, where an investor gives a broker money for securities trading and the broker steals the money. In so noting, the Court cited with approval *In re Bauer*, 26 S.E.C. 770 (1947) (broker committed securities fraud by accepting investor funds given to him for the purchase of securities but instead pocketed the money). It is well-recognized that the "in connection with" element may be met in many different ways. *SEC v. Woolf*, 835 F. Supp. 2d 111, 119-21 (E.D. Va. 2011).

Recent decisions follow *Zandford* in holding that fictitious trading constitutes securities fraud. *In re J.P. Jeanneret Associates, Inc. (Securities Actions)*, 769 F. Supp. 2d 340, 361-63 (S.D.N.Y. 2011) (collecting cases). In *Jeanneret*, a case related to the Madoff Ponzi scheme, the court noted that "all of my colleagues who have encountered this issue in Madoff-related cases have concluded that, in the context of his Ponzi scheme, the 'in connection with' requirement is satisfied by his phony purchases and sales." *Id.* at 363. *See also Grippo v. Perazzo*, 357 F.3d 1218 (11th Cir. 2004) (investor sufficiently alleged securities fraud where he alleged broker had accepted money for the purchase of securities even though broker never purchased securities); *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008) (actual purchase of securities not necessary where money had been deposited for purpose of investing in securities); *Schnorr v. Schubert*, 2005 U.S. Dist. LEXIS 45757 (W.D. Okla. 2005) (plaintiffs' claim was for securities fraud where they had deposited money in non-existent trading accounts and defendants stole the money).

As the Seventh Circuit observed in *Lauer*, 52 F.3d 670, where the defendant promoted a non-existent security, "It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws."

Any violation of Section 10(b) and Rule 10b-5 also violates FINRA Rule 2020, which covers an even broader range of fraudulent conduct. *Dep't of Enforcement v. Fillet*, 2008011762801, 2013 FINRA Discip. LEXIS 26 (NAC Oct. 2, 2013). Cherry's misconduct thus violated FINRA Rule 2020, as alleged.

passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." FINRA Rule 3270 contains similar language, except that it changed the requirement for "prompt" written notice to "prior" written notice. FINRA Rule 3270 provides that a registered person may not be employed or receive compensation in connection with a business activity outside the scope of his or her relationship with a member firm without giving the firm prior written notice. Passive investments are excepted.

Cherry's activities in connection with the Cherry Group and CAJ Marketing constituted outside business activities that had to be disclosed by Cherry to his Firm. He received compensation in connection with those activities, and he was not a passive investor. Those activities were outside the scope of his relationship with his Firm.

Cherry failed to give his Firm either prompt or prior written notice about his outside business activities. With respect to the Cherry Group, the disclosure he gave the Firm in 2007 did not accurately reflect the facts in 2009, when he began receiving money from BD and DD through the Cherry Group. The 2007 disclosure, in fact, was false and misleading. Contrary to that disclosure, in 2009 he was marketing products and services of the Cherry Group to World Group customers and was not making sure that they understood the distinction between the Cherry Group and World Group. With respect to CAJ Marketing, Cherry failed to disclose anything at all to his Firm.

IV. SANCTIONS

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines. The Sanction Guidelines contain a range of sanctions for particular violations, depending on the circumstances. They also contain

General Principles, applicable in all cases, and overarching Principal Considerations. In this case, all factors weigh in favor of the most stringent sanctions.

A. First Cause of Action: Conversion

Market Regulation proved that Cherry converted customer funds. The Sanction Guidelines provide that a bar is the standard sanction for conversion.[118] There are no mitigating factors that could possibly justify a lesser sanction than a bar.

Cherry's Firm terminated him for a failure to cooperate with its investigation of his dealings with BD and DD. Cherry's termination does not render further discipline unnecessary or unfair. To the contrary, his failure to be forthcoming, coupled with the suspect nature of many of the documents that he proffered in his defense and his overall lack of credibility, persuade the Hearing Panel that Cherry lacks the integrity required to participate in the securities industry. Termination by one firm with the opportunity later to register with another is not a sufficiently remedial sanction to protect investors. A bar is required to prevent Cherry from re-entry into the securities industry.

The Sanction Guidelines suggest that adjudicators consider whether an individual has taken corrective measures[119] or has attempted to pay restitution.[120] Such conduct might show recognition of wrongdoing and remorse. Here, in contrast, Cherry portrays himself as unable to remedy the customers' loss because his wife has title to the house. He displays no consciousness of wrongdoing or remorse. He continues to rely on obstacles of his own making to prevent the customers he injured from recovering their money.

[118] Sanction Guidelines at 36.

[119] Sanction Guidelines at 6, Principal Consideration 3.

[120] Sanction Guidelines at 6, Principal Consideration 4.

Cherry's misconduct resulted in substantial harm to BD and DD,[121] who were unsophisticated investors who relied upon him.[122] When they asked for the return of their funds, he falsely portrayed himself as attempting to recover the funds from Equitable Strategies and tried to intimidate them by suggesting that they did not understand the difficulty he was having in dealing with Equitable Strategies.[123] He engaged in the misconduct for his own financial gain.[124]

Disciplinary sanctions must be significant enough to protect the investing public, both by deterring the individual respondent and by deterring others from such misconduct in the future.[125] Sanctions should be designed to improve the overall business standards in the securities industry and encourage investor confidence.[126] In this case, only a bar serves these overarching purposes.

Without question, Cherry should be barred.

The Sanction Guidelines also provide for restitution in appropriate cases. Restitution is a traditional remedy used to restore the *status quo ante* where a victim otherwise would unjustly suffer loss. Adjudicators may order restitution when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct. They are authorized to order

[121] Sanction Guidelines at 6, Principal Consideration 11.

[122] Sanction Guidelines at 7, Principal Consideration 19.

[123] Sanction Guidelines at 6, Principal Consideration 10.

[124] Sanction Guidelines at 7, Principal Consideration 17. *Otto v. SEC*, 253 F.3d 960 (7th Cir. 2001) (use of customer money for personal benefit was "unethical and reprehensible").

[125] *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry").

[126] Sanction Guidelines at 2, General Principles 1.

restitution from an individual violator even if a member firm has compensated the victim of the individual violator's misconduct.[127]

BD and DD suffered a loss of $474,000 of the principle they invested with Cherry, due to Cherry's conversion. They recovered $300,000 from Cherry's Firm in settlement of their arbitration claim. Their outstanding loss is $174,000. To restore BD and DD to the *status quo ante*, and fully repay their principle, Cherry should pay them $174,000 in restitution.[128]

The Sanction Guidelines further provide for disgorgement in appropriate cases. Disgorgement may be used to redress injuries suffered by customers or may be ordered to be disgorged to FINRA.[129] Disgorgement is a well-established equitable remedy that may be required to remediate misconduct where the respondent has obtained a financial benefit from the misconduct. It has been long held that a wrongdoer should not be permitted to retain ill-gotten gain derived, directly or indirectly, from the wrongdoing.[130]

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[127] Sanction Guidelines 4, General Principle 5.

[128] At first blush, it might be argued that BD and DD have received only $200,000 of their principle, not $300,000. This is because they ultimately retained only a portion of the $300,000 settlement. They paid their attorney $100,000 of their arbitration award as a contingency fee. Tr. (DD) 72-73.

However, it is incorrect to subtract the attorney's fee from the recovery BD and DD received in the settlement. A fraud victim's recovery is the amount awarded in a judgment or paid in a settlement. Whatever the fraud victim might decide to do with the funds recovered, and whatever the arrangement with an attorney who helped the victim obtain a recovery, the recovery is the same – it is the amount awarded or paid to the victim. *See generally United States v. Hoglund*, 178 F.3d 410, 414 (6th Cir. 1999), which explains that a settlement sum belongs to the client alone, and any contingency fee is a separate contractual matter.

[129] Sanction Guidelines 5, General Principle 6.

[130] *E.g., SEC v. Chetan Kapur, Lilaboc, LLC*, 2012 U.S. Dist. LEXIS 169784, at *6 (S.D.N.Y. 2012) (the primary purpose of disgorgement is "to deprive violators of their ill-gotten gains"); *SEC v. Credit Bancorp, Ltd.*, 2011 U.S. Dist. LEXIS 14797, at *2-5 (S.D.N.Y. 2011) (unlike restitution, which focuses on compensating investors for their losses, disgorgement is intended to force a wrongdoer to give up the amount by which he was unjustly enriched).

In this case, once Cherry has paid $174,000 as restitution to BD and DD, he will still retain $300,000 of the money he took from them. He should disgorge the remaining $300,000 of his ill-gotten gains to FINRA. [131]

B. Second Cause of Action: Undisclosed Outside Business Activities

The Sanction Guidelines recommend specific sanctions for violations of FINRA's Rules in connection with outside business activities.[132] When the outside business activities do not involve aggravating conduct, a suspension for up to 30 business days is appropriate. When the outside business activities involve aggravating conduct, a longer suspension of up to one year may be imposed. In egregious cases, even a bar may be imposed. A case may be found to be egregious if customers of the firm have suffered substantial injury relating to the misconduct.[133] A fine ranging from $2,500 to $50,000 may be ordered,[134] along with disgorgement.[135]

[131] Cherry engaged in willful fraud and deceit in violation of Section 10(b) of the Exchange Act, Rule 10b-5, and FINRA Rule 2020, as also alleged in the First Cause of Action. This securities fraud is an alternative basis for the sanctions imposed.

A bar is clearly warranted. No recommended sanction covers the specific type of securities fraud here. The Hearing Panel considers the Sanction Guidelines for false statements and misleading omissions to be appropriate guideposts, however, because false statements and misleading omissions are, like the misconduct here, violations of Section 10(b) and Rule 10b-5, as well as FINRA Rule 2020. The Sanction Guidelines provide that making false statements or misleading omissions may warrant a bar in egregious cases of intentional or reckless misconduct. Sanction Guidelines at 88. Cherry's misconduct was intentional and willful, and the Hearing Panel considers this an egregious case.
The General Principles and Principal Considerations (as discussed above) apply to sanction considerations in all cases and support the remainder of the sanctions, including restitution and disgorgement.

[132] Sanction Guidelines at 13.

[133] *Id.*

[134] *Id.*

[135] *Id.* at note 1; Sanction Guidelines 5, General Principle 6.

The Sanction Guidelines specify Principal Considerations that bear on the egregiousness of an outside-business-activity violation and the sanction that should be imposed. All five of those itemized considerations support the imposition of a bar in this case.[136]

First, the outside business activities in which Cherry engaged involved customers of his Firm. *Second*, the customers were injured as a result of Cherry's activities. *Third*, the dollar volume of "sales" was substantial. Cherry diverted close to half a million dollars to his outside business activities. *Fourth*, Cherry's marketing to BD and DD involved use of his Firm's marketing tools and created the false impression that he was selling products and services that his Firm had approved. *Fifth*, Cherry both misled his Firm about his activities (by making false disclosures about the Cherry Group and Equitable Strategies) and concealed his activities from the Firm (by making no disclosure at all about CAJ Marketing).

The Hearing Panel concludes that Cherry's violation of FINRA Rule 3270 (for conduct on or after December 15, 2010) and NASD Rule 3030 (for earlier conduct) was egregious and resulted in significant customer harm. The Hearing Panel concludes that many aggravating factors exist and that there are no mitigating factors. Accordingly, a bar is the appropriate sanction.[137]

V. ORDER

For the conversion and fraud violations alleged in the First Cause of Action (violations of FINRA Rules` 2150(a) and 2010, Respondent John Cherry III is barred from associating with any FINRA member firm in any capacity. He is further ordered to pay BD and DD restitution in the amount of $174,000 (along with pre-judgment interest on any unpaid balance, starting on

[136] *Id.*

[137] The Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.

December 1, 2010, the date when Cherry's interest payments ended, until paid in full). Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).[138] If this decision becomes FINRA's final disciplinary action, the bar will take effect immediately and the restitution shall be due in full on March 6, 2014. Cherry is also ordered to pay FINRA $300,000 in disgorgement. Disgorgement is due on the same date as the restitution is to be paid to the customers.

For the outside business activity violation alleged in the Second Cause of Action (violation of NASD Rule 3030 for conduct prior to December 15, 2010; and violation of FINRA Rules 3270 and 2010 for conduct on or after that date), Cherry is barred from associating with any FINRA member firm in any capacity.

In addition, Respondent is ordered to pay the costs of the hearing in the amount of $3860.71 which includes a $750 administrative fee and the cost of the transcript. The cost 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.

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Lucinda O. McConathy
Hearing Officer for the Hearing Panel

Copies to: John Cherry III (via electronic, overnight courier and first-class mail)
Gary E. Jackson, Esq. (via electronic and first-class mail)
Manuel Yanez, Esq. (via electronic mail)
James J. Nixon, Esq. (via electronic mail)

[138] The interest rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes and is adjusted each quarter.

BD and DD are identified in an addendum to this decision that is not public.