FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JAMES W. FLOWER (CRD No. 2817701), Respondent.	Disciplinary Proceeding No. 2017052701101 Hearing Officer–LOM **EXTENDED HEARING PANEL DECISION** May 27, 2021

Respondent, James W. Flower, excessively traded in five customer accounts in violation of FINRA rules regarding quantitative unsuitability. Respondent's misconduct rose to the level of churning because he traded for his own benefit, in reckless disregard of his customers' interests, while exercising de facto control of the accounts. In so doing, he acted in willful violation of federal securities laws. For the excessive trading and churning alleged in the First and Second Causes of Action, Respondent is barred from associating with any FINRA member in any capacity and ordered to pay restitution plus prejudgment interest.

Separately, Respondent effected 17 unauthorized trades in one customer's account in violation of FINRA Rule 2010. For the unauthorized trading alleged in the Third Cause of Action, Respondent is barred from associating with any FINRA member in any capacity and ordered to pay restitution plus prejudgment interest.

Finally, Respondent mismarked 58 transactions in various accounts as unsolicited, when they were in fact solicited. This misconduct caused his firm's books and records to be false and inaccurate in violation of FINRA rules. For this misconduct, alleged in the Fourth Cause of Action, Respondent is barred from associating with any FINRA member in any capacity.

Appearances

For the Complainant: Robert Kennedy, Esq., Michael Perkins, Esq., Adam Balin, Esq., Matthew Minerva, Esq., and Kay Lackey, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: James Flower, *pro se*

DECISION

I. Introduction

Respondent, James W. Flower ("Flower"), was a registered representative with SW Financial ("SW Financial") during the relevant period, from January 1, 2016, through July 31, 2018. He is now registered with another FINRA member firm. Although he is in New York, he generates business by cold calling people all over the country, focusing primarily on older customers who are small business owners and retirees.

The five customers involved in this case resided in Louisiana, Maryland, Oklahoma, and Texas when they started working with Flower. They ranged in age from mid-fifties to late seventies. Four of the customers own small businesses; the fifth is a retired aircraft maintenance worker.

A. Violations

1. First and Second Causes of Action

We find that Flower engaged in excessive trading and churning in five customers' accounts. There were multiple signs of excessive trading, and Flower exercised de facto control over the accounts for his own benefit in reckless disregard for his customers' interests.

Flower repeatedly turned over or replaced all the securities in the accounts with new securities. The annualized turnover rates were high, ranging from 16 to 33. According to the Securities and Exchange Commission ("SEC"), an annualized turnover rate of six is presumptively excessive.

The resulting annualized cost-to-equity ratios were also high, ranging from 69% to 176%. The high cost-to-equity ratios meant that the customers would have to make back a large amount of money (sometimes more than the cash value in the account) to cover their expenses and break even. They could make no profit until the expenses were covered. The high cost-to-equity ratios made it virtually impossible that the accounts could be profitable. The threshold ratio signaling excessive trading is generally 20%.

Flower also engaged in what is known as in-and-out trading in the accounts, buying and then selling the same stock in a matter of a few days. The SEC has described in-and-out trading as a hallmark of excessive trading. Although the accounts were relatively small (ranging from an average funded equity value of less than $4,000 to roughly $70,000), Flower purchased more than $5 million in securities in the five accounts by using margin, causing the customers to incur more costs while allowing him to trade a larger volume of securities and charge more commissions.

Although the accounts were non-discretionary, Flower exercised de facto control over them. One customer even told Flower directly that he should decide what should be done in the account. Flower called the customers frequently, sometimes weekly, to discuss selling a position or purchasing a new security. The customers consistently accepted his recommendations and guidance and never offered an independent investment idea of their own. They were unsophisticated investors. None of them had actively traded securities before; none of them tracked what was happening in their accounts in any meaningful way; and none of them had much of an understanding about the way securities brokers are paid or, in particular, how Flower was paid. They had no idea of the costs they were incurring from the frequent trading and use of margin in their accounts. Their lack of investment sophistication would have been obvious to Flower in his telephone conversations with them.

In fact, Flower discouraged the customers from trying to understand what was going on in their accounts. When customers received letters from SW Financial intended to alert them to the frequent trading in their accounts and the potential negative effect it could have on their accounts, Flower characterized the letters as "standard stuff" and mere "housekeeping" that they should just sign and return. And that is what they did, without understanding that the letters were red flags.

Flower traded in reckless disregard for his clients' interests and for his own benefit. The trading decimated the value of the customers' accounts and destroyed the aircraft maintenance worker's retirement security. During the relevant period, the five customers together suffered realized losses (including all trade costs, fees, and margin interest) totaling roughly $223,000. During the same period, Flower charged commissions on the trading in the five accounts of nearly $185,000, of which he received 70%. Although Flower handled 149 accounts during the relevant period, he made a third of his commissions from these five customer accounts.

2. Third Cause of Action

Flower did not seek the required prior authorization from the retired aircraft maintenance worker for 17 trades. Flower engaged in all but one of those trades while the customer was experiencing serious medical issues that interfered with his daily living. The trading resulted in more than $30,000 in market losses. This misconduct aided Flower's excessive trading and churning and further demonstrates his de facto control of the account.

3. Fourth Cause of Action

Flower mismarked 58 sales in various accounts as unsolicited, when in fact the trades were solicited. As his own testimony revealed, he prompted the customers to act. The trades occurred only after he called his customers to tell them a stock in their portfolio was losing value, to suggest that there was a profit to be taken, or to recommend a purchase that would require the sale of an existing position. Most of the purported unsolicited trades were sales at a loss. The mismarking of the sales as unsolicited made it seem that the customers had chosen to take the losses and helped obscure Flower's excessive trading and churning. This misconduct caused SW Financial's books and records to be false and inaccurate.

B. Sanctions

Flower testified that the way he conducted business with the five customers in this case is the way he conducts business today at the broker-dealer firm where he is now registered. He sees nothing wrong with the trading he conducted in the five customers' accounts. To the extent the customers did not understand the trading in their accounts, Flower lays the blame on their "negligence."

Considering Flower's testimony, the seriousness of the misconduct, and various aggravating factors, the Extended Hearing Panel has no confidence that Flower would conduct his business in the future in a fair and ethical way and in compliance with the applicable legal and regulatory requirements. He is a serious risk to the investing public. As discussed in more detail below, for his excessive trading and churning, we bar him from association with any FINRA member firm and order him to pay the customers' trading costs as restitution, along with prejudgment interest. We separately sanction him for unauthorized trading and for mismarking trades as unsolicited when they were solicited. We also impose costs.

C. Statutory Disqualification

We find that Flower's churning was a willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. As discussed below, by operation of the Exchange Act, Flower is subject to a statutory disqualification.

II. Findings

A. Procedural History

Due to the COVID-19 pandemic, and by agreement of the parties, the six-day hearing was conducted on January 19–22, and January 25–26, 2021, by videoconference. A court reporter transcribed the proceeding. An Extended Hearing Panel composed of the Hearing Officer and two industry panel members heard and viewed the evidence at the hearing and reviewed the evidence afterward in deliberating and formulating this decision. Flower and the five customers involved in this case testified, along with three members of FINRA's staff.[1] This decision is based on careful, thorough study of the entire record.

[1] The hearing testimony is referred to with the prefix "Tr." followed by the individual's name or initials in parentheses and then the identifying pages. For example, Respondent's testimony is cited as follows: Tr. (Flower) 218. In addition to Respondent (Tr. 218–379, 399–541, 1208–49), the following people testified: LJW (a customer in Maryland who runs an IT contracting firm) (Tr. 543–707); MK (a customer in Tulsa, Oklahoma, who runs a tax consulting firm) (Tr. 727–835); DT (a customer in Texas who runs an air conditioning company) (Tr. 841–926); WN (a customer retired from working in aircraft maintenance who moved from Texas to New Mexico) (Tr. 975–1069); BW (a customer in Louisiana who runs a building contractor business) (Tr. 1076–1173); EW (a FINRA principal investigator in Enforcement) (Tr. 52–215); CD (a FINRA examiner in the unit that investigates high-risk

B. Respondent

1. History in Securities Industry

Flower entered the securities industry in September 1997 and has been registered with various FINRA member firms since then.[2] In late 2015, he left Laidlaw and Company (UK) LTD ("Laidlaw") and joined Salomon Whitney Financial, which became SW Financial. He was registered as a General Securities Representative with SW Financial until the beginning of June 2019.[3] While he worked with SW Financial, he was located in Farmingdale, New York.[4] The alleged misconduct occurred from January 2016 through July 2018.[5]

Currently, Flower is a registered representative with another FINRA member firm, Spartan Capital Securities, LLC ("Spartan"), and holds Series 7 and Series 63 licenses. He works at a Garden City, New York, branch of Spartan.[6]

2. Respondent's Regulatory History and Financial Troubles

Flower had no customer complaints or regulatory actions against him for the first 13 years he was in the industry. But after that he was the subject of three customer claims and a regulatory suspension. Those resulted in financial difficulties that gave him an incentive to boost his compensation through excessive trading and churning.

In December 2010, Flower was served with a customer arbitration claim that complained he had misrepresented the characteristics and risks of multiple purchases of an ETF (an exchange-traded fund), misrepresented the use of margin, and failed to execute a stop loss order. Flower paid $67,500 to settle the case.[7]

In September 2015, two customers filed separate arbitration claims against Flower while he was registered through Laidlaw. One claim was for $90,000. It alleged churning and

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registered representatives) (Tr. 933–57); and TH (a FINRA examiner who conducts examinations to identify high-risk registered representatives) (Tr. 1176–86).

Exhibits are identified by a prefix (CX for Complainant's exhibits and JX for joint exhibits) and a unique document number. Respondent submitted no exhibits. Joint stipulations are referred to by the abbreviation "Stip." and a unique identifying number for each paragraph. The first stipulation, for example, is "Stip. ¶ 1." Enforcement's pre-hearing brief is referred to as "Enf. Br." Respondent's pre-hearing brief is referred to as "Resp. Br." There were no post-hearing briefs.

The Amended Complaint is referred to as "Am. Compl." and the Answer is referred to as "Ans."

[2] CX-12, at 17; Stip. ¶ 3.

[3] CX-12, at 4, 5, 18; CX-13; Tr. (Flower) 240; Stip. ¶ 3.

[4] CX-12, at 18.

[5] Am. Compl. ¶ 1.

[6] Tr. (Flower) 219–20, 227; CX-12, at 3–4, 27.

[7] Tr. (Flower) 1208–09; CX-12, at 34–36.

unsuitability from May 2014 to July 2015.[8] The other claim was for $250,000. It alleged, among other things, excessive use of margin and churning from November 2014 to March 2015.[9] Laidlaw retained counsel and settled the smaller arbitration case for $45,000.[10] The firm then reduced Flower's compensation so that he received only 50% instead of 70% of the commissions he charged.[11] "So it was pretty much taking no paycheck home," Flower testified at the hearing, "because the firm would strip any type of earnings or commission I had towards the $45,000, as well as the attorney fees."[12]

Because his firm was withholding some of his commission earnings, Flower fell into financial difficulties. "Several months went by, I was earning no money and I decided after speaking and counseling with a bankruptcy attorney, to file bankruptcy in January of '16, January 14th of 2016."[13] Flower testified that he could not pay his bills and had no other choice than to file for bankruptcy only a month after joining SW Financial.[14] The bankruptcy proceeding stayed the second customer's arbitration case and no hearing was ever held.[15]

While he was at SW Financial, and during the relevant period in this case, Flower continued to have problems. He entered into an Acceptance, Waiver, and Consent ("AWC") in which he consented to the entry of findings that he had recommended an exchange-traded note to 13 customers without having a reasonable basis for the recommendation. The customers lost more than $249,000. Flower was suspended for three months and ordered to take continuing education on complex products. His suspension ran from July 3, 2017, to October 2, 2017.[16]

During his suspension, Flower gave on-the-record ("OTR") testimony on July 25, 2017.[17] After Flower returned to SW Financial following his suspension, the firm put him on heightened supervision.[18] Flower testified at another OTR on February 12, 2019.[19] The Complaint in this case was filed on April 10, 2020, and the First Amended Complaint was filed on January 13, 2021. The Amended Complaint removed certain transactions from the charges; no new Answer was required.

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[8] CX-12, at 37–39.

[9] CX-12, at 36–37.

[10] Tr. (Flower) 1209–10; CX-12, at 36–39.

[11] Tr. (Flower) 1209–10.

[12] Tr. (Flower) 1210–11.

[13] Tr. (Flower) 1211.

[14] Tr. (Flower) 1208–12.

[15] Tr. (Flower) 229, 1211–12; CX-12, at 36–37.

[16] Tr. (Flower) 375; CX-12, at 42–44.

[17] Tr. (Flower) 259.

[18] Tr. (Flower) 1213.

[19] Tr. (Flower) 259.

C. Jurisdiction

FINRA has jurisdiction to bring this case against Flower because he was registered with FINRA through SW Financial at the time of the alleged misconduct, and Enforcement filed the Complaint while he was associated with another FINRA member firm, Spartan. FINRA retains jurisdiction to commence a disciplinary proceeding against a person associated with a FINRA member firm for two years after the person's association and concomitant registration have ended, if the complaint is based on alleged misconduct that occurred while the person was associated with a FINRA member.[20]

D. Origin of Proceeding

A FINRA unit that conducts examinations to identify high-risk registered representatives did a high-risk exam of Flower's activities in 2017 because it appeared that he had done a lot of trading in only a few accounts to achieve his commissions. FINRA Examiner TH conducted the exam, which covered Flower's trading in the accounts of 13 customers from January 1, 2016, through February 28, 2017.[21] In connection with that exam, TH spoke to four of the customers involved in this case, LJW, MK, DT, and BW, and took Flower's testimony. Afterward, TH referred those four customers' accounts to Enforcement to review for excessive trading.[22]

FINRA Examiner CD, who works in a FINRA unit that investigates high-risk registered representatives, conducted another examination of Flower's activities in 2018 that focused on excessive trading in 2017 and 2018.[23] CD gathered information to determine if there was potential excessive trading. If he calculated a cost-to-equity ratio of more than 20% or a turnover rate of more than 6%, he would look at the relevant investor profiles and communicate with the customers to see whether they understood the trading in their accounts and the commissions charged, as well as whether they had authorized the trading. He also sought information from Flower.[24] In the course of the investigation, CD learned that both excessive trading and unauthorized trading may have occurred in WN's account. CD referred the potential violations to Enforcement.[25]

E. Summary of Excessive Trading and High Costs in the Five Customer Accounts

EW, a principal investigator with Enforcement, reviewed voluminous data and compiled information regarding the trading in the five accounts in 11 summary exhibits, CX-1 through

[20] FINRA By-Laws, Article V, Section 4.

[21] Tr. (TH) 1176–86.

[22] Tr. (TH) 1185–86.

[23] Tr. (TH) 1186; Tr. (CD) 936–37, 943, 945.

[24] Tr. (CD) 941, 943, 945–50.

[25] Tr. (CD) 949–51.

CX-11.[26] He testified regarding the sources of the information shown in the summary exhibits and the care he took in creating them. He also explained the significance of items like the annualized cost-to-equity ratio and turnover rate.[27] We find his testimony credible and the summary exhibits helpful to our consideration of the charges. We have no reason to doubt, nor does Respondent dispute, the reliability of the numbers in those exhibits.

One of the exhibits EW created, CX-1, is a summary of Flower's trading in the five customer accounts and the rewards he reaped from it. Flower traded in the five customer accounts frequently, which was expensive for the customers but lucrative for Flower. The customers collectively incurred more than $210,000 in trade costs. Almost $185,000 of those costs were commissions. The trading gained the customers nothing. During the roughly 30-month relevant period, the customers suffered more than $223,000 in realized losses.[28]

With respect to each customer account, CX-1 shows the following:

- During 20 months from December 2016 to July 2018, Flower executed 174 trades in WN's account and purchased almost $3.7 million in securities. The total trading costs were $111,688. Commissions made up the bulk of those costs at $101,806. WN opened the account with approximately $191,000 in assets transferred from a Merrill Lynch investment advisory group called Fisher Investments.[29] During the 20 months Flower handled the account, however, the account steadily lost value and had an average funded account equity of only $70,000.[30]

- During 30 months from February 2016 to July 2018, Flower executed 100 trades in LJW's account and purchased $875,705 in securities. The total trade costs were nearly $35,000, of which commissions accounted for $28,881. The average funded account equity was only $18,801.[31]

- During 28 months from April 2016 to July 2018, Flower executed 90 trades in DT's account and purchased $947,256 in securities. The total trade costs were $35,749, of which commissions accounted for $31,010. The average funded account equity was only $24,644.[32]

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[26] Tr. (EW) 58–59, 69–72.

[27] Tr. (EW) 62–93.

[28] CX-1, at 1.

[29] JX-38, at 5; Tr. (WN) 1011–16.

[30] CX-1, at 1; JX-38, at 5.

[31] CX-1, at 1.

[32] CX-1, at 1.

- During 15 months from January 2016 to March 2017, Flower executed 64 trades in MK's account and purchased $528,334 in securities. The total trade costs were $20,084, of which commissions accounted for $16,473. The average funded account equity was only $13,658.[33]

- During 16 months from March 2016 to June 2017, Flower executed 38 trades in BW's account and purchased $173,575 in securities. The total trade costs were $8,599, of which commissions accounted for $6,354. The average funded account equity was only $3,883.[34]

Given the small average funded account equity in these accounts, Flower would not have been able to trade frequently on a cash basis. Flower used margin in all the accounts to trade a much larger volume of shares than he otherwise would have been able to do.[35]

EW also conducted an analysis of the turnover rates in the accounts and the cost-to-equity ratios and placed the results of that analysis in CX-1. He explained that the turnover rate is a measure of how many times a portfolio of securities is turned over or replaced during a given year. It is calculated by taking total purchases and dividing by the average monthly account equity. The cost-to-equity ratio is a comparison of the total expenses incurred by an account to the average monthly account equity. He said that it is also sometimes called a break-even analysis because it indicates how much an account must appreciate in a given year to cover expenses and break even.[36]

CX-1 shows the following for each account.

- The annualized turnover rate for WN's account was 31.59. The cost-to-equity ratio—or break-even point—was 103.49%.

- The annualized turnover rate for LJW's account was 18.63. The cost-to-equity ratio was 81.35%.

- The annualized turnover rate for DT's account was 16.47. The cost-to-equity ratio was 69.69%.

- The annualized turnover rate for MK's account was 30.94. The cost-to-equity ratio was 125.39%.

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[33] CX-1, at 1.

[34] CX-1, at 1.

[35] CX-1; JX-3; JX-9; JX-24; JX-31; JX-32; JX-39.

[36] Tr. (EW) 62–63.

- The annualized turnover rate for BW's account was 33.52. The cost-to-equity ratio was 176.70%.

EW identified a pattern of in-and-out trading in the five accounts. He compiled a chart, CX-7, showing some trades where Flower executed a purchase and then sold the same stock within a week or so, often for a loss. These trades did not benefit the customers, but they did benefit Flower.

For example, Flower bought 5,000 shares of Advanced Micro Devices Inc. in WN's account on November 13, 2017, but then sold all the shares two days later, on November 15, 2017, for a realized loss of $2,668. He similarly bought 1,000 shares of Cirrus Logic Inc. in WN's account on November 13 and then sold those shares on November 15, for a realized loss of $3,293. For each of those purchases, Flower charged a commission of $1,300. On November 17, he bought 1,250 shares of Cirrus Logic again—even though he had sold it for a loss only two days before—and charged a commission of $1,650. A little over ten days later, on November 28, Flower sold the shares of Cirrus Logic for another loss of $2,756.48. Despite the loss, he charged a commission of $625.[37] This trading suggests no purpose other than to generate commissions for Flower.

Even where a sale resulted in a small profit, total trade costs could exceed the profit. For example, Flower bought OPKO Health Inc. in BW's account on March 14, 2016, and then sold it on March 22, 2016, for a profit of $140.76. But total trade costs for the purchase were $159 and total trade costs for the sale were $159, for a total of more than $300. The trade costs for each transaction included a $100 commission and other fees.[38] Regardless of whether Flower charged a commission, and regardless of whether the customer bought or sold a security or made a profit, the firm charged a $59 fee on every transaction.[39] The customer might think it a profitable trade unless he analyzed the costs involved, which, as discussed below, neither BW nor any of the other customers did.

While Flower did not always charge a commission on a sale, he did charge commissions on all the purchase transactions identified in CX-7, generally around 2.5%.[40] So a purchase followed by a sale a few days later to fund the purchase of a new stock would benefit Flower even if he did not charge a commission on the sale, because he would charge a commission on each new purchase.

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[37] CX-7, at 1.

[38] CX-7, at 1.

[39] Tr. (Flower) 253, 279–80.

[40] CX-7.

F. Respondent's Benefit from the Excessive Trading

While working at SW Financial, Flower was compensated by commissions (including markups and markdowns) on his trading. He was entitled to 70% of all gross commissions earned in a monthly pay period and had the possibility of earning additional payouts as well.[41] He determined whether a trade would be executed on an agency basis or principal basis, and he determined the amount of a markup, markdown, or commission.[42]

CX-11 summarizes EW's analysis of the total benefit Flower obtained from the frequent trading in the five accounts. During the relevant period, the five customer accounts at issue represented 3.36% of the accounts he managed and 34.09% of his commissions. He had 149 accounts total, which yielded total commissions during the relevant period of $541,293. But the five customer accounts involved in this case accounted for $184,525 of the commissions he charged.[43] The frequent trading in the five accounts benefited Flower disproportionately compared to his commissions on other accounts he handled, as he had to have known.

Furthermore, the commissions Flower charged on these five accounts were high even compared to his total assets under management. During the relevant period, he had approximately $2 million in assets under management.[44]

G. Respondent's De Facto Control over the Five Customer Accounts

As detailed below, the customers all testified that they liked Flower and trusted and relied on him. He inspired their confidence by presenting himself as knowledgeable and successful in the stock market and expressing empathy for their medical problems and past unhappy experiences investing with other brokers.

We find that they were unsophisticated investors who were easily manipulated by Flower. They consistently followed Flower's recommendations and guidance, and they never came to him with independent investment ideas for him to execute. They did not understand how much they were being charged for the trading in their accounts and were unaware of the extent to which Flower was using margin in their accounts. Most of them did not look at their statements and confirmations, and, even when they were shown the documents at the hearing, they often did not understand them.

We further find that it would have been obvious to Flower from his conversations with the five customers that they relied on him and did not independently analyze the trading in their

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[41] Tr. (Flower) 242; CX-13, at 10.

[42] Tr. (Flower) 252–54.

[43] CX-11. *See also* CX-1.

[44] Tr. (Flower) 515.

accounts. He had de facto control over the accounts, and he knew it. He exercised it to trade frequently for his own benefit and in reckless disregard for his customers' interest.

1. Customer LJW

a. Background

Flower cold called LJW in January or February 2016.[45] On February 10, 2016, LJW opened an individual non-discretionary account at SW Financial with Flower as the broker of record. Between February 2016 and late July 2018 (except during his three-month suspension from the beginning of July through September 2017), Flower serviced the account.[46]

LJW was born in 1962 and was in his mid-fifties when Flower first contacted him. He lives with his wife in Maryland and runs an IT contracting firm. The firm, which he started in 2004, provides services to the federal government.[47] He has a bachelor's degree from Rutgers University and has taken some post-graduate computer and professional courses.[48] When LJW first spoke to Flower, he was responsible for private school tuition for his three children, who were in high school and college.[49] His average salary as a government contractor was $132,000, although it sometimes fluctuated between zero and $200,000.[50]

When Flower first called him, LJW's previous securities investing experience was limited. He was working with another broker who had cold called him a few months before, in October or November 2015.[51]

b. Establishment of Account

In their initial conversation, Flower and LJW talked for a half-hour or so.[52] Flower asked LJW "to give him a chance,"[53] and promised "to do right by" him.[54] He left LJW with the impression that he had a research team that generated ideas about good stocks to buy and various contacts who added to his insights.[55] In fact, unknown to LJW, Flower gathered his investment

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[45] Tr. (LJW) 553–54; Tr. (Flower) 266.

[46] Stip. ¶¶ 17–19.

[47] Tr. (LJW) 549–54; Tr. (Flower) 266.

[48] Tr. (LJW) 551–53.

[49] Tr. (LJW) 560, 563–64, 580, 677.

[50] Tr. (LJW) 563, 577, 677.

[51] Tr. (LJW) 554–60.

[52] Tr. (LJW) 558.

[53] Tr. (LJW) 558.

[54] Tr. (LJW) 556.

[55] Tr. (LJW) 553 (Respondent "said he had some good stocks that he and his research team were very high on."); 558 ("[H]e had a research arm behind him."); 564 ("[H]e talked about having this research, a bunch of research

ideas from public sources like Motley Fool and conversations with other brokers. There was no research team.[56]

Flower asked for LJW's background. LJW responded in a way that revealed some naivete about securities trading. LJW emphasized that he did not have a lot of money to invest and did not want to take a lot of risk. But he did want an investment return better than he might achieve with a conservative investment. He told Flower,

> I don't have a lot of access to funds. So I'll give you money that I am ready, willing to kind of invest with. But I don't want to get calls, I don't want to have to add more money in. I don't want to chase anything. I don't want to have a lot of risk. Again in my mind, it was just something kind of learn, the stock stuff, get some appreciation, more than just putting it in a mutual fund.[57]

He added that he "wanted to stay with stocks that covered known brands that didn't have a downside."[58] LJW reiterated, "I spoke very clearly in terms of either not having a lot of level of risk and having the [price] range between five and $20 per stock transaction."[59] LJW told Flower, "I am new at this."[60] "[T]his is, you know, just a step in to get familiar with stocks and so forth."[61]

LJW found Flower "very convincing"[62] and "wanted to give [him] a shot based on that."[63] Shortly after their initial conversation, LJW opened an account with Flower at SW Financial.[64] He funded the account with a small investment that he remembered as around $3,000[65] "to see where [his] money would go."[66] "I didn't have a lot of money to invest," he

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analysts at the firm behind him. He had these contacts."); 565 (Flower told LJW, "I will come to you with things that are based on information from my research team or meetings [I] attend[].").

[56] Tr. (Flower) 250–51.

[57] Tr. (LJW) 561.

[58] Tr. (LJW) 557.

[59] Tr. (LJW) 581.

[60] Tr. (LJW) 586.

[61] Tr. (LJW) 589.

[62] Tr. (LJW) 681.

[63] Tr. (LJW) 681.

[64] Tr. (LJW) 573–74; JX-1, at 2–7.

[65] Tr. (LJW) 553–54, 558–59.

[66] Tr. (LJW) 554.

acknowledged, "but I wanted to do something to see."[67] "I told him on my first day . . . I am going to play with the money that is in the account."[68]

Flower made it seem like the first trade would be a low-cost experiment. He did not charge a commission on the first trade in the account opened by LJW. The only cost was SW Financial's standard fee of $59.[69]

The account opening documents arrived pre-populated with information. LJW testified that many of the items were not filled out accurately, including his annual income, net worth, and liquid net worth. LJW thought that the inflated values were someone's effort to impress SW Financial with his potential as a client. The documents also misrepresented his investment experience as more substantial than it was. He signed the document without talking with Flower about the discrepancies or about what it meant to check the box for speculative investing.[70] "[I]t was all filled in and I probably was just signing it and getting it off my desk."[71] LJW did not understand that the inaccurate information would enable Flower to trade in a different way than he would if the correct information had been entered. "I didn't think it would translate how he would handle my account."[72]

c. Establishment of Margin in the Account

LJW had no prior experience with margin,[73] but he signed a margin agreement on February 10, 2016, when he opened the account. Flower did not discuss with him the use of margin or its potential benefits and risks. They did not discuss the interest rate that would be paid for margin. Nor did they discuss maintenance calls or margin calls. LJW never had a conversation of any kind with Flower about margin.[74] LJW just saw the margin document as part of a whole package for him to sign to open the account and do the initial trade. He had no understanding of margin at the time and did not read the papers before he signed them.[75]

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[67] Tr. (LJW) 557.

[68] Tr. (LJW) 620.

[69] Tr. (Flower) 278–80.

[70] Tr. (LJW) 573–89, 683–84; JX-1.

[71] Tr. (LJW) 582.

[72] Tr. (LJW) 589.

[73] Tr. (LJW) 698–700.

[74] Tr. (LJW) 593–96, 639, 698–700; JX-1, at 17–19.

[75] Tr. (LJW) 593–95.

d. LJW's Telephone Calls with Respondent

Flower only communicated with LJW by telephone, and it was always Flower who called LJW. LJW never called Flower.[76] They talked as often as two or three times a week.[77]

Flower portrayed his recommendations as based on research and high-level contacts with the companies he was trading. LJW described the typical conversation this way: "He never said hey, I have a hunch. He came to me and said my research team did this. We met with the CFO of this company. I think we should make a buy. I think there will be an upside here."[78] Flower conveyed a sense that he had the kind of access and knowledge that his customer did not. He would say that he "ha[d] a good relationship with the CFO or CEO of the company,"[79] or he would call LJW and say, "I just came from a board meeting or a management shareholder meeting and I think this new stock is going to take off."[80] Or he might say, "[M]y research team came up with a buy recommendation and I want to get you in early to make up for some stock we lost before."[81]

Often, Flower expressed a sense of urgency when he called to recommend the purchase of a particular stock. "There was always a reason why I had to buy today," LJW testified.[82] "There was always some reason, an assortment of reasons why at that moment to do it."[83] "It was either to get me into a stock or out of a stock."[84] "[H]e never called with a status. It was always a reason to buy or get out of a stock."[85] LJW described how Flower created a sense of urgency: "[He might say] I have a stock that is going to, it is a hot stock. It is going to appreciate. I think it is going to go 30 or 40 percent over the next 35, 60 days."[86]

LJW was trying to limit his investments to the money that was in the account.[87] Because he resisted adding money to the account, frequently the only alternative was to sell an existing position to raise money for the purchase of the new stock.[88] Flower often recommended that

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[76] Tr. (LJW) 603.

[77] Tr. (LJW) 599, 603, 609.

[78] Tr. (LJW) 599.

[79] Tr. (LJW) 634.

[80] Tr. (LJW) 603–04.

[81] Tr. (LJW) 603–04.

[82] Tr. (LJW) 624.

[83] Tr. (LJW) 632.

[84] Tr. (LJW) 604.

[85] Tr. (LJW) 652.

[86] Tr. (LJW) 694.

[87] Tr. (LJW) 631–32.

[88] Tr. (LJW) 631–33.

LJW sell one security to purchase another.[89] For example, Flower urged LJW to buy shares in a fund called Cornerstone Strategic Value Fund, Inc. In order to do that, Flower suggested that LJW sell stock in a company called Prospect Capital Corp.[90] "There was a purchase of stock . . . that he wanted to get me into that new stock," LJW said, "and I was unwilling to put money into the account. And the only way he could get me to buy into the new stock, is if we sold the existing stock."[91] He had purchased Prospect Capital for the account just the month before, on May 16, 2016, on a riskless principal basis. LJW explained that he would not have sold the existing position "if it wasn't that Mr. Flower expressed that there was a timing, a sense of urgency why we had to buy the new stock, get in to the new stock."[92] On June 22, 2016, Flower sold Prospect Capital out of the account and purchased Cornerstone.[93] He marked the sale of Prospect Capital as unsolicited, even though he had persuaded LJW to sell the stock in order to buy Cornerstone.[94]

Flower charged a markup of $840 when he purchased 3,000 shares of Prospect Capital on May 16, 2016, which was more than 3.5% of the principal amount of the transaction. While he charged no commission on the sale of Prospect Capital, he charged a commission of $750 on the purchase of Cornerstone to replace Prospect Capital, which amounted to roughly 3.5% of the principal amount of that transaction.[95] LJW did not track costs incurred from the trading in his account,[96] and he did not know that he was charged a markup or understand what a markup was.[97] As a result, he had no idea that within a little more than a month he had paid more than 7% to buy and then replace his investment in Prospect Capital with Cornerstone.

e. LJW's Trust in Respondent

LJW had "blind trust" in Flower.[98] Flower cultivated his trust by appearing to put the customer's interest ahead of his. LJW testified that whenever Flower told him that he was going to take a loss on a sale of stock, "typically he would say well, I'm not going to charge you

[89] Tr. (LJW) 622.

[90] Tr. (LJW) 619–21; Tr. (Flower) 289–91.

[91] Tr. (LJW) 620.

[92] Tr. (LJW) 620–21; CX-4, at 1.

[93] CX-4, at 1; JX-4, at 243, 245.

[94] CX-9, at 1; JX-4, at 243.

[95] JX-4, at 1, 243, 245, 255; Tr. (LJW) 615–18.

[96] Tr. (LJW) 609, 615–18.

[97] Tr. (LJW) 612–17.

[98] Tr. (LJW) 599.

commission on this."[99] Flower told LJW that by forgoing his commission on a sale he would make LJW "whole" and "[i]t will make it up."[100] LJW testified,

> I am pretty sure every time he lost me money on a transaction which he recommended, okay, no broker fee. I'll get you out, I will get you into something else. . . . So we moved in to a stock he recommended that was safe, that was steady. That had no downside. That was typically the dynamic that occurred. If he made a recommendation that went way south than he expected, then he would offer no broker fee and try to get me into a safe stock to make that money back up, so we could do more hunting later.[101]

Flower typically told LJW that he wanted to sell stock because it was "not moving." He would say, "[L]et me get you out. Don't worry no commission. I'll get you in to the other stock, it will have more upside."[102]

LJW did not find it surprising that Flower sold stocks on the same day he bought stocks in the account.

> [T]here [were] many times where we sold stocks the same day to purchase stock. So to me that is very consistent with the conversations that Mr. Flower and I had at the beginning, which is don't keep coming to me asking me for new money to put in. . . . If you are hot on one stock today and hot on another stock tomorrow, you need to move money from that existing fund.[103]

Flower told LJW, "I have a stock that is going to move quicker."[104] LJW did not focus on the fact that Flower received a commission on the purchase of each new stock.

Until LJW learned about Flower's disciplinary history in March or April 2018, he relied "100 percent" on Flower about what securities to purchase and when.[105] He also relied on Flower 100 percent for what securities to sell.[106] LJW considered Flower the "expert."[107] He thought Flower was "very compelling."[108] He also thought he was receiving well-informed

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[99] Tr. (LJW) 622.

[100] Tr. (LJW) 622.

[101] Tr. (LJW) 644–45.

[102] Tr. (LJW) 623.

[103] Tr. (LJW) 596.

[104] Tr. (LJW) 652.

[105] Tr. (LJW) 604–05.

[106] Tr. (LJW) 605.

[107] Tr. (LJW) 606.

[108] Tr. (LJW) 625.

recommendations. When Flower called LJW, "It was always hey, my guys are following this stock for a while. I just met with the CFO. I just had lunch with other investors going in. My research team has been following it, we feel really strong about this stock."[109]

LJW did not conduct his own research to purchase securities for his account,[110] but a few times during the two years LJW worked with Flower, LJW "would say hey, this stock is doing well, why do you want to get out."[111] Flower would say "oh, I have something else that will give us a faster return,"[112] or he would say "I tell you what, I could buy you a cheaper stock, get you more leverage and that would have the same upside."[113] Occasionally, one of LJW's friends might make a comment to him about Facebook or Apple stock going up, and LJW might ask Flower about it. LJW said, "[Flower] would come back and remind me what I said at the first introductory meeting, that stock is too expensive. You won't get much upside on that. You will get some percentage growth. But that stock is too expensive based on what you communicated to me."[114] LJW testified that he might delay acting on a recommendation from Flower,[115] but "10 times out of 10 I said, okay, just make it happen."[116]

LJW never called Flower to say he wanted to buy or sell a stock.[117] In the end, LJW said, "I deferred to him."[118]

f. LJW's Understanding of Charges for Trading

LJW had little understanding of how he would be charged for trading in the account. Flower did not discuss commissions, markups, markdowns, or any other type of charges with LJW.[119] LJW did not know what the terms markup or markdown mean except in the context of going to a retail mall.[120] LJW assumed that Flower would receive a commission of 1 to 2% on any buy or sell, for a total of 2 to 4%.[121]

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[109] Tr. (LJW) 606–07.

[110] Tr. (LJW) 607.

[111] Tr. (LJW) 605.

[112] Tr. (LJW) 605.

[113] Tr. (LJW) 606.

[114] Tr. (LJW) 608.

[115] Tr. (LJW) 624–26.

[116] Tr. (LJW) 626.

[117] Tr. (LJW) 611.

[118] Tr. (LJW) 608.

[119] Tr. (LJW) 566–67, 614.

[120] Tr. (LJW) 614.

[121] Tr. (LJW) 617–18.

Flower, however, executed many of the trades on a riskless principal basis, where the charges were folded into the purchase price and not broken out as commissions, the way they would be done on an agency basis. If a trade was done on an agency basis, the trade confirmation showed the principal (number of shares multiplied by price), SW Financial's standard fee or commission, and—clearly and separately labeled—the commission on the transaction.[122] On a riskless principal trade, the confirmation sent to the customer would show for each transaction the quantity of shares, the price paid (or received in a sale) by the customer, and SW Financial's standard $59 fee, along with the date, the security description and other information. Below this information, the confirmation would indicate that the introducing broker was acting "as principal for you and your account." Below that, under the heading "Special remarks for this transaction," the confirmation specified "Riskless Principal," and "Reported Price," and, finally, "Commission Equivalent" with a cash figure "per share."[123] A customer would have to understand that the price he paid or received for the stock actually included an addition or subtraction separate from SW Financial's flat $59 fee. He also would have to understand that he had to figure out the charge by multiplying the "Commission Equivalent" number by the number of shares involved in the transaction.

LJW did not understand the confirmations and never did the arithmetic required to know what he was being charged.[124] LJW had, and still has, no idea what riskless principal means or what agency basis is. Flower never walked him through a trade confirmation to show him about the meaning of these terms.[125] When shown the difference between a trade confirmation for a trade done on a riskless principal basis and one done on an agency basis, LJW characterized the charge on the riskless principal transaction as "hidden."[126] He was unaware of how much he was being charged on such transactions and said it was inconsistent with what he expected to be charged.[127] Once he was helped to calculate the charge on a riskless principal basis, he characterized the 3.5% charge on the purchase of Prospect Capital as "horrible" because it was just on the buy side only and he would assume there would also be a charge on the sell side.[128]

When asked for his understanding as to how he would be charged after the first trade, LJW said, "I assumed just from watching TV shows as a stockbroker, he is making some money on the buy and the sell. That is pretty much all I knew."[129] When asked about how much he expected to be charged, LJW said, "You know, I had no idea, sir. You know I hear kind of the E-

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[122] JX-4, at 265.

[123] JX-4, at 1, 3, 5–6, 9, 11, 13, 21, 23, 27, 29, 31–32, 41, 45, 77, 87, 89, 91, 97, 99, 101, 109, 111, 113, 117, 121, 125, 132, 143, 145, 159, 161, 165–66, 177, 179, 185, 191, 193, 209, 213, 225, 227, 231, 251, 255.

[124] Tr. (LJW) 617–18, 626–27.

[125] Tr. (LJW) 616, 618.

[126] Tr. (LJW) 626.

[127] Tr. (LJW) 617–18.

[128] Tr. (LJW) 618.

[129] Tr. (LJW) 566.

Trade and Fidelity type stuff on TV, I thought one or two points."[130] He thought that a "point" on his relatively small investments would be an equivalently small charge. He said, "[B]ecause I was playing that $5 to $20 range and most of my stock purchases . . . were somewhere around three to [five] to $10,000. I didn't think it was relative to that investment, that large. I didn't expect it to be that large."[131]

g. LJW's Tracking of the Account

When asked how he tracked what was going on in his account, LJW said, "I didn't. He and I talked frequently, two or three times a week. I relied on him to tell me how the stock was doing and what our position was."[132] LJW acknowledged that he received account statements in the mail, but said, "I am embarrassed to say this, there were some I probably never opened."[133] He explained that a statement covered the preceding 30 days of transactions, but that he had already talked to Flower about those transactions 12 or 15 times. "I knew we had sold some stocks, we had bought some stocks. I had a general sense of what the amount was but I never looked at the statements too much at all."[134] Similarly, LJW did not usually open his trade confirmations. Instead, he relied on talking with Flower.[135]

h. Trading in LJW's Account

Between February 2016 and July 2018, Flower executed 100 transactions in LJW's account, consisting of 41 purchases and 59 sales.[136] Flower was responsible for marking whether transactions he executed in customer accounts were solicited or unsolicited.[137] Even though LJW relied on Flower and never called Flower with an investment idea, Flower designated 41 of the 59 sales in the account in SW Financial's order entry system as unsolicited.[138]

Much of the trading was on margin.[139] But, as noted above, Flower never discussed the risks or costs of margin with LJW. Instead, Flower encouraged LJW to trade without mentioning that he needed to use margin to do it. For example, Flower made three purchases of stock of a pharmaceutical company called Valeant in September 2016 on margin for a total of 1,700 shares. SW Financial assessed its standard fee on all three transactions. Flower charged a markup on the

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[130] Tr. (LJW) 567.

[131] Tr. (LJW) 568.

[132] Tr. (LJW) 609.

[133] Tr. (LJW) 610.

[134] Tr. (LJW) 610.

[135] Tr. (LJW) 615–16.

[136] CX-1; CX-4; JX-3.

[137] Stip. ¶ 20.

[138] CX-4.

[139] JX-3.

third purchase of 700 shares that was the commission equivalent of 65 cents per share, or $455. As reflected in the confirmations, Flower made the purchases as the stock declined in value from $30.13 to $26.53.[140] Flower told LJW at the time that he should buy the stock even though the price was declining because "his research team" thought it would hit a target price of $35 per share.[141] In October, the next month, maintenance calls required the sale or redemption of some of the Valeant shares in three separate transactions. The price ranged from $22.74 to $21.36 per share. The firm charged its standard fee on the transactions.[142] Flower sold the rest of the Valeant position in a fourth transaction at $21.62 per share. He charged the commission equivalent of 50 cents per share, or $750, on that sale. The firm charged its standard fee.[143] LJW was not aware that the purchases were on margin until he was walked through the account records at the hearing, and he was unaware that some of the sales were the result of margin calls.[144]

i. Activity Letters

SW Financial sent LJW what was called an activity letter, dated October 25, 2016, which summarized trading activity in his account in September 2016. It reported that 11 trades had occurred in the account in September and that the cost over assets, or COA, was 31%. The letter said that LJW's account was classified as actively traded and the firm wanted to confirm that he understood the trading in the account.[145] The letter cautioned, "Active trading in the securities markets can involve a higher degree of risk and may not be suitable for all investors." Additionally, it said, "Due to the higher degree of activity, overall commissions may be greater than in a 'buy and hold' strategy."[146]

LJW signed the activity letter on November 2, 2016, and returned it to SW Financial. He viewed it as a restatement of activity in the account. He did not consider it particularly important because he already knew he had made a lot of trades in September. He had been talking with Flower two or three times a week and thought he already had a good idea of what was going on in the account.[147] "I thought it was just a statement of hey, here is what is going on."[148] He may have discussed the activity letter with Flower, but Flower suggested it was not significant. "I think the first one I got, I might have said hey, Mr. Flower I got this compliance thing," LJW testified. "[H]e said that is just standard stuff, checking on our activity."[149] LJW said, "To me

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[140] JX-4, at 203, 215, 223.

[141] Tr. (LJW) 637–38.

[142] JX-4, at 195, 197, 201.

[143] JX-4, at 191.

[144] Tr. (LJW) 634–44; JX-3, at 163, 167–68; JX-4, at 191, 195, 197, 201, 223.

[145] JX-5, at 1–2.

[146] JX-5, at 1.

[147] Tr. (LJW) 654–63.

[148] Tr. (LJW) 655.

[149] Tr. (LJW) 656–57.

this was kind of a confirmation that Mr. Flower and I made a lot of trades in the month of September."[150]

When asked the purpose of an activity letter, Flower explained in a similar fashion, that such a letter confirms the status of the account. Where there is more active trading in a month than in prior months, the activity letter "make[s] sure that the clients were aware of what is going on in the account, that nothing has changed with their financial position, keep[s] them up to date, and mak[es] them understand where their account is at the current point in time."[151] To the extent Flower discussed the activity letter with LJW, he did not advise the customer that it was a red flag.

LJW did not understand the significance of the other information in the activity letter. He did not know whether cost over assets at 31% was good or bad.[152]

When LJW later received another activity letter in December 2016, he treated it similarly. He signed and returned it. To LJW, the activity letter "was a non[-]event. It was a confirmation that Mr. Flower [was] not making trades behind [his] back."[153] Neither he nor Flower changed their behavior.[154] The firm sent LJW yet another activity letter dated on March 21, 2017, summarizing the trading in February. He understood that he had made 10 trades in February. He did not know what turnover rate or cost-to-equity ratio meant.[155]

j. Closing of LJW's Account

LJW discovered that something was "wrong" with his account in March or April 2018, a little over two years after he had opened the account with Flower. LJW was thinking about buying a company, and one of his attorneys sent him a link to access information regarding a broker who was going to represent him in the transaction. He did not previously know that such background information was publicly available. He looked up Flower's name and was surprised to see discussion of some disciplinary actions.[156] In particular, Flower had never mentioned to LJW the three-month suspension from early July to early October 2017. That period coincided with a time that Flower told LJW he would be away in Central America or South America to deal with personal and family issues.[157] Upon reviewing the public disclosures, LJW became

[150] Tr. (LJW) 659.

[151] Tr. (Flower) 1245–46.

[152] Tr. (LJW) 685–86; JX-5.

[153] Tr. (LJW) 662–63.

[154] Tr. (LJW) 659–63; JX-6.

[155] Tr. (LJW) 663–65; JX-7.

[156] Tr. (LJW) 597–98, 689. The link was to FINRA's Broker Check. Tr. (LJW) 689.

[157] Tr. (LJW) 597–99, 666. LJW remembered Flower saying he was going to Honduras, but in his questioning of LJW, Flower suggested it was Paraguay. Tr. (LJW) 666, 687.

suspicious that Flower had deceived him about why he did not actively manage the account for those three months.[158]

LJW did not make any trades in his account during the period that Flower was suspended.[159] He said that he trusted Flower, and, during the period Flower told him he would be out of the country, LJW "didn't want to be handed off to some other guy [he] had no relationship with."[160]

Prior to learning of Flower's suspension, LJW had not looked at his statements in any detail. When he reviewed the statement from around March or April 2018, he saw that there was a net loss in the account, which upset him.[161] He said, "I was so focused there is a loss here, what does that unrealized loss mean."[162] He then "tried to get out."[163] He said, "I found out I was on margin, I found out that I had to put money in, I guess a margin call it is called or something like that."[164] LJW told Flower he wanted "to get out of everything."[165] According to LJW, Flower responded, "[W]ell you're on margin, we need to get out when it is the right time."[166]

It took several months to close the account and sever the relationship.[167] The account was officially closed on July 25, 2018.[168]

It was only when he closed his account that LJW found out that half the money that he thought was in the account was not there.[169] LJW believes that he ultimately contributed a total of around $75,000 to the account and lost half of it.[170] He has done no more investing since closing his account with Flower.[171]

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[158] Tr. (LJW) 668–69.

[159] Tr. (LJW) 666–67.

[160] Tr. (LJW) 666–67.

[161] Tr (LJW) 599–600.

[162] Tr. (LJW) 600.

[163] Tr. (LJW) 600.

[164] Tr. (LJW) 600, 669–70.

[165] Tr. (LJW) 669.

[166] Tr. (LJW) 669–70.

[167] Tr. (LJW) 669–70.

[168] Stip. ¶ 19.

[169] Tr. (LJW) 597.

[170] Tr. (LJW) 670–71.

[171] Tr. (LJW) 693.

k. Effect of Respondent's Trading on Account

Respondent's trading in LJW's account had a negative effect on the account. EW, the FINRA examiner who created the summary exhibits, calculated that the annualized turnover rate was 18.63 while Flower handled the account, and the annualized cost-to-equity ratio was 81.35%. Although the average funded equity in the account was $18,801, Flower's total purchases in the account were $875,705. LJW sustained $46,798 in realized losses, including $34,564 in total trading costs. Commissions of $28,881 were the largest portion of the trading costs.[172]

2. Customer MK

a. Background

Flower cold called MK in January 2016, and MK opened an individual non-discretionary account at SW Financial, with Flower as the broker of record, on January 27, 2016.[173] Between January 2016 and March 2017, Flower serviced the account.[174] MK lives in Tulsa, Oklahoma, and never met Flower in person.[175]

MK was born in 1938 and was in his late seventies when Flower called him.[176] He is a CPA who runs a tax consulting business he established in 1985. Currently, he has some part-time employees.[177] He has a BS degree in accounting from the University of Idaho in Moscow, Idaho.[178]

MK had traded stocks off and on since about 1962 or '63.[179] He had dealt with local brokers and others who had solicited him from New York.[180] At the time Flower called him, he had three securities accounts at different firms.[181] In those other accounts, MK never did the kind of short-term trading that he ended up doing in his account with Flower.[182]

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[172] CX-1, at 1; CX-4, at 5.

[173] Tr. (Flower) 400; Tr. (MK) 731–32; Stip. ¶ 5.

[174] Stip. ¶ 6.

[175] Tr. (Flower) 399; Tr. (MK) 729, 731.

[176] Tr. (MK) 727–30.

[177] Tr. (MK) 730.

[178] Tr. (MK) 731.

[179] Tr. (MK) 733.

[180] Tr. (MK) 734–35.

[181] Tr. (MK) 733–34.

[182] Tr. (MK) 817–18.

b. Establishment of Account

MK's initial call with Flower lasted about 15 to 20 minutes.[183] When MK said he was looking for a "good return," Flower led him to believe that he had gotten 20 to 50% returns in the past.[184] MK was under the impression that Flower had fallen "into an inside track on information into a couple of stocks that if [he] invested with [Flower], [he] could make a really good return."[185] In the first call, Flower was trying to persuade him to buy stock in a pharmaceutical company. Flower told him that it "was going through testing for releasing a new drug and usually when that happens, you wind up with, you know, a jump in the stock price and everybody is happy."[186]

Although MK did not immediately invest, he later decided to open an account with Flower for about $5,000.[187]

c. Establishment of Margin in the Account

MK signed a margin agreement on May 27, 2016, nearly three months after he opened his account with Flower,[188] although he did not like debt.[189] "Generally I didn't like margin. There might be some situation you get into where you want to but generally not."[190] The reason MK signed the margin agreement was that there was a "particular situation and Mr. Flower wanted to purchase more stock." MK "didn't want to put any more money in, so [they] were just going to use the margin on the securities that [they] had in the account."[191] Flower recommended to MK that he use margin, and MK took the recommendation.[192]

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[183] Tr. (MK) 737.

[184] Tr. (MK) 742–43.

[185] Tr. (MK) 735.

[186] Tr. (MK) 737.

[187] Tr. (MK) 738.

[188] JX-20, at 1.

[189] Tr. (MK) 754–58.

[190] Tr. (MK) 755.

[191] Tr. (MK) 756.

[192] Tr. (MK) 758.

d. MK's Telephone Calls with Respondent

Flower spoke to MK in the beginning on a weekly basis. Later, they spoke less frequently, probably on a monthly or bimonthly basis.[193] Flower discussed specific trades with MK, not a trading strategy.[194] The conversations focused on buying and selling.

> Well usually he would say, well this is going to happen and that is going to happen. And you know, we are about to do this, so it was usually a conversation where, you know, things were looking good or there was never, you know, we should get out of all this stuff because nothing is doing good.[195]

e. MK's Trust in Respondent

MK relied on Flower's recommendations about what securities to purchase and when. The quantities purchased would depend on the funds available.[196] MK trusted Flower because he had told MK that "he had a good track record coming up with, you know, winning securities, ones that were going up in value."[197] MK might look up the history of a stock recommended by Flower, but he never independently went to Flower with ideas about securities to purchase in the account.[198]

f. MK's Understanding of Charges for Trading

MK's first trade was free. MK understood that each later trade was going to cost approximately $100, including the firm's $59 fee. He was not aware of any other fees or commissions associated with the transactions in the account. Flower did not discuss with him the commissions on any particular transaction or any other fees associated with trading in the account.[199]

MK had a very basic understanding of the terms markup and markdown, describing them as additions to and subtractions from the price of something. He was not familiar with the terms agency trade and riskless principal trade. Flower never discussed markups, markdowns, agency trades, or riskless principal trades with MK. MK had no understanding of what these terms meant for the cost of his trading in a securities account.[200]

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[193] Tr. (MK) 762–63.

[194] Tr. (MK) 739.

[195] Tr. (MK) 783.

[196] Tr. (MK) 758–59.

[197] Tr. (MK) 759.

[198] Tr. (MK) 760, 762, 801.

[199] Tr. (MK) 739–40, 778, 783–84; CX-3, at 1.

[200] Tr. (MK) 740–42.

g. MK's Tracking of the Account

MK received monthly statements in the mail. He looked at the values in the account and kept a spreadsheet showing the value of the securities at the end of each month. He also filed the confirmations he received.[201] He did not track the prices of the individual transactions, however, or the expenses that were being incurred. Nor did he track the number of transactions in a month.[202] He did not know if he made money or lost money on an individual transaction.[203] He characterized those details as "too much stuff to track."[204]

h. Trading in MK's Account

From January 2016 through March 2017, a period of about 15 months, Flower executed 64 transactions in MK's account, consisting of 29 purchases and 35 sales. Even though MK relied upon Flower's recommendations and advice, Flower designated 27 of the 35 sales in the account as unsolicited.[205]

i. Activity Letter

SW Financial sent MK an activity letter, dated September 30, 2016, which summarized trading activity in his account in August 2016. It reported that nine trades had occurred in the account in August and that the cost over assets was 36%. The letter said that MK's account was classified as actively traded and the firm wanted to confirm that he understood the trading in the account. It included cautionary language concerning the higher degree of risk and potential higher level of commissions associated with active trading.[206]

MK called Flower about the letter because he did not remember that many trades in the account. Flower focused on making sure that MK signed and returned the letter.[207] Flower said he would "look into the thing."[208] MK understood from Flower's comments that he was going to investigate why there were so many trades. At the hearing, MK had no idea why Flower would

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[201] Tr. (MK) 760–62, 824.

[202] Tr. (MK) 824–26.

[203] Tr. (MK) 825.

[204] Tr. (MK) 825.

[205] CX-1; CX-3; JX-9.

[206] JX-26.

[207] Tr. (MK) 784–88.

[208] Tr. (MK) 788, 827–29.

not already have had information about the trades.[209] MK signed the letter on October 5, 2016, and returned it.[210] Flower never got back to him about the activity letter or the trading.[211]

After receiving the activity letter, MK said his trust of Flower decreased. The letter indicated that there was "something" going on, but he did not know "exactly" what it was.[212] Nevertheless, MK continued to work with Flower.[213] He did not close the account until the spring of 2017.[214]

j. Closing of MK's Account

MK closed his account with Flower at the end of March of 2017 because it was losing money.[215]

k. Effect of Respondent's Trading on Account

Flower's trading had a negative effect on MK's account. From January 2016 until the closing of the account, according to EW's calculations, the account had an annualized turnover rate of 30.94 and an annualized cost-to-equity ratio of 125.39%.[216] The average funded equity in the account was $13,658, but Flower purchased securities with a value of $528,334. MK sustained $22,575 in realized losses, including $20,084 in total trading costs. Commissions of $16,473 were the largest portion of the trading costs.[217]

l. Respondent's Effort to Enlist MK's Help in His Defense

MK had no contact with Flower for two years after he closed his account. Then, in the spring of 2019, Flower called MK seeking his help. He told MK that he was being investigated. He did not explain who was investigating him or what the investigation was about. After the call, Flower sent him a document labeled as an "affidavit," although it did not purport to be a sworn statement and did not have any place for it to be notarized. The document was designed to establish that MK had made his own investment decisions in his account and intended to actively

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[209] Tr. (MK) 827–29.

[210] JX-26, at 2.

[211] Tr. (MK) 827–28.

[212] Tr. (MK) 788–89.

[213] Tr. (MK) 790, 833; CX-3.

[214] Tr. (MK) 790.

[215] Tr. (MK) 801, 833; Stip. ¶ 7.

[216] CX-1, at 1; CX-3, at 4.

[217] CX-1, at 1; CX-3, at 4.

trade securities. It declared that Flower had discussed the merits of his recommendations with MK.[218]

Although MK asked Flower to tell him more about the investigation, Flower never gave much of an explanation.[219] "[H]e just really wanted the document back."[220] MK signed the document.[221]

At the hearing, MK said that the purported affidavit was not accurate. "[W]e didn't discuss all of the merits and I didn't authorize all of the trades because some of them I was unaware of."[222] He also said that he would not have signed it if he had known that FINRA staff had questioned Flower under oath about possible excessive trading in his account.[223]

3. Customer DT

a. Background

DT was born in 1944 and was already in his seventies when Flower cold called him in 2016.[224] He lives in Lancaster, Texas, with his wife. He has owned and operated an air conditioning company for 50 years. He finished high school and then obtained an associate's degree in air conditioning and refrigeration.[225]

b. Establishment of Account

When Flower cold called him, DT had not traded in the stock market for five to ten years.[226] DT was not interested in going into the market for only a 2% to 5% profit. But he was interested in a 25% to 30% return, which is what Flower talked about.[227]

Flower asked about DT's previous experience in the market and his background. DT told him, "I knew the basic fundamental guidelines of how the market works. You invest money and you hope to get returns."[228] When Flower asked about his investment objectives, DT said, "I

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[218] Tr. (MK) 802–05; JX-27.

[219] Tr. (MK) 829–30.

[220] Tr. (MK) 829–30.

[221] Tr. 802; JX-27.

[222] Tr. (MK) 805.

[223] Tr. (MK) 806–07.

[224] Tr. (DT) 843–47.

[225] Tr. (DT) 844–45.

[226] Tr. (DT) 847–48, 864.

[227] Tr. (DT) 849.

[228] Tr. (DT) 849–50.

would probably answer that saying I want to make good money, a profit on my investments, you know."[229]

After several calls with Flower, DT opened an individual non-discretionary account with Flower at SW Financial on April 18, 2016.[230] The account opening documents came pre-populated. Initially, the account was marked with cash trading privileges. DT did not know what that meant. But he signed the documents where it was indicated his signature was required.[231]

Flower serviced the account at SW Financial from April 2016 to the beginning of July 2018, except for the period of his suspension.[232] When asked about any discussion he had with Flower about how Flower would handle the account, DT responded that they would "invest in the stocks that [Flower] come up with."[233]

DT and Flower never met in person.[234]

c. Establishment of Margin in the Account

In June 2016, DT signed a margin agreement.[235] He did so because Flower recommended that DT use margin to get "more leverage on what you got in the account."[236] DT had not previously used margin.[237]

d. DT's calls with Respondent

Flower would call DT once or twice a week by telephone.[238] The calls usually involved a recommendation to buy or sell a particular stock. "That is all, mostly opportunity to take this and sell this and do something with something else or not or hang it or something like that, you know."[239]

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[229] Tr. (DT) 864.

[230] Tr. (DT) 847–52; Stip. ¶ 11; JX-8, at 6.

[231] Tr. (DT) 865–67; JX-8, at 1.

[232] Stip. ¶¶ 12–13.

[233] Tr. (DT) 852.

[234] Tr. (DT) 845.

[235] Tr. (DT) 866–67, 873–75; JX-8, at 7–8.

[236] Tr. (DT) 875.

[237] Tr. (DT) 874.

[238] Tr. (DT) 858–59.

[239] Tr. (DT) 859–60.

e. DT's Trust in Respondent

DT relied on Flower's recommendations of stocks to buy and sell. He never conducted his own research on Flower's recommendations and never offered ideas to Flower about the purchase of a security.[240] Referring to Flower, DT said, "I solely depended upon our conversation and you know, trying to make a dollar in the marketplace."[241] He later added, "I certainly relied on him to make the final decision whether or not we should sell or buy."[242]

f. DT's Understanding of Charges for Trading

DT understood that there would be a percentage charge on the trades.[243] But Flower never discussed with him the commissions being charged or the total cost of trading in the account.[244]

DT did not know the term riskless principal in 2016, when he opened the account with Flower, and still does not know what the term means.[245] He has a basic understanding of a markup: "You take an item and you mark it up."[246] But he does not know anything about markups and markdowns as related to stocks and securities. Flower never explained to DT the difference between a markup and a commission or discussed with him the terms markup and markdown as they related to the trades in his account.[247]

g. DT's Tracking of the Account

DT did not monitor and track the buying and selling of stock in his account. He testified that he never opened the "packages" of information sent in the mail[248] "because probably a lot of it I would not have understood any way."[249] DT also did not use online access to look at what was happening in the account. He said, "I don't really do computers."[250] "I never did know

[240] Tr. (DT) 851–54, 924.

[241] Tr. (DT) 854–55.

[242] Tr. (DT) 924.

[243] Tr. (DT) 860.

[244] Tr. (DT) 898–99.

[245] Tr. (DT) 860–61.

[246] Tr. (DT) 862.

[247] Tr. (DT) 862, 879–80.

[248] Tr. (DT) 853–55.

[249] Tr. (DT) 855.

[250] Tr. (DT) 856.

actually even today how many dollars I lost or how many dollars principal I put up," DT said. "I still don't know what that number was that I lost."[251]

h. Trading in DT's Account

From April 2016 through July 2018, a period of about 28 months, Flower executed 90 transactions in DT's account. This is the relevant period covered by the Amended Complaint. But DT continued dealing with Flower through May 2019, after he moved to Spartan. Flower executed another 55 trades in DT's account at Spartan for a total of 145 trades while he handled DT's investments.[252]

Flower marked transactions as unsolicited when DT knew nothing about the company being traded. For example, Flower sold GNC from DT's account on September 15, 2016. Flower marked the trade unsolicited. But DT testified that it was Flower's recommendation to sell GNC. The next day, on September 16, Flower bought Cliff's Natural Resources in the account. That also was Flower's recommendation. And then, five days later, on September 21, Flower sold Cliff's Natural Resources from the account. DT testified that he would have sold the stock only at Flower's prompting.[253] When asked about sales of another stock, Eagle Bulk Shipping, that Flower marked unsolicited, DT testified, "I didn't make any recommendations, if somebody recommended selling, had to be him."[254]

During the relevant period, Flower marked 43 transactions as unsolicited, almost half the transactions he executed during that period. All but two were sales.[255] Of the 41 purported unsolicited sales, 29 resulted in realized losses. DT did not remember ever independently recommending to Flower to sell a stock held in the account.[256]

i. Activity Letter

DT received an activity letter dated September 30, 2016, from SW Financial regarding the eight trades in his account in August. He signed the activity letter on October 4, 2016, and returned it. When asked about how he interpreted the letter, he said it meant nothing had changed with his liquid or net worth.[257] Initially in his testimony he interpreted cost over assets, or COA, to mean that he "had 34 percent profit" from the eight trades in August.[258] But, as he puzzled

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[251] Tr. (DT) 923.

[252] CX-1; CX-5, at 1–5, 10–11; JX-10.

[253] JX-9; JX-10; Tr. (DT) 891–95.

[254] Tr. (DT) 897.

[255] CX-5, at 1–5.

[256] Tr. (DT) 924.

[257] Tr. (DT) 887–90; JX-14.

[258] Tr. (DT) 889.

over the sentence discussing cost over assets, he finally concluded that the words "could mean a lot of things really.[259] He never discussed the activity letter with Flower.[260]

DT was unaware that between April 2016 and the end of July 2018 there were over 90 transactions in his account.[261] Although DT's account had an average funded equity of roughly $25,000, the account traded over $98,000 in securities.[262] Asked whether he had given Flower anywhere close to $98,000, DT said, "I hope I didn't."[263]

DT was unaware why SW Financial sent the activity letter, and, since it did not mention words like excessive trading and churning, he did not realize that the letter was highlighting those potential issues. Nor did he understand what excessive trading and churning are.[264]

j. Closing of DT's Account

DT closed his account with Flower at SW Financial on July 2, 2018.[265] But he opened an account at Spartan when Flower moved to Spartan and did not close the account at Spartan until May 2019.[266]

k. Effect of Respondent's Trading on Account

FINRA staff calculated that Flower's trading in DT's account during the relevant period resulted in an annualized turnover rate of 16.47 and an annualized cost-to-equity ratio of 69.69%. Although the average funded equity in the account was $24,644, Flower purchased securities with a total value of $947,256. According to the staff's calculations, in the 28 months Flower handled the account at SW Financial, DT sustained realized losses of $18,986. DT paid $35,749 in total trading costs. Commissions of $31,010 were the largest portion of the trading costs.[267]

l. Respondent's Effort to Enlist DT's Help in His Defense

DT remembered at some point either during or after Flower's suspension that Flower told him that he was being "railroaded," or something to that effect.[268] Flower asked DT "not to jump

[259] Tr. (DT) 889–90.

[260] Tr. (DT) 890.

[261] Tr. (DT) 907–08.

[262] CX-1, at 1.

[263] Tr. (DT) 922; CX-1.

[264] Tr. (DT) 924–26.

[265] Stip. ¶ 13.

[266] Tr. (DT) 907.

[267] CX-1, at 1; CX-5, at 5.

[268] Tr. (DT) 900–01.

ship and close out the account because, you know, that would look bad on him."[269] Flower asked him to sign a document "to try to turn the boat around."[270] Flower led DT to understand that he was being investigated, but he did not inform DT that his handling of DT's account was one of the reasons for the investigation.[271]

DT signed a purported affidavit on April 24, 2019, while he still held the account with Flower at Spartan. The document was not sworn before a notary public. DT's wife witnessed his signature. DT does not know who drafted the document. The document represented that he liked and understood the risks of short-term trading, and that he wanted to continue to work with Flower.[272] When Flower approached him to sign the document, he did not inform DT that while the account was at Spartan he had sustained additional losses.[273]

4. Customer WN

a. Background

WN was born in 1941 and was in his mid-seventies when Flower called him in 2016.[274] WN was retired at the time. WN went to high school, served in the Marines for four years, became a police officer, and then went into aircraft maintenance for American Airlines. He lived in Grapevine, Texas in 2016, but he and his wife moved to Ruidoso, New Mexico, in 2017.[275]

After several telephone calls with Flower, WN opened an account at SW Financial. Flower serviced the account between December 2016 and May 2018, except during the period he was suspended.[276] WN and Flower have never met in person.[277]

WN had very little securities trading experience and no previous experience with a frequent trading strategy. In December 2016, he had an account with Fisher Investments at Merrill Lynch with assets valued at $191,512.84. The account held blue chip stocks[278] and some bonds he inherited from his father.[279] He viewed the assets in the account as his savings for

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[269] Tr. (DT) 901.

[270] Tr. (DT) 902.

[271] Tr. (DT) 900–04.

[272] Tr. (DT) 905; JX-18.

[273] Tr. (DT) 906; CX-5, at 11.

[274] Stip. ¶ 22.

[275] Tr. (WN) 977–80, 983–84, 998.

[276] Tr. (WN) 979–80, 983; Stip. ¶ 9.

[277] Tr. (WN) 977–80.

[278] Tr. (WN) 980, 982, 1013–15; JX-38, at 5.

[279] Tr. (WN) 1006, 1012–13; JX-38, at 8.

retirement, to help him deal with future medical issues and the like. He also had an account at Scotts Trade.[280]

WN would have stayed with Fisher Investments, but he had used some of the money in the account to buy a house in New Mexico, where he planned to retire. That brought his account below the minimum required by Fisher Investments. For that reason, he needed to find another place to put his assets.[281]

WN described his retirement plan, which was to eliminate any mortgage and other recurring bills so that he would be able to focus on his health. "The only reason I was trying, got out of Fisher, I was trying to have a house that was paid off and no bills . . . because I thought I would need . . . a retirement setup, I wouldn't have any problems if bills came in or whatever . . . I thought I was in good shape at the time financially and health was the only thing I was worried about."[282]

b. Establishment of Account

In their early conversations, when Flower was seeking WN's business, Flower told WN that "he followed the same princip[le] that Fisher did."[283] That meant investing in mostly blue chips.[284] Someone at Fisher had told WN to hang onto the blue chip stocks in the account.[285] WN did not have much investment experience. He had worked with Fisher, believing the firm to be "somebody that [he] thought would be able to handle the money in the stock market because obviously [he] didn't know how."[286] He testified, "When I was at Fisher, they pretty well took care of everything. . . . I had hoped Mr. Flower would do the same thing."[287] When asked whether Flower had discussed any trading strategies for his account, WN responded, "I really thought he said he was going to stay the same as Fisher."[288] "I think most of the subject was that there would be no change. It would all be just like what I was used to."[289] The only exception was the bonds held in the Fisher account. Flower did not work with bonds, so they were sold.[290]

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[280] Tr. (WN) 979–81, 984–85, 1064–66.

[281] Tr. (WN) 979–80, 1001, 1012–13, 1062.

[282] Tr. (WN) 1030.

[283] Tr. (WN) 981–82.

[284] Tr. (WN) 982, 1013–14.

[285] Tr. (WN) 1013–14.

[286] Tr. (WN) 982–83.

[287] Tr. (WN) 987.

[288] Tr. (WN) 983.

[289] Tr. (WN) 991.

[290] Tr. (WN) 1012–13.

Flower persuaded WN to invest with him both because he professed to follow the same conservative investment principles as Fisher and because Flower was an engaging conversationalist. WN described the first few calls with Flower this way: "He told me what a good fellow he was. He was a likeable fellow on the phone or I would not have gone with him. I enjoyed talking with him and messing with him."[291] "[H]e seemed like a nice man [who knew] what he was doing." WN testified, "I trusted him at the time."[292]

When WN set up an individual non-discretionary account at SW Financial in December 2016,[293] he told Flower that he always wanted a reserve amount of cash available to cover anticipated medical expenses. WN was planning for some neck and back surgery and specified that $30–35,000 be reserved to cover those expenses. It turned out that he needed other surgeries and medical care in 2017, 2018, and 2019 before he eventually had the neck surgery in August of 2020.[294] "[T]he deal was to make the account grow and that I would later on in retirement, be able to use the money. And I had to have a certain amount for the surgeries."[295]

The account opening documents WN received were pre-populated. He thought some of the boxes checked off in the documents were inaccurate, so he used a blue pen to mark accurate information.[296] But he did not change everything that he now perceives as inaccurate.[297]

c. Establishment of Margin

WN did not understand most of what was on the account opening forms.[298] But he did understand that it was a cash account. One section for trading privileges was marked "cash."[299] WN explained, "[I]f I have cash, then I could buy it."[300]

When he opened the account, WN was not interested in trading on margin "because [then] you're playing with somebody else's money."[301] He testified, "[Y]ears ago . . . [s]ome of the guys at work put together a program" using margin to buy "cotton or silver or something like

[291] Tr. (WN) 982.

[292] Tr. (WN) 1062.

[293] Tr. (WN) 983–85; Stip. ¶ 8.

[294] Tr. (WN) 984–85.

[295] Tr. (WN) 994.

[296] Tr. (WN) 996–1007, 1050–51; JX-36.

[297] Tr. (WN) 999–1007, 1050–51.

[298] Tr. (WN) 996–97.

[299] Tr. (WN) 997; JX-36, at 1.

[300] Tr. (WN) 997.

[301] Tr. (WN) 997.

that."[302] But, he said, "[I]t didn't work out."[303] The group that he traded commodities with lost everything.[304] He said, "I understand, margin is you could make money on it but you could lose a lot."[305]

SW Financial had in its records a margin agreement with an electronic signature for WN, dated January 11, 2017.[306] Flower testified that WN "wanted" to use margin. "He signed the margin agreement, meaning he wanted to do margin."[307]

WN did not remember the document, but conceded he may have received it from Flower in January 2017.[308] WN does not believe he ever told Flower that he wanted to use margin.[309] He believed that margin "was like playing blackjack or roulette or something like that. Not something that you want to do with your money."[310]

By the end of January 2017, about a month after opening the account with Flower, WN's account had a margin balance of $160,802.[311] WN did not know his account was on margin and was unaware of the margin balance.[312] He does not remember Flower telling him about the margin balance[313] and believes if Flower had he would have been upset about it. "I don't believe in doing margins," WN said.[314]

Flower maintained that WN "was interested in taking more of a risk" in the account than Fisher had taken, so that was why Flower sold the blue chip stocks when the account was transferred to him from Fisher.[315] Flower claimed that WN wanted to use margin because "he wanted to see more upside potential with using the leverage of margin."[316] Given WN's circumstances—in his seventies, retired, with little investment experience, and needing a reserve

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302 Tr. (WN) 997–98, 1007.

303 Tr. (WN) 998.

304 Tr. (WN) 1054–56.

305 Tr. (WN) 998.

306 JX-37, at 1.

307 Tr. (Flower) 454–55.

308 Tr. (WN) 1007–09.

309 Tr. (WN) 1009.

310 Tr. (WN) 1009–10.

311 JX-39, at 246.

312 Tr. (WN) 1010–11.

313 Tr. (WN) 1020.

314 Tr. (WN) 1021.

315 Tr. (Flower) 513.

316 Tr. (Flower) 512.

of funds for anticipated medical expenses—we find Flower's testimony on this subject not credible.

d. WN's Calls with Respondent

Flower called WN regularly, maybe once a month.[317] Typically, he told WN that the account "was doing good."[318] The conversation was "like the weather report."[319] Flower would say "how good everything was doing."[320] Flower talked very little about specific stocks or trades, and WN does not remember him ever talking about the cost of trading in the account.[321] Throughout the period WN worked with Flower, he was undergoing surgeries and suffering health problems. "Basically," WN said, "I think that is all we really talked about when he called."[322] WN summed up the reassuring and comforting way Flower talked with him:

> [W]hen he called, he talked and he would simply say you done pretty good. Everything's going great. He would say how is your medical problems, how is this and what is going on there. And he seemed generally concerned about my health and everything and he was taking care of you. You know I really just assumed he was but you assume a lot of things, gets you in trouble . . . .[323]

e. WN's Trust in Respondent

WN relied "100 percent" on Flower's recommendations of what securities to purchase.[324] He relied on Flower similarly for what security to sell and when.[325] WN did not conduct securities research and did not offer ideas to Flower about what to purchase or sell.[326] WN trusted Flower to manage and handle his account. "He seemed trustworthy at the time."[327]

[317] Tr. (WN) 989.

[318] Tr. (WN) 989.

[319] Tr. (WN) 990.

[320] Tr. (WN) 990.

[321] Tr. (WN) 990, 1018–19.

[322] Tr. (WN) 1066.

[323] Tr. (WN) 1066.

[324] Tr. (WN) 985–86.

[325] Tr. (WN) 986.

[326] Tr. (WN) 986.

[327] Tr. (WN) 988.

f. WN's Understanding of Charges for Trading

WN's assumptions about the costs of trading in his account were colored by his experience at Fisher. "I assumed it would be like Fisher, if you made money, they took a percentage," he said. "If you didn't, they didn't do anything."[328]

WN has no understanding of the term riskless principal. When asked about it, he said, "[A]pparently it is you get over your head real fast with that."[329] Nor does he understand the terms markups and markdowns. When asked about those terms, he said, "I was thinking it would just be like stock was going up or it was coming down."[330] When asked whether Flower had explained the terms markups and markdowns as compared to commissions, WN said, "I don't believe so."[331]

As with LJW's account and the accounts of the other customers, Flower executed many trades on a riskless principal basis, where the charges for the transactions were not clearly set forth in the confirmations sent to customers.[332] From the outset of the relationship, Flower took advantage of the way that costs were hidden when the transaction was on a riskless principal basis. For example, on January 20, 2017, he sold 64 shares of a security for a price reported in the confirmation as $142.78 per share. That yielded a principal of $9,137.92. SW Financial's standard flat fee of $59 was then subtracted, along with a $0.21 miscellaneous fee, to leave WN with $9,078.71. The "principal," however, had already been reduced, according to the confirmation, by $2.70 per share. The reported price of the security was in fact $145.48. Flower had imposed a charge, but it would not have been obvious to WN.[333]

g. WN's Tracking of the Account

Although WN received monthly statements in the mail, he did not open them until the end of the year. Instead, he relied on Flower.[334] He may have received trade confirmations, but he does not remember. "At that time," he said, "I guess my health was more important."[335] If he

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[328] Tr. (WN) 990.

[329] Tr. (WN) 991.

[330] Tr. (WN) 991.

[331] Tr. (WN) 992.

[332] *E.g.*, JX-40, at 477, 493.

[333] JX-40, at 493. Notably, less than 100 shares were involved in this transaction and the principal was less than $10,000. Flower charged a very high commission equivalent of $2.70 per share. Later, when he was able to trade larger amounts of stock, he decreased the commission equivalent charge. So, for example, he sold 8,000 shares of a security on April 25, 2017, with a principal amount of more than $24,000. He charged a commission equivalent of only two cents per share. JX-40, at 388.

[334] Tr. (WN) 986–87.

[335] Tr. (WN) 987.

had online access to his account, he does not remember using it. "I'm not really computer savvy."[336]

h. Trading in WN's Account

At the end of December 2016, WN's account at Fisher held assets valued at $191,512.[337] Although WN had expected to keep the blue chip stocks transferred to Flower, Flower sold them.[338] Flower did not inform WN that he had sold everything. Rather, he vaguely told WN the changes "kind of balanced it out."[339] The January 20, 2017 sales of WN's blue chip stocks totaled $182,616.[340]

Flower executed 174 trades in WN's account between December 2016 and July 2018.[341] He began marking some sales as unsolicited in February 2017, the month after he sold the blue chips that had been in the portfolio when it was transferred to him. After buying 2,500 shares of First Solar Inc. on February 21, 2017, Flower sold the First Solar shares two days later, on February 23, for a realized loss of $6,709.41. He marked the sale unsolicited.[342]

Similarly, on February 27, 2017, Flower marked the sale of a closed-end mutual fund called Cornerstone Total Return Fund Inc. as unsolicited.[343] Flower had bought the fund for the account on January 9, 2017.[344] WN remembered, "I got dividend checks [from Cornerstone] at first, then it dribbled off pretty fast."

Given WN's circumstances, and his impression that Flower was following the conservative approach that Fisher had followed, it is difficult to credit Flower's marking of these transactions as unsolicited. Flower admitted that WN did not bring trading ideas to him.[345]

Flower was the engine for the trading in WN's account. While he was suspended for three months, from the beginning of July 2017 through September 2017, there were no trades in the account. But immediately upon Flower's return to SW Financial after his suspension, he

[336] Tr. (WN) 987–98.

[337] JX-38, at 5; Tr. (WN) 1016.

[338] CX-2, at 1–2.

[339] Tr. 1018.

[340] JX-39, at 246; Tr. 1019–20.

[341] CX-1.

[342] CX-2, at 2.

[343] CX-2, at 2.

[344] Tr. (Flower) 466; CX-2, at 1.

[345] Tr. (Flower) 536.

executed 20 trades in WN's account in October 2017.[346] He resumed his pattern of in-and-out trading.

- On October 4, 2017, he added 5,300 shares to the account's holding of 2,200 shares of Carvana Company CL A. But on October 19 he sold 2,500 shares of the company at a lower price than he had bought the shares earlier in the month.[347]

- On October 10, he bought 1,000 shares of INPHI Corp.; on October 17, he sold them.

- On October 10, he also bought 5,000 shares of Vuzix Corp. New; and on October 19, he sold them.

- On October 24, he bought 2,000 shares of Mulesoft Inc. CL A; on October 27, he sold them.

- On October 27, he bought 1,500 shares of Cirrus Logic Inc.; on October 30, he sold them.[348]

Flower did not tell WN that he was suspended for the months of July, August, and September 2017.[349] And WN was unaware that after Flower returned from his suspension there were 20 trades in his account in one month.[350]

i. Activity Letter

SW Financial sent WN an activity letter, dated March 21, 2017, which summarized trading activity in his account in February. It reported that 12 trades had occurred in the account that month, resulting in an annualized turnover ratio of 30.32 and a cost-to-equity ratio of 17.74. WN did not understand those terms.[351] Flower made the form seem insignificant, characterizing it and other forms as "just housekeeping records."[352] WN said, "[I]t was just sign it and send it back."[353]

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[346] CX-2, at 4–5.

[347] JX-39, at 177, 170–71.

[348] JX-39, at 170–71.

[349] Tr. (WN) 1042–43.

[350] Tr. (WN) 1045.

[351] Tr. (WN) 1024–29; JX-41.

[352] Tr. (WN) 1026.

[353] Tr. (WN) 1026.

When WN examined the letter at the hearing, he still did not understand the terms it used, such as turnover rate and cost-to-equity ratio.[354] He said, "[M]aybe I needed somebody to walk me across the yard. I am not capable of reading this stuff."[355]

j. Closing of WN's Account

The reckoning came when WN told Flower that he needed the money reserved in cash for medical expenses, around $35,000. Flower told WN that he could not send the money to WN because the account did not have that much left.[356] "I think," WN said, "that is when we kind of lost faith in each other."[357] Flower ceased servicing WN's account on May 24, 2018.[358]

k. Effect of Respondent's Trading on Account

Between December 2016 and the end of July 2018, FINRA staff calculated that Flower's trading in WN's account resulted in an annualized turnover rate of 31.59 and an annualized cost-to-equity ratio of 103.49%. Although the average funded equity in the account was $70,252, Flower purchased securities with a total value of $3,699,225. According to the staff's calculations, in the 20 months Flower handled the account, WN sustained realized losses of $131,979. WN paid $111,688 in commissions and other trade costs—more than half the value of the account at the time WN transferred it from Fisher to Flower's care. When WN transferred the account to Flower it had a value of $191,512.[359] Commissions of $101,806 were the largest portion of the trading costs.[360]

The losses suffered in the account have had a dramatic impact on WN's life in retirement. He no longer has most of the savings he transferred to Flower's care. He and his wife now rely on a limited amount of money provided by Social Security and his pension from American Airlines. In the summer of 2020, they had to sell the house they bought in New Mexico and downsize because they needed the money.[361]

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[354] Tr. (WN) 1024–29; JX-41.

[355] Tr. (WN) 1028.

[356] Tr. (WH) 1056–58.

[357] Tr. (WN) 1057.

[358] Stip. ¶ 10.

[359] CX-1; CX-2, at 5; JX-38 at 5.

[360] CX-1.

[361] Tr. (WN) 1059–61.

5. Customer BW

a. Background

BW was born in 1953 and was in his early sixties when Flower cold called him. He lives in Louisiana with his wife and youngest son. He is a building contractor who runs his own design and build firm for residential housing. He attended architecture school at Tulane University for four and a half years and does continuing education courses every year to maintain his contractor's license.[362]

BW has about $60,000 in annual income. He does not make a lot of money from his business, and he invests a lot back in the business.[363] His wife has a physical condition that renders her dependent on him.[364] They are both on Medicare, and BW has no other insurance to assist with his wife's care.[365] He has some rental properties that generate some income, but they are mortgaged. They are his retirement plan.[366]

BW's mother died in 2008 and left him some money that became available to him in 2009. He decided to invest about 25% of it, and around the same time he received several calls from stockbrokers soliciting his business. He placed a few thousand dollars with one of them and a little more money with another person.[367] He was disappointed with the results.[368] "I had some bad luck with, you know, the first investments."[369]

b. Establishment of Account

Flower cold called BW toward the end of 2015, just before he left Laidlaw.[370] Flower struck BW as a "very personable guy," and BW "just felt like [he] trusted him."[371] BW told Flower about the bad experience he had had with a prior stockbroker.[372] BW said, "[B]y the time Jim got to me I was not quite as trusting as when I went into it."[373] But, BW testified, "Jim was

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[362] Tr. (BW) 1079–82.

[363] Tr. (BW) 1158.

[364] Tr. (BW) 1168.

[365] Tr. (BW) 1169.

[366] Tr. (BW) 1168–69.

[367] Tr. (BW) 1082–83, 1089.

[368] Tr. (BW) 1083, 1085.

[369] Tr. (BW) 1083.

[370] Tr. (BW) 1094, 1098–99.

[371] Tr. (BW) 1083.

[372] Tr. (BW) 1087–88.

[373] Tr. (BW) 1088.

able to allay my fears."[374] "[H]e was commiserating with me about my bad luck who I chose to do my previous investing," BW recalled, "and it sounded like he was going to be able to help me recover some of the money."[375] BW checked that Flower had "legitimate credentials" and was reassured.[376]

BW understood that Flower had a team of people who researched stock recommendations "and knew what was going on."[377] BW said, "I didn't have any time to do that and no understanding either."[378]

BW originally invested around $6,000 with Laidlaw.[379] He wanted to invest the money "in something other than a bank where it would not grow."[380] BW transferred his account from Laidlaw to SW Financial when Flower moved from one firm to the other.[381]

On December 13, 2015, BW opened an individual non-discretionary account at SW Financial with Flower as the broker of record.[382] Between December 2015 and the beginning of April 2017, Flower serviced BW's account.[383]

From the outset, BW's attitude toward investing made him vulnerable to manipulation and revealed to Flower that he would have the ability to trade in the account as he pleased. BW did not remember discussing Flower's investment strategy for the account. But even if Flower had tried to explain it to him, BW said, "I probably would have listened for just long enough to put me almost to sleep. And then I would say please don't go on. I don't understand this stuff, it is up to you."[384] Similarly, if Flower had tried to explain the terms in the account opening forms and what speculation meant, BW said, "I would have stopped him and said look, I don't really want to know the mechanics. I just want you to recover some money and make me some money."[385]

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[374] Tr. (BW) 1088.

[375] Tr. (BW) 1083.

[376] Tr. (BW) 1089–91.

[377] Tr. (BW) 1091.

[378] Tr. (BW) 1091–92.

[379] Tr. (BW) 1114.

[380] Tr. (BW) 1089.

[381] JX-30; Tr. (BW) 1099–1101.

[382] Stip. ¶ 14.

[383] Stip. ¶¶ 15–16.

[384] Tr. (BW) 1095.

[385] Tr. (BW) 1108–09.

BW summed up his attitude toward stock market investing: "I have no interest."[386] Nor did he think he had the time to delve into the securities markets and figure out good stocks in which to invest.[387] "That's why you hire people to do those things."[388] He concluded, "I love what I do but I hate what they do."[389]

c. Establishment of Margin

BW signed a margin agreement along with his account opening documents on December 18, 2015. He considered the margin agreement part of the material he was supposed to sign to open his account.[390]

The account opening form had various boxes marked to indicate BW's investment experience with stocks, options, bonds, mutual funds, and other financial products. Many of the boxes were marked to indicate that BW had extensive experience that he did not have. In particular, the box for margin experience was marked to indicate that he had more than 15 years of experience using margin. That was untrue.[391] But BW acknowledges that he might have traded margin before in another brokerage account.[392]

BW signed a second margin agreement on April 5, 2016, about four months after opening his account with Flower. BW does not remember the circumstances of signing the second agreement. But when he received the document from Flower, it had indications of where he should sign and date it and he would have done that without reading more than the first sentence.[393] BW said, "[H]e knew what my overall objective was and I didn't care about the minutia of our agreement."[394]

At the hearing, BW explained his understanding of margin. "[I]t was sort of betting on how a stock is going to do, whether or not it goes up or down, you could potentially make money."[395] He said he understood that there are risks in the stock market, "[b]ut the risks

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[386] Tr. (BW) 1129.

[387] Tr. (BW) 1128–29.

[388] Tr. (BW) 1129.

[389] Tr. (BW) 1129.

[390] JX-29; Tr. (BW) 1119.

[391] JX-28, at 2; Tr. (BW) 1111–14.

[392] Tr. (BW) 1165.

[393] Tr. (BW) 1119–22.

[394] Tr. (BW) 1122.

[395] Tr. (BW) 1113.

involving a margin account, I'm not sure if I understand that."[396] He does not remember if Flower spoke to him about the risks of margin.[397]

d. BW's Calls with Respondent

Flower would call BW with stock ideas, but BW would respond that he knew about the building and contractor business, not stocks.[398] "I would tell him I have absolutely no expertise in the area."[399] BW said,

> Most of the time shortly into the spiel about why [a particular stock] was promising, I would stop him and say, I don't want to know this. I'm ignorant of what you are talking about. You are going to ask for my endorsement of this thing and I can't give it to you because I don't know anything. That is why you are my guy.[400]

Even at the hearing, BW conveyed his disengagement from the issues that arose in his account, saying that "I actually glaze over and I can't follow you."[401] He explained how he dealt with Flower and any other broker he dealt with: "So I rely on the basic overall guiding princip[le] . . . make me my money back and however you do it, I don't want you to explain it to me because it just gives me a headache."[402]

BW saw Flower as the expert to whom he could cede control of the account. He told each person who called him about investing in stocks, including Flower, that he did not know about stock investing and was looking for someone on whom he could rely. By such comments, BW repeatedly conveyed to Flower that he would not interfere with Flower's ability to manage the account as he liked.

> [B]asically the reason I hired him was to make these decisions for me. . . . I got numerous calls from the various people who sold to me and I tried to impress each of them the idea that I didn't really want calls about my opinion on a stock because I don't have a valid opinion. . . . I just don't know enough about it. So I always deferred to the people that I hired as the experts to make the right decisions.[403]

[396] Tr. (BW) 1118.

[397] Tr. (BW) 1122.

[398] Tr. (BW) 1083–84.

[399] Tr. (BW) 1084.

[400] Tr. (BW) 1092.

[401] Tr. (BW) 1165.

[402] Tr. (BW) 1165.

[403] Tr. (BW) 1084.

e. BW's Trust in Respondent

BW described his trust in Flower: "I kind of felt like Jim was, I don't know, I just trusted him. He talked a good game is what I would say."[404] "[I]t was all about the fact that I liked Jim on the phone. He sounded very trustworthy. He sounded very sympathetic to my plight."[405] He said, "[I]t sounded like he probably had the skill to help me out of my situation and get me back on track and get some of my money back."[406]

BW's focus was on recouping the money he had lost with the prior broker, and if Flower told him they should speculate in their trading, he said, "I probably would have said go for it . . . do what you want as long as you understand I have lost money in the past and I'm tired of that. And I would like to make some of my money back."[407]

BW made plain to Flower that he controlled the trading in the account. "[I]t was up to Jim," he testified. "I mean I made that clear to him, I just didn't have enough information."[408]

BW never called Flower with ideas for securities investments.[409] And he can remember no instance when he independently went to Flower to say he wanted to sell a security.[410] "I would never venture to call someone who is supposed to be my expert and tell him what I think. That is just not my MO."[411]

f. BW's Understanding of Charges for Trading

BW was "not under the illusion that [Flower] was working for free."[412] But he had no understanding of how or what he was being charged for the trading. He did not know if a flat fee was charged or a percentage fee.[413] He did not recall Flower using the words markup and markdown in a conversation. He has no understanding of what those words mean in the context of a securities account. He also does not know the difference between a riskless principal trade and an agency trade.[414]

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404 Tr. (BW) 1086–87.

405 Tr. (BW) 1093.

406 Tr. (BW) 1093–94.

407 Tr. (BW) 1109–10.

408 Tr. (BW) 1124.

409 Tr. (BW) 1123–24.

410 Tr. (BW) 1141.

411 Tr. (BW) 1151–52.

412 Tr. (BW) 1095–96.

413 Tr. (BW) 1095–96.

414 Tr. (BW) 1095–97.

"I don't care about how much someone else makes in a transaction," BW said. "I only care at the end of the day, I also make money."[415] He emphasized his lack of interest in the details of the costs of trading. "[T]hat is not the kind of stuff that I want to occupy my brain with."[416] "Make me money, make yourself money. I don't care how you do it or how much . . . you end up with. I only care that my portfolio grows."[417]

g. BW's Tracking of the Account

Although BW thought it was a good idea to invest some of the money he inherited from his mother, he "did not want to monitor it or pay attention to it."[418] BW still has unopened statements.[419] Those that he opened, he did not understand. Whenever he looked at the documents, he concluded that the value of the assets was either close to where it was or slightly growing. He said, "I didn't see anything too alarming whenever I did look."[420] BW also did not review trade confirmations to see what was being charged to his account for the trading activity.[421] BW never used online access to his account.[422]

h. Trading in BW's Account

Between March 2016 and June 2017, Flower executed 38 trades and made total securities purchases of $173,575 in BW's account at SW Financial.[423] Even though BW told Flower that he should make decisions about what to buy and sell, Flower marked 18 of the transactions unsolicited.[424]

i. Closing of BW's Account

BW's stepson handles his "paperwork" and business. His stepson opens mail and tells him about anything significant.[425] At some point, his stepson told BW that "the account had reached basically zero balance or something, close to that." His stepson said, "[Y]ou realize

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[415] Tr. (BW) 1095.

[416] Tr. (BW) 1096.

[417] Tr. (BW) 1096–97.

[418] Tr. (BW) 1089.

[419] Tr. (BW) 1124.

[420] Tr. (BW) 1125–26.

[421] Tr. (BW) 1143–44.

[422] Tr. (BW) 1128.

[423] CX-1.

[424] CX-6.

[425] Tr. (BW) 1127.

basically you lost all of your money."[426] BW responded, "[N]o, not really. I didn't know that."[427] Flower stopped servicing BW's account at SW Financial on April 3, 2017.[428]

j. Effect of Respondent's Trading on Account

FINRA staff calculated that, during the relevant period, Flower's trading in BW's account resulted in an annualized turnover rate of 33.52 and an annualized cost-to-equity ratio of 176.7%. Although the average funded equity in the account was $3,883, Flower purchased securities with a total value of $173,575. According to the staff's calculations, while Flower handled the account, BW sustained realized losses of $2,958. BW paid $8,599 in total trade costs.[429] Commissions of $6,354 were the largest portion of the trading costs.[430]

k. Respondent's Effort to Enlist BW's Help in His Defense

Despite losing money with Flower at SW Financial, BW continued to work with Flower when he moved to his current firm, Spartan.[431] Flower came to him saying he needed BW to help him keep his license and stay in business. He wanted BW to sign something that endorsed him.[432] BW was "okay with it." He said, "I didn't feel like I was lying about anything, I didn't distrust Jim."[433] Flower's assistant at Spartan emailed BW an affidavit and an account transfer form.[434] Flower did not explain to BW that his account with Flower at SW Financial was part of a FINRA investigation into potential excessive trading.[435]

BW's signature appears on an affidavit similar to the affidavits Flower sent to other customers.[436] He does not remember signing it.[437] He does vaguely remember that he "signed something for Jim, you know, to try to help out."[438]

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[426] Tr. (BW) 1152.

[427] Tr. (BW) 1152.

[428] Stip. ¶ 16.

[429] CX-1, at 1; CX-6, at 3; CX-29; JX-31; JX-32.

[430] CX-1, at 1.

[431] Tr. (BW) 1153–54, 1163, 1165.

[432] Tr. (BW) 1153–55.

[433] Tr. (BW) 1155.

[434] Tr. (BW) 1165–66.

[435] Tr. (BW) 1171–72.

[436] JX-35; Tr. (BW) 1159–60.

[437] Tr. (BW) 1158.

[438] Tr. (BW) 1160.

The document labeled as an affidavit is undated and not notarized.[439] It says, among other things, that BW had over 20 years of investing experience with multiple firms, that his income and net worth were "substantial," and that he liked working with Flower, who kept him up-to-date on stocks.[440] When shown the document by Enforcement late in 2020, BW was surprised. "Holy mackerel," he testified, "there is only one true statement in that which was I am the owner of [BW's] Construction." He said it was "categorically untrue" that he had over 20 years of investing experience.[441] BW believes he would have noticed the untrue statements and would not have signed the document.[442] He noted, "I am not a liar and that [assertion of 20 years of investing experience] is a lie."[443] But BW may have signed the document along with the account transfer forms to transfer his account to Spartan.[444] He declared that if he were presented with the document today, he would not sign it.[445]

H. Unauthorized Trades in WN's Account

SW Financial did not maintain any discretionary accounts.[446] Accordingly, Flower was required to seek prior authorization before executing any trade in the customers' accounts. The Amended Complaint identifies 17 alleged unauthorized trades in the account of WN, the retired aircraft maintenance worker.[447] CD, the FINRA examiner who investigated Flower after he was identified as a high-risk registered representative, saw numerous trades in WN's account without evidence of a communication between Flower and WN prior to the trades.[448]

EW, the FINRA investigator who examined the trading records, compiled CX-10 from SW Financial's trade blotter, Flower's client list, phone records, and Rule 8210 response, as well as Flower's colleague's phone records and Rule 8210 response. That exhibit shows the details of the trades and when they occurred.[449]

All but one of the suspect trades occurred in April, May, and June of 2017.[450] WN broke his ribs and had some other health issues between April and June 2017. These issues affected his

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439 JX-35.

440 JX-35.

441 Tr. (BW) 1156.

442 Tr. (BW) 1157–61.

443 Tr. (BW) 1159.

444 Tr. (BW) 1165–66.

445 Tr. (BW) 1161.

446 Stip. ¶ 26.

447 Am. Compl. ¶ 28.

448 Tr. (CD) 949–50.

449 CX-10, at 1.

450 CX-10.

day-to-day living.[451] He was focused on his health issues during this period, not securities trading.[452]

CX-10 also matches the alleged unauthorized trades with their opposite side trades and calculates the resulting realized profit or loss for each trade. That analysis concludes that the unauthorized trading resulted in a total realized loss of $31,328.[453] The details relevant to sanctions are set forth in that section of this decision.

Flower maintained that he had spoken with WN in advance of the alleged unauthorized trades. He acknowledged that SW Financial's compliance officer wanted its registered representatives to use only their office telephones to conduct business.[454] But he testified at the hearing that he "may" have used his cell phone to obtain authority from WN for the trades.[455] He claimed that the firm's telephone system was suffering outages that necessitated using his cell phone to talk with WN.[456] This testimony was inconsistent with his February 12, 2019 OTR testimony,[457] his written Rule 8210 response,[458] and the stipulation he agreed to prior to the hearing.[459]

Flower's story also was not supported by SW Financial's telephone records, which showed, for example, that Flower made and received numerous calls from his desk phone on April 4, 2017, but had no record of any calls with WN.[460] Flower bought shares of Silver Wheaton Corp. for WN's account, and he sold shares of Care Cap PPTYS Inc. the same day.[461] On April 19, 2017, Flower sold the shares of Silver Wheaton he had bought for the account earlier in the month in a transaction he marked unsolicited. There were over 60 telephone calls made to and from Flower's desk that day—but no calls with WN.[462]

Then, on May 22, 2017, Flower bought Under Armour Inc. CL C for WN's account and two days later, on May 24, he sold it. Flower charged a markup of $2,150 on the purchase and a

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[451] Tr. (WN) 1029–30.

[452] Tr. (WN) 985, 1030.

[453] CX-10, at 2–3.

[454] Tr. (Flower) 519.

[455] Tr. (Flower) 444.

[456] Tr. (Flower) 444, 479–80.

[457] Tr. (Flower) 444–46.

[458] Tr. (Flower) 446–52; CX-55, at 2.

[459] Stip. ¶¶ 23–24; Tr. (Flower) 452–53, 478–79.

[460] CX-57, at 2–3; Tr. (Flower) 481–83.

[461] CX-10, at 1.

[462] CX-57, at 14–15; Tr. (Flower) 483–86.

markdown of $1,250 on the sale.[463] SW Financial's telephone records show that Flower was busy on his desk phone both days, but he did not speak with WN either day.[464]

Flower charged WN a total of $3,400 for the two transactions in Under Armour over the course of three days, while WN suffered a loss of $3,297.[465] It is difficult to believe that the transactions served any purpose but to generate commissions. Flower's testimony that he obtained WN's authorization prior to making the 17 trades is not credible and is not supported by evidence.

I. Purported Unsolicited Trades

Flower was responsible for marking all transactions he executed in his customers' accounts at SW Financial as either solicited or unsolicited.[466] He marked numerous sales of securities in the five customers' accounts as unsolicited. He mismarked at least 58 trades, mostly sales.

As noted above in discussing the individual customers' accounts, none of the five customers ever called Flower with an investment idea. According to the customers, Flower would call them with a recommendation to buy or sell. The customers may have authorized trades, but only because Flower prompted them to do so. The transactions would not have occurred if Flower had not called the customers. There is no evidence of these customers even once independently instructing Flower to execute a trade without a call from Flower.

In fact, in connection with the sales marked unsolicited, Flower acknowledges that he initiated calls and provided the information that caused the customers to sell.[467] Often his customers, who are scattered around the country and do not know one another, sold the same stock on the same day—because he called them with the same information. "I would present to them the same clients that had the same securities, same opportunity of what they wanted to do. Where the position was, the update with the news and the current events and they would instruct me to sell the stock or you know to hold it."[468]

When asked about the pattern of his recommending a purchase around the same time as an unsolicited sale, Flower responded, "I would give them an opportunity with another recommendation to try to make up the losses from the sale of the loss for the unsolicited trade or to diversify the account with bringing in another recommendation, another position in the

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[463] CX-10, at 1; Tr. (Flower) 486–87.

[464] Tr. (Flower) 486–90; CX-57, at 35–38.

[465] CX-2, at 3; Tr. (Flower) 490.

[466] Stip. ¶ 20.

[467] Tr. (Flower) 526–28, 538–39.

[468] Tr. (Flower) 535. CX-9 shows the pattern of multiple customers selling the same stock on the same day in purportedly unsolicited transactions.

account."[469] In one example, as discussed above, Flower sold First Solar out of WN's account on February 23, 2017, two days after buying it, and marked the sale an unsolicited transaction. But WN did not call him to execute the sale, as Flower himself acknowledges.[470] Flower called WN. "I updated him on the stock, let him know it was coming down and he instructed me to sell the stock."[471]

When asked to distinguish between solicited transactions and unsolicited transactions, Flower defined solicitation as "bringing the recommendation to [WN], explaining the recommendation and telling [WN] why I would like to buy the stock."[472] He defined an unsolicited transaction as one where he would provide information without urging a particular course of action. "I would ask them what they wanted to do with the position, correct. I would update them with the current news, what was going on and then they instructed me what to do with the trade, whether to sell or to buy."[473]

On February 23, 2017, the same day that Flower sold First Solar out of WN's account and marked the transaction unsolicited, he recommended that WN purchase shares of Freeport McMoran. When asked whether he recommended the sale of First Solar to make the purchase of Freeport McMoran, Flower avoided answering the question. "It says unsolicited. So he recommended me to sell the stock because it was a loss."[474]

But WN was not recommending anything to Flower. WN was not tracking the stock and was not seeking to trade in and out of the market. As discussed above, he was focused on his medical issues and thought that Flower was following Fisher's conservative investment approach. The sale of First Solar was prompted by a call from Flower and would not have happened without it.

Similarly, Flower executed the purchase of Eagle Bulk Shipping Inc. in MK's account on November 16, 2016, marking the trade solicited. Then, on the very next day, November 17, Flower sold the Eagle Bulk position for a loss of $4,818, marking the sale unsolicited.[475] Flower said, "Just like the scenario with the other individuals, I called [MK] and told him the stock was dropping fast and he instructed me to sell it."[476] Flower called DT, who also held Eagle Bulk Shipping, with the same information, prompting DT to sell the position on the same day,

[469] Tr. (Flower) 527–28.

[470] Tr. (Flower) 470–71; CX-2, at 2.

[471] Tr. (Flower) 471.

[472] Tr. (Flower) 509–10.

[473] Tr. (Flower) 510–11.

[474] Tr. (Flower) 471–72.

[475] CX-3, at 3.

[476] Tr. (Flower). 424.

November 17.[477] During November 2016, Flower also traded in and out of Eagle Bulk Shipping in LJW's account.[478]

Flower sometimes called customers to invite them to take a profit on a stock but marked those sales as unsolicited. For example, he purchased Eagle Bulk Shipping in DT's account on November 14, 2017. He marked the purchase solicited. Later that very same day, he sold Eagle Bulk Shipping out of the account but marked that sale unsolicited.[479] He explained that the price per share had jumped and he had called DT about it: "Okay, I bought the stock, I guess in the morning and then the stock shot up by afternoon. I brought to all the customers that had this Eagle Bulk and said to them, you know, it shot up this fast, would you like me to just take the profit. And [DT] advised me to sell the stock and take the profit."[480]

Flower distinguished between recommending a trade and bringing a potential trade to the customer's attention. Asked why he marked the purchase of Eagle Bulk Shipping in DT's account as a solicited transaction, he said, "Because I recommended to buy the stock. I presented the idea, I solicited the stock."[481] Later the same day, when he called DT again about Eagle Bulk Shipping, he marked the sale unsolicited because he considered himself merely following the customer's instructions. "And then by the afternoon when it shot up that fast, I asked him, I said what do you want me to do? I could be taking profits here of this much money. He said you know what, I would like to sell the stock and take the profit."[482]

J. Credibility

1. Flower

With respect to the excessive trading and churning charges, Flower mainly relied on the customers' signatures on account opening documents and margin agreements, saying that the customers "wanted" to speculate and "wanted" to use margin.[483] He also contended that the customers had signed numerous activity letters without complaint.[484] The record is replete with evidence that the customers did not understand the terms in the documents, and Flower did not explain the terms or the costs and risks of the trading in which he engaged. They signed documents containing inaccurate information regarding their circumstances and investment experience because they did not understand the significance of the inaccuracies. Flower's

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[477] Tr. (Flower) 422–25.

[478] Tr. (Flower) 646–51.

[479] CX-5, at 2.

[480] Tr. (Flower) 531.

[481] Tr. (Flower) 532.

[482] Tr. (Flower) 532.

[483] Tr. (Flower) 454–55, 513, 516–17.

[484] Tr. (Flower) 1215–16.

assertion that these customers freely chose to engage in the frequent trading strategy and use of margin is not credible.

Flower's testimony about the 17 alleged unauthorized trades in WN's account also was not credible. As discussed above, Flower spoke to his customers from his desk phone; that was SW Financial's policy. He stipulated that he only had conversations with his customers on that telephone, and he gave testimony in an OTR to the same effect. And yet, for the first time at the hearing, he claimed that the firm was having trouble with its telephone system and, as a result, he talked to WN on his cell phone. The firm's records show no problems with its telephone system on the days in question. The firm's records show that Flower used his desk telephone throughout the day, but they show no evidence that he talked to WN. And WN does not remember talking with Flower because he was focused on his medical issues and not securities trading. In fact, WN does not remember ever calling Flower with a direction to sell or buy securities. In short, Flower appears to have made up the story about talking with WN on his cell phone.

Similarly, we do not believe that the trades Flower marked as unsolicited were unsolicited. No customer had the interest, time, knowledge, or sophistication to direct the trading in his account. As discussed above, Flower admitted that the trades were prompted by a call from him. They were not the result of the customers following the stocks and independently reaching out to Flower. Flower testified that he would call a customer to say that an existing position was dropping in value, but he had a better stock that he thought would make up for the loss. Or he might call to say there is a profit to be taken and ask whether the customer wanted him to take it. Often, his customers traded in the same securities on the same day, reflecting that they had received a call from Flower encouraging them to take the same action. The mismarking of the sales as unsolicited created the false impression that the customers were more involved with the trading in their accounts than they were.

We further find that Flower misled his customers. He told several that he could generate returns of 30% to 50%, that he was dealing with boards and CFOs of the companies he was recommending, and that he had a research team supporting his recommendations. There was no evidence that such assertions were true. He told his customers that the activity letters were mere "housekeeping." That was misleading. The letters were red flags. He promised WN he would follow Fisher's conservative strategy with his investments, but then he sold all the blue chip stocks out of the account in the first month and began an aggressive program of frequent trading on margin. He asked for the customers' help to cover up his misconduct by vouching for him in inaccurate purported affidavits, but without telling them that he was under investigation for misconduct in connection with their accounts.

2. The Customers

We find the customers' testimony credible. They testified to the best of their memory and without rancor toward Flower. Each customer's testimony was consistent with the testimony of the others regarding their dealings with Flower. They said that Flower called them about buying and selling specific stocks, without discussing the costs of trading or the costs and risks of using margin. Several spoke of the sense of urgency he would convey. They all found him engaging, and they all trusted him.

We find it credible that they trusted Flower. At the hearing, when he greeted them and asked them questions, he was respectful and expressed appreciation for their time. He and the customers maintained a friendly demeanor toward one another.

In questioning DT, Flower characterized what he did when he recommended a new stock to replace an existing position as "trying to fight and scratch back and make back the money that we had lost with your account."[485] This rings true as the sort of thing he said to the customers when trading. It created a sense that he was battling on their behalf and encouraged them to trust him.

Even though the customers received account statements, confirmations, and activity letters, we find it credible that they did not understand what was going on in their accounts. None of them monitored the trading costs they were incurring. But even if they had tried, it would have been difficult for them to draw any conclusion about costs. The documents used terms known in the securities industry but not to persons inexperienced in securities trading. The trades done on a riskless principal basis required the customers to look at the confirmations; understand that the markup or markdown had been folded into what was shown as the price; understand that the commission equivalent per share appearing under the heading "Special remarks" showed the amount of markup or markdown on a per share basis; and then know to multiply the commission equivalent by the number of shares to calculate the commission actually charged on the transaction. The documents did not explain in clear and simple language the commission paid on a trade. Some of the customers misinterpreted the documents even when they were walked through them at the hearing. They would not have been able to understand the significance of the information in those documents without assistance, which Flower did not provide. Instead, he encouraged them to rely solely on him.

3. FINRA Staff

As previously discussed, we find EW's testimony credible. He clearly explained his analysis of the data and his calculation of the figures in the 11 summary exhibits. We also find the testimony of CD and TH credible. Their testimony explained how this proceeding came to be and corroborated EW's testimony that the trading in the customers' accounts appeared to be excessive.

[485] Tr. (Flower) 916.

III. Conclusions

A. First and Second Causes of Action: Churning and Excessive Trading/Quantitative Unsuitability

1. Nature of the Charges

In the First Cause of Action, Enforcement alleges that Flower churned the accounts in willful violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and in violation of FINRA Rule 2020, which prohibits the same fraudulent conduct as Section 10(b) and Rule 10b-5. Churning has long been held a form of securities fraud.[486] "Churning occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests."[487] A churning violation has three elements: excessive trading, discretionary or de facto control, and scienter, i.e., intent to defraud or, at the very least, reckless disregard of the customers' interests.[488]

In the Second Cause of Action, Enforcement alleges that Flower engaged in excessive trading in violation of FINRA Rule 2111, which governs suitability. Rule 2111 requires that a member or associated person have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the customer considering the customer's investment profile and circumstances. Among other things, the customer's age, financial situation and needs, investment experience, liquidity needs, and risk tolerance should be considered when making a recommendation of a security or a security trading strategy. The suitability Rule reflects that "[i]mplicit in all member and associated person relationships with customers and others is the fundamental responsibility for fair dealing."[489]

Rule 2111 is composed of three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability. Excessive trading charges focus on quantitative suitability. Even if a trade may be suitable when viewed in isolation, it may be unsuitable if it is part of a pattern of excessive trading that is incompatible with a customer's investment profile. Factors such as the turnover rate, the cost-to-equity ratio, and the use of in-and-out trading in a customer's account may be the basis for finding a violation of the quantitative suitability obligation.[490]

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[486] *Michael T. Studer*, Exchange Act Release No. 50543A, 2004 SEC LEXIS 3157, at *16–22 (Nov. 30, 2004), *aff'd*, 260 F. App'x 342 (2d Cir. 2008); *Joseph J. Barbato*, Exchange Act Release No. 41034, 1999 SEC LEXIS 276, at *37 (Feb. 10, 1999); *Donald A. Roche*, Exchange Act Release No. 38742, 1997 SEC LEXIS 1283, at *12–13 (June 17, 1997).

[487] *Roche*, 1997 SEC LEXIS 1283, at *12 (quoting *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 324 (5th Cir. 1981)).

[488] *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 767 F.2d 1498, 1501 (11th Cir. 1985); *Jeffrey B. Bukantz*, Exchange Act Release No. 41827, 1999 SEC LEXIS 1780, at *18 (Sept. 2, 1999).

[489] FINRA Rule 2111, Supplementary Material .01, General Principles.

[490] FINRA Rule 2111, Supplementary Material .05, Components of Suitability Obligations.

In both Causes, Enforcement alleges that the misconduct violated FINRA Rule 2010, which requires that business conduct be consistent with "high standards of commercial honor and just and equitable principles of trade." Rule 2010 is a broad and generalized ethical provision that applies to any unethical business-related conduct whenever the "misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business."[491] Whenever another violation of a FINRA rule is found, it is also a violation of the high standard of ethical conduct required by Rule 2010.[492]

2. Charges Proven

Excessive Trading. The SEC has long held that a cost-to-equity ratio of more than 20% generally indicates that excessive trading has occurred.[493] The figures here are well above that threshold. Three customer accounts had cost-to-equity ratios exceeding 100%, which is five times the threshold (WN, 103.49%; MK, 125.39%; and BW, 176.70%) and two accounts had ratios more than triple the threshold (LJW, 81.35%; DT, 69.69%).[494] These numbers signify that it would be extremely difficult, if not impossible, for the customers to recoup their losses and make a profit.

Similarly, the SEC has held that annualized turnover rates above 6 signal excessive trading.[495] The annualized turnover rates here ranged from 16.47 to 33.52, all more than double the threshold rate.[496] Turnover rates much lower than the ones proven in this case, turnover rates as low as 3.44 to 11.84, have been held to be excessive in certain circumstances.[497]

A pattern of in-and-out trading is another marker of excessive trading.[498] In this case, the summary chart CX-7 tracks numerous instances of buying and then selling the same security within a matter of days. That trading was a pattern, not a unique instance of rapidly trading a security because of a particular event. The customers usually lost money on the transactions, but Flower increased his commissions by using the proceeds of the sales for purchases of new stock and charging more commissions.

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491 *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 SEC LEXIS 2684, at *11–12 (Oct. 23, 2002). *See also John E. Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *28–29 (Feb. 10, 2012) (collecting cases).

492 *E.g.*, *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007).

493 *Newport Coast Sec., Inc*., Exchange Act Release No. 88548, 2020 SEC LEXIS 917, at *10 (Apr. 3, 2020) (citing *Daniel Richard Howard*, Exchange Act Release No. 46269, 2002 SEC LEXIS 3421, at *6 (July 26, 2002)); *Raphael Pinchas*, Exchange Act Release No. 41816, 1999 SEC LEXIS 1754, at *18 (Sept. 1, 1999).

494 CX-1.

495 *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *10.

496 CX-1.

497 *J. Stephen Stout*, Exchange Act Release No. 43410, 2000 SEC LEXIS 2119, at *50 (Oct. 4, 2000).

498 *Dep't of Enforcement v. Haq*, No. ELI2004026701, 2009 FINRA Discip. LEXIS 3, at *24 (NAC Apr. 6, 2009) (citing *John M. Reynolds*, Exchange Act Release No. 30036, 1991 SEC LEXIS 2725, at *8 n.12 (Dec. 4. 1991)).

The conclusion that the trading was excessive is bolstered by the large amount of securities purchases compared to the funded equity in the accounts. The average funded equity in the accounts ranged from $70,000 to less than $4,000. The customers had limited financial resources and resisted adding money to their accounts. And yet Flower purchased over $5 million of securities in the five accounts.

Besides analyzing the number and frequency of trades in a customer's account, the SEC considers the investment objectives and financial condition, age, and retirement status of the customers.[499] Four of the customers here were in their sixties and seventies when they started working with Flower. One was already retired. None of them had large amounts of cash that they could afford to lose. WN, the former aircraft maintenance worker, had the largest account, but he had saved that money to cover medical and other expenses in retirement and thought that the account would be handled in a conservative manner. Frequent trading on margin was incompatible with the customers' financial condition, age, and retirement status. Although the customers signed account opening documents, margin agreements, purported affidavits, and activity letters that on their face signified a desire to speculate and confirmed that they understood the trading in their accounts, those documents did not accurately reflect the customers' circumstances.

De Facto Control. The record compels the conclusion that Flower had de facto control over these five accounts. Regardless of the pre-populated entries on their account opening forms and their signing of margin agreements, these five customers lacked sufficient investment experience and sophistication to independently evaluate Flower's recommendations or the trading in their accounts. They relied entirely on him.[500] "A registered representative's de facto control over an account 'may be established when the customer relies on the representative such that the representative controls the volume and frequency of transactions.'"[501]

The SEC has upheld a finding of de facto control where customers testified that they followed their broker's trading recommendations, some trading was unauthorized, and margin was used even though margin was not sought out by the customers.[502] The same factors exist here. The customers uniformly testified that trades only happened because Flower called them to talk about buying or selling specific stocks and they consistently followed his suggestions. Even Flower testified that he called the customers with information and that the trades he marked unsolicited happened after those calls. Some of the trading was unauthorized. And Flower

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[499] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *10.

[500] *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir. 1980); *Laurie Jones Canady*, Exchange Act Release No. 41250, 1999 SEC LEXIS 669, at *20 (Apr. 5, 1999), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000); *Barbato*, 1999 SEC LEXIS 276, at *39 & n.24.

[501] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *8 (quoting *Richard G. Cody*, Exchange Act Release No. 64565, 2002 SEC LEXIS 3421, at *41 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012)).

[502] *Id.* at *9.

arranged for the customers to use margin without explaining the risks, even though they either had no experience with margin or wanted to avoid it.

It is also apparent from other evidence that Flower had de facto control of the accounts. There were no trades in the three accounts that were open while Flower was suspended. But after the suspension was over, the accounts were actively traded once again.[503] Trading only happened when Flower made it happen.

Scienter. Scienter is a mental state embracing an intent to deceive, manipulate, or defraud. In a churning case, scienter can be established by showing that a broker's trading was in reckless disregard for the customer's interests.[504] Specific intent to defraud is not required.[505] It is sufficient to show that cost-to-equity and turnover rates were so high that the broker "must have known that he was acting in reckless disregard" of his customer's interest.[506] In such circumstances, the ineluctable conclusion is that the broker engaged in the excessive trading to further his own interest in generating commissions.[507]

The figures here support the conclusion that Flower traded for the purpose of generating commissions and that he must have known he was acting in reckless disregard for his customers' interests. The SEC has held that cost-to-equity ratios of more than 100%, which would require the client to earn more than 100% per year to break even, demonstrate that a broker intentionally traded to generate commissions.[508] Churning has been found for lower cost-to-equity ratios, too.[509] The conclusion is further compelled where a broker has generated a significant portion of his commissions from a few customer accounts.[510] Flower generated a third of his commissions from these five accounts, which constituted less than 4% of the 149 accounts he managed.

Furthermore, the degree to which Flower acted contrary to the interests and wishes of his customers strongly suggests he acted knowingly and intentionally to increase his commissions without regard for the risks and the losses the customers might—and did—suffer.

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[503] CX-2, at 4 (WN); CX-4, at 4 (LJW); CX-5, at 3–4 (DT).

[504] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *13; *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 775 n.6 (9th Cir. 1984).

[505] *Dep't of Enforcement v. Taddonio*, No. 2015044823502, 2019 FINRA Discip. LEXIS 3, at *52–53 (NAC Jan. 29, 2019), *appeal docketed*, No. 3-19012 (SEC Feb. 28, 2019).

[506] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *13; *Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *33 (NAC Apr. 26, 2013).

[507] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *12–13.

[508] *Id.* at *13.

[509] *Id.* at *14 (52.96% to 68.82%); *Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *33 (cost-to-equity ratio of nearly 45%); *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *15–16 (July 2, 2013) (59%), *aff'd sub nom*. *Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

[510] *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *13–14 (commissions of 25% to 50% from one or two customers).

- Flower knew that LJW, the owner of the IT contracting firm, had family obligations and little access to funds for investment. Flower had LJW sign a margin agreement as part of his account opening documents, even though he had no experience with margin. This enabled more trading and the generation of more commissions for Flower. It had no advantage for the customer.

- MK, the tax accountant, was in his seventies and did not like margin, but Flower persuaded MK to sign a margin agreement after opening his account in order to do a particular trade. MK resisted adding more money to the account, and Flower urged him to purchase a particular security. Afterward, Flower continued to trade on margin in the account. The purchase of more securities benefited Flower by generating more commissions. But MK incurred substantial costs as a result. The annualized cost-to-equity ratio in the account was 125.39%.

- DT, the owner of the air conditioning company, was also in his seventies and had very little experience in the stock market. Although he did not remember doing so, Flower arranged for him to sign a margin agreement. Flower generated more commissions by trading on margin, but margin added risks and costs to the account, which Flower never explained to DT.

- Flower knew that WN, the aircraft maintenance worker, had recently retired, wanted to keep the conservative investments he had with Fisher, and needed cash to take care of medical needs. And yet Flower sold the blue chip stocks transferred to his care and purchased several million dollars of securities on margin in the account. The additional purchases generated commissions for Flower and losses for WN. Flower's unauthorized trading in the account further demonstrated his disregard for his client's interest. Flower was so intent on trading that he failed to reserve the funds WN told him he would need for surgery. With respect to that reserve, he knowingly acted contrary to his customer's interest. As a result of all the trading, WN suffered more than $131,000 in realized losses, roughly 68% of the value of the assets he had saved for his retirement and transferred from Fisher to Flower.

- Flower knew that BW, the home building contractor, was distressed about losing money with another stockbroker and that he did not want to add money to the account. He also knew that BW's wife depended on his financial support because of her physical condition. This should have counseled a conservative approach, but, instead, Flower had BW sign a margin agreement. Margin enabled Flower to increase the volume of trading possible in the account—thereby increasing Flower's commissions. The annualized cost-to-equity ratio in the account was an astounding 176.70%.

We are struck by the similarity of many of the facts in this case to the facts in the NAC's decision in *Department of Enforcement v. Taddonio*.[511] EB, a registered representative found in *Taddonio* to have excessively traded and churned customer accounts, cold called mostly elderly small business owners, some of whom had limited means and limited investment experience. Like Flower, EB spoke with the customers often and encouraged their trust. Like Flower, he had his customers sign margin agreements and then used margin to trade frequently, running up the annualized turn-over rates and cost-to-equity ratios in the accounts. The customers who testified in *Taddonio* did not understand how EB was using margin or the markups and markdowns in their accounts. Nor did they understand their mounting losses. They consistently accepted EB's recommendations. Several told EB that they relied on him, just as BW in this case told Flower he should make the trading decisions.[512]

Under these circumstances, the NAC said, "[W]e can reach no other conclusion than the trading in the accounts [EB] controlled was quantitatively unsuitable."[513] And the NAC further concluded that EB acted with scienter, based on his high commissions and on the high turnover rates and cost-to-equity ratios. In these circumstances, the NAC said, he must have known he was acting in reckless disregard for his customer's interests.[514]

We likewise can reach no other conclusion than that Flower engaged in excessive trading while exercising de facto control of the accounts and with the scienter necessary to categorize it as churning. He must have known that the trading was in reckless disregard of his customers' interests.

Our conclusion is reinforced by the size of the commissions Flower earned on the five accounts. He made a third of all his commissions on these five accounts, which represented a fraction of the 149 accounts he handled. At the same time, the customers lost so much money and incurred such high costs that it was virtually impossible that they could break even. Scienter may also be inferred from the amount of commissions charged by the registered representative.[515]

Willful Violation. We further conclude that Flower's churning of the accounts was a willful violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5. The finding of a willful violation of the federal securities laws subjects him to statutory disqualification.

Pursuant to Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act, broker-dealers and associated persons are subject to disqualification from the securities industry for willful

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[511] *Taddonio*, 2019 FINRA Discip. LEXIS 3, at *20–37.

[512] *Id.*

[513] *Id.* at *52.

[514] *Id.* at *54.

[515] *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *55-56 & n.82 (May 29, 2015) (collecting cases).

violations of the federal securities laws.[516] A willful violation of the securities laws means that the violator knew what he was doing when he committed the violative act.[517] Misconduct is willful in the context of the securities laws if the person "intentionally commit[ed] the act" that constitutes the violation, regardless of whether he understood that he was violating a particular rule.[518] Willful acts are voluntary, in contrast to acts that are inadvertent or coerced. All that is necessary is that the person does the act intentionally.[519]

Flower intentionally engaged in frequent trading, using margin to increase the amount of commissions he could earn on the relatively small accounts. When he traded stocks in-and-out of the accounts generating losses for the customers and commissions for himself, he knew that it benefited him to the detriment of his customers. It was his choice to trade in this fashion, not the customers' choice. He acted in reckless disregard of his customers' interest, and his churning of the accounts was willful.

3. Respondent's Defense Fails

Flower argues that he committed no violations. He points out that the customers signed documents signifying that they had extensive prior investment experience, were interested in speculation, and were willing to use margin. He notes that some of them also signed and returned to SW Financial the activity letters the firm sent customers when there was unusually high trading activity in an account to make sure they were aware of the activity.[520] No customer complained to Flower, and he asserted that the firm's compliance staff never told him he was doing anything wrong.[521] He said he assumed the customers understood what they were

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[516] *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(D).

[517] *See Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000).

[518] *Mathis v. SEC*, 671 F.3d 210, 215 (2d Cir. 2012).

[519] *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *15, *19–20 & nn.22–23 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016). *See also Dep't of Enforcement v. Riemer*, No. 2013038986001, 2016 FINRA Discip. LEXIS 56, at *15–17 & nn.38–41 (OHO Nov. 4, 2016), *aff'd*, 2017 FINRA Discip. LEXIS 38 (NAC Oct. 5, 2017), *aff'd*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022 (Oct. 31, 2018); *Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2015 FINRA Discip. LEXIS 42, at *41 (OHO July 10, 2015), *aff'd*, 2017 FINRA Discip. LEXIS 10 (NAC Mar. 15, 2017), *aff'd in part and remanded in part*, Exchange Act Release No. 83555, 2018 SEC LEXIS 1588 (June 28, 2018), *sanctions reaffirmed*, No. 2009017440201r, 2020 FINRA Discip. LEXIS 5 (NAC Mar. 27, 2020), *appeal docketed*, No. 3-17930r (SEC Apr. 27, 2020).

[520] Tr. (Flower) 1215–16.

[521] Tr. (Flower) 1216–17, 1221. On the other hand, Flower testified to at least one occasion where the firm's compliance officer spoke to him about the level of commissions in DT's account and told Flower to limit commissions to $100 per transaction. Tr. (Flower) 1248–49. In closing argument, Flower asserted that the person who supervised him after he returned from his suspension "did not once stop [him] from trading any of these customers." Tr. (Flower) 1325–26.

signing.[522] If they did not, he called it "negligence on their end."[523] Referring to the customers, Flower said, "So it was on them."[524]

The customers signed pre-populated documents presented to them as necessary to open an account. They did not understand what they were signing or why. They signed margin agreements without understanding the risks of trading on margin, and Flower never explained those risks. In part, the customers did not complain because they did not understand how Flower had taken advantage of their trust. That is why two of them, DT and BW, continued to work with Flower after he moved to Spartan, and he persuaded three of them, MK, DT, and BW, to sign purported affidavits supporting him while he was being investigated—without telling them that he was being investigated for potential misconduct in their accounts. Some customers also viewed complaining as a sign of weakness. "[I] just tried to move on," DT testified. "[Y]ou take the losses and try to suck it up, go home and not like to admit your weaknesses."[525]

While the record makes clear that the customers could have been more skeptical and more diligent in evaluating Flower's recommendations and the trading in their accounts, their lack of understanding is no defense. It only highlights how Flower took advantage of their vulnerability.

Flower asserts that Enforcement "cherry picked" these five clients out of all his clients because of a lack of performance.[526] He also argues that once he agreed to the three-month suspension in the summer of 2017, he had a "bulls eye" on his back and he was a "victim."[527] He claims that Enforcement unfairly filled the customers' heads with negative thoughts about him.[528]

We reject all these assertions because they are inconsistent with the record. There is no evidence that Enforcement behaved unfairly. In any event, regardless of what Enforcement said to the customers, the in-and-out trading and the high turnover rates and cost-to-equity ratios compel the conclusion Flower churned these accounts. If the customers had understood the costs of Flower's frequent trading in their accounts they would never have authorized it. It was inconsistent with their circumstances and financial needs. The evidence amply demonstrates that

[522] Tr. (Flower) 1226–27.

[523] Tr. (Flower) 1227. In closing argument, Flower said, "It is my belief that their negligence to review the paperwork is not my fault and they were aware of the trading strategies for some time and not once ever asked me to slow down trading or halt trading." Tr. (Closing) 1325.

[524] Tr. (Flower) 529.

[525] Tr. (DT) 855, 920.

[526] Tr. (Flower) 1217–18.

[527] Tr. (Flower) 1221–22.

[528] Tr. (Flower) 1217–20.

Flower manipulated these customers, controlled the trading in their accounts, and traded to maximize his commissions without regard for the damage he was doing to their accounts.

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We conclude that Flower violated FINRA Rules 2111 and 2010 by excessive trading and willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as FINRA Rules 2020 and 2010, by churning the five customer accounts.

B. Third Cause of Action: Unauthorized Trading

1. Nature of the Charges

Enforcement alleges in the Third Cause of Action that Flower engaged in unauthorized trading in the account of the retired aircraft maintenance worker, WN, and that the conduct violated FINRA Rule 2010. As noted above, FINRA Rule 2010 requires FINRA members and their associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business. The Rule requires members of the securities industry not merely to conform to legal and regulatory requirements, but to conduct themselves with integrity, fairness, and honesty.[529] For that reason, although Rule 2010 is violated whenever another violation of the securities laws or rules is proven, it also can be violated without another specific rule violation. Rule 2010 is a broad and generalized ethical provision that applies to any unethical business-related conduct whenever the "misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business."[530] A FINRA Rule 2010 violation occurs when a respondent has acted either in bad faith or has engaged in a breach of ethical norms in the industry.[531]

Based on contract and agency principles, a registered representative is legally bound to follow the customer's instructions and to act only as authorized.[532] In special circumstances, as where a customer lacks investment sophistication, the representative has heightened duties to avoid taking unfair advantage of the customer's simplicity.[533] Unauthorized trading is

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[529] *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *22 n.20 (Feb. 13, 2015) (discussing NASD predecessor to FINRA Rule 2010: "[T]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. [FINRA Rule 2010] protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation.") (internal quotations omitted).

[530] *Dep't of Enforcement v. Manoff*, Exchange Act Release No. 46708, 2002 SEC LEXIS 2684, at *11–12 (Oct. 23, 2002).

[531] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013).

[532] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1129 (D.C. Cir. 1990) (a broker-dealer is an agent of the customer and must act only as authorized).

[533] *De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293 (2d Cir. 2002).

misconduct that "goes to the heart of the trustworthiness of a securities professional"[534] and "is a fundamental betrayal of the duty owed by a sales[person] to his [or her] customers."[535] The SEC and the NAC have repeatedly held that unauthorized trading is "a serious breach of the duty to observe high standards of commercial honor and just and equitable principles of trade."[536]

Thus, unauthorized trading is both a dishonest and unfair act in bad faith and a breach of the ethical norms of the industry. It is a violation of FINRA Rule 2010.

2. Charges Proven

SW Financial's telephone records for the relevant days (the day before or the day of one of the supposed unsolicited transactions) show no contact between Flower and WN using his desk telephone. Flower stipulated that he only dealt with his customers using his desk telephone. He testified to the same effect at an OTR, and he responded in writing to a Rule 8210 request with the same statement. WN testified that he never independently instructed Flower to engage in a trade, and in the spring of 2017, when all but one of the purported unsolicited transactions occurred, he was focused on medical issues, not securities trading.

As discussed above, Flower's hearing testimony that he spoke to WN about the 17 transactions on his cell phone because SW Financial's telephone system was down at the time is not credible. It is inconsistent with the firm's records and WN's testimony.

The circumstances make this an egregious violation. The unauthorized trades were in aid of a trading pattern that was contrary to the customer's wishes and interest. Flower knew that WN wanted to keep the blue chip stocks in his account and that the assets were WN's retirement savings. He knew that WN was under the impression that Flower would follow the same conservative strategy that Fisher had followed. And he knew that WN wanted a cash reserve for anticipated medical expenses of $30–35,000. But Flower sold the blue chip stocks and pursued an active trading strategy on margin that was nothing like Fisher's approach. He ran the account value down until it no longer had the cash reserve that WN had requested Flower to retain.

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We conclude that Flower violated his ethical duties under FINRA Rule 2010.

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534 *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *6 (July 1, 2008) (quoting *Adam Stuart Levine*, Exchange Act Release No. 32214, 1993 SEC LEXIS 1108, at *3 (Apr. 26, 1993)).

535 *Id.* (quoting *Keith L. DeSanto*, Exchange Act Release No. 35860, 1995 SEC LEXIS 1500, at *16 (June 19, 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996)).

536 *Id.* (quoting *Bradley Kanode*, Exchange Act Release No. 26792, 1989 SEC LEXIS 825, at *3 (May 8, 1989)). *See also Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *20 (quoting *Sears*, 2008 SEC LEXIS 1521, at *6).

C. Fourth Cause of Action: Mismarking Transactions

1. Nature of the Charges

FINRA Rule 4511 requires member firms to make and preserve books and records as provided under FINRA rules, the Exchange Act, and applicable Exchange Act rules. Exchange Act Rule 17a-3(a)(6)(i) requires member firms to make and keep a memorandum of each brokerage order that reflects "the terms and conditions of the order or instructions." Implicit in the SEC's recordkeeping rules is that the information contained in the records must be accurate.[537] Marking a solicited transaction as unsolicited makes the record of the transaction inaccurate in violation of FINRA Rules 4511 and 2010.[538]

Enforcement alleges that Flower mismarked 58 transactions in different accounts as unsolicited, when they were in fact solicited.

2. Charges Proven

Flower engaged in a pattern of calling customers with a recommendation for a new purchase and a request for new money to fund the new purchase. The customers routinely said they did not want to add new money to their accounts. Often the only alternative was to sell an existing position to buy the new stock.[539] The pattern was repeated in multiple customer accounts.[540] Sometimes Flower called to say a stock in the customer's portfolio was declining and not doing well, but that he had another stock with better prospects.[541] Occasionally, Flower would call a customer to say that he could take a profit by selling a stock.[542] Flower would mark all of these sales transaction as unsolicited because, he claims, he did not explicitly recommend the transaction.[543]

Flower admitted, however, the sales he labeled unsolicited occurred because he called the customers and provided them information.[544] Flower did not merely take orders or execute trading ideas the customers brought to him. Rather, it was a call from Flower that prompted the customers to authorize the transactions.

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[537] *Dean Witter Reynolds, Inc.*, Exchange Act Release No. 46578, 2002 SEC LEXIS 3436, at *25 (Oct. 1, 2002).

[538] *Dep't of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *38–39 (NAC July 28, 2011) (marking solicited transactions as unsolicited violates NASD Conduct Rules 2110 and 3110, the rules that preceded FINRA Rules 2010 and 4511).

[539] Tr. (Flower) 281–91.

[540] Tr. (Flower) 295–97, 302–03, 363–64, 366–69, 370–72, 414–16, 533–35; CX-9.

[541] Tr. (LJW) 623, 632.

[542] Tr. (Flower) 367–68, 529–32.

[543] Tr. (Flower) 531–32, 1236.

[544] Tr. (Flower) 281–91, 369, 538–39, 1235–36.

We conclude that the transactions marked unsolicited were mismarked. Flower engaged in a demonstrated pattern of marking sales unsolicited in circumstances where it is not credible that the customers would have chosen to sell absent Flower's intervention. Many of the sales were for a loss after the stock had been held in the account only a few days. Flower's own testimony was that he distinguished solicited transactions from unsolicited transactions by whether he actively urged a course of action or he only laid out information that encouraged the customer to take a course of action. He admits that the trades occurred after he contacted the customers and provided the information that prompted action. Our conclusion is corroborated by the customers' testimony that they never took an independent trading idea to Flower.

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We conclude that Flower mismarked 58 transactions as unsolicited when they were, in fact, solicited, in violation of FINRA Rules 4511 and 2010.

IV. Sanctions

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines contain recommendations for sanctions for many specific violations, depending on the circumstances. They also contain overarching Principal Considerations and General Principles, which are applicable in all cases, and which are used to analyze aggravating and mitigating factors.[545] Recommended ranges in the guidelines are not absolute. They suggest, but do not mandate, a range of sanctions to be applied. Adjudicators have discretion to decide based on the facts and circumstances of the case to impose a sanction above or below the recommended range, or even no sanction at all.[546]

The Guidelines declare that the "purpose of FINRA's disciplinary process is to protect the investing public, support and improve the overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent."[547] It is with those purposes in mind that we analyze and impose the sanctions discussed below.

A. First and Second Causes of Action: Churning and Excessive Trading/Quantitative Unsuitability

1. Specific Sanction Guidelines

The Guidelines treat churning and excessive trading together under one specific Guideline. They advise that adjudicators should consider a wide range of fines from $5,000 to

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545 FINRA Sanction Guidelines (Oct. 2020), http://www.finra.org/sanctionguidelines.

546 Guidelines at 3–4, General Principle 3 (applicable to all sanction determinations).

547 Guidelines at 2, General Principle 1.

$116,000. The Guidelines also advise adjudicators to consider suspending an individual respondent in any or all capacities for a period of one month to two years. Where aggravating factors predominate, however, adjudicators are advised to consider a longer suspension of up to two years or a bar. Where misconduct rises to the level of churning, as Flower's misconduct does here, the Guidelines strongly urge adjudicators to consider barring the individual for the reckless or intentional misconduct.[548]

2. Aggravating Factors Predominate

We are unaware of any mitigating factors. The following aggravating factors predominate.

Substantial Harm to Vulnerable Investors. Flower's excessive trading and churning caused the five customers to lose a substantial amount of money, totaling more than $223,000. The harm he inflicted was particularly severe as to WN, the retired aircraft maintenance worker, who had to sell the house he bought as his retirement home because he needed money, and who now has nothing to rely on but fixed income in the form of Social Security and a pension from American Airlines. Flower even caused WN to lose the $30–$35,000 he wanted set aside for medical procedures.[549]

These five customers were unsophisticated investors who trusted Flower to manage their accounts. They had no understanding of the trading he was doing in their accounts and no understanding of how he was using margin. They did not know the high costs they were incurring. Even after they became aware that they had lost most of their money, they could not say definitively how much they had lost. Further evidencing their trust in Flower, even after his trading decimated the value of their accounts, he was able to persuade three of them (MK, DT, and BW) to sign documents supporting and endorsing him. Two of them (DT and BW) even opened accounts with him at his current firm.[550]

Flower purposely seeks out seniors when he cold calls people. They can be more vulnerable to deceptive and fraudulent practices, and they can be more seriously harmed by such misconduct because they have less time to recoup losses.[551] At least three of the customers involved in this case were in their seventies when they started working with Flower, and one was in his early sixties. WN, the aircraft maintenance worker, was seriously harmed by Flower's misconduct. His careful planning for his retirement was upended by the loss of most of his assets from Flower's trading.

[548] Guidelines at 78.

[549] Guidelines at 7 (Principal Consideration No. 11).

[550] Guidelines at 8 (Principal Consideration No. 18).

[551] Guidelines at 8 (Principal Consideration No. 20).

Reckless, If Not Intentional, Misconduct; Misleading Customers. Flower's misconduct was, at a minimum, reckless, if not intentional.[552] It was clear to him that these customers were unsophisticated investors who relied on what he told them. One customer, BW, even told Flower he should make the decisions about what to buy and sell because BW was not interested and did not consider himself able to evaluate Flower's recommendations. Even though some of them disliked using margin, Flower persuaded them to sign margin agreements without informing them of the risks and added costs of it. He then traded an enormous volume of securities in the accounts for their modest size using margin. He misled WN, the retired aircraft maintenance worker, saying he would follow Fisher's conservative investment approach but embarked on an aggressive frequent trading strategy using margin.

Flower lulled his clients into inactivity.[553] He intentionally discouraged some of the customers from studying the activity letters that they received by calling the letters mere "housekeeping." He knew the significance of those letters, but his customers did not.

Given that Flower made a third of his commissions in the relevant period from these five accounts, when he was handling 149 accounts, he must have known that he was engaged in an extraordinary amount of trading in the five accounts and that he was the only one who benefited.[554]

Misconduct Resulted in Monetary Gain. The excessive trading and churning created the clear potential for Flower's monetary gain, and, in fact, resulted in his substantial monetary gain. The trading appeared to have no purpose other than to generate income for Flower.[555]

Extensive Pattern of Misconduct Over Long Period of Time. Flower engaged in an extensive pattern of excessive trading and churning over two and a half years, a long period of time. He engaged in more than 450 trades in the five accounts during the relevant period, despite their relatively small size. Essentially, he continued his pattern of misconduct until the accounts ran out of money.[556]

Lack of Acceptance of Responsibility. Flower does not accept any responsibility for his misconduct. He asserts that no customer told him to stop trading and his compliance department never told him he was doing anything wrong. If the customers did not understand what was happening in their accounts, Flower blames them.[557]

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[552] Guidelines at 8 (Principal Consideration No. 13).

[553] Guidelines at 7 (Principal Consideration No. 10).

[554] Guidelines at 7–8 (Principal Consideration No. 13).

[555] Guidelines at 8 (Principal Consideration No. 16).

[556] Guidelines at 7 (Principal Consideration Nos. 8–9).

[557] Guidelines at 7 (Principal Consideration No. 2).

Disciplinary and Arbitration History. Disciplinary sanctions should be more severe for recidivists. They have already failed to comply with FINRA's rules or the securities laws. More severe sanctions are particularly warranted where an individual's disciplinary and arbitration history includes significant past misconduct that is like the misconduct at issue.[558]

Flower has both a disciplinary history and an arbitration history. He settled a customer arbitration claim against him in 2009 that included a claim that he had misrepresented the use of margin. He used margin in this case, which the customers did not understand, to facilitate the frequent trading that generated commissions for him. In 2015, his employing firm settled another customer claim against him. During the relevant period for this case, Flower signed an AWC consenting to findings that he recommended a note to 13 customers without having a reasonable basis for the recommendation. He was suspended for three months. None of these events appears to have chastened Flower or made him more careful in his dealings with customers. As soon as his suspension was over, he returned to SW Financial and resumed the excessive trading and churning in the accounts of these five customers.

3. Bar, Restitution, and Prejudgment Interest

Under the Guidelines, and for the protection of investors, Flower should be barred from associating with any FINRA member firm in any capacity. Aggravating factors predominate. We are troubled that Flower sees nothing wrong with his handling of these accounts and lays the blame on the customers for not understanding costs and risks of the trading and use of margin. He testified that he conducts his business at his current firm the same way he conducted business at SW Financial. If so, we are concerned about other vulnerable investors who may be susceptible to abuse in their accounts.

To remediate misconduct, the Guidelines advise in General Principle No. 6 that adjudicators should consider a respondent's ill-gotten gain. It can be appropriate to order disgorgement of ill-gotten gain. "Adjudicators may order that the respondent's ill-gotten gain be disgorged and that the financial benefit, directly and indirectly, derived by the respondent be used to redress harms suffered by customers."[559] The Guidelines also provide that it may be appropriate to order restitution to "restore the status quo ante" where "an identifiable person has suffered a quantifiable loss" proven to be "proximately caused by a respondent's misconduct." The Guidelines expressly provide that an order of restitution "may exceed the amount of the respondent's ill-gotten gain."[560] Victims cannot be fully restored to the status quo ante unless prejudgment interest is also ordered. "Compensation deferred is compensation reduced by the

[558] Guidelines at 7 (Principal Consideration No. 1); Guidelines at 2–3 (General Principle No. 2).

[559] Guidelines at 5 (General Principle No. 6).

[560] Guidelines at 4 (General Principle No. 5).

time value of money."[561] The Guidelines additionally authorize adjudicators to order prejudgment interest on the base amount of restitution.[562]

Here there are five identifiable persons. Each has suffered a quantifiable loss that was proximately caused by Flower's misconduct. Restitution is appropriate here to remediate Flower's misconduct and "restore the status quo ante for victims who would otherwise unjustly suffer loss."[563] "An order requiring restitution seeks primarily to return customers to their prior positions by restoring the funds of which they were wrongfully deprived."[564] In addition, ordering Flower to pay restitution ensures that he is deprived of his ill-gotten gains and avoids his unjust enrichment.[565]

Enforcement requests restitution to be paid to the five customers in the total amount of $210,686.18, plus prejudgment interest. This restitution figure is based on the total trade costs incurred by the customers for the excessive trading and churning during the relevant period.[566] The total trade costs for each individual customer are: WN ($111,688.19); LJW ($34,564.35); DT ($35,749.55); MK ($20,084.10); and BW ($8,599.99).[567] We consider it imperative that these five customers be made whole to the extent possible. We find that the requested restitution plus prejudgment interest is a reasonable approximation of the harm that Flower caused and is a fair compensation to the persons Flower harmed.

Accordingly, the specifics of the restitution to be paid to each customer are shown below and reflected in Appendix A to this decision. The customers' initials appear in the text of the decision; Appendix A, which will not be released publicly, includes the customers' full names. The amount ordered does not include the trading losses the customers suffered from Flower's misconduct. Rather, the ordered restitution focuses solely on the high trading costs the customers incurred, which were the foreseeable, direct, and proximate result of Flower's excessive trading

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[561] *Strauss v. Milwaukee Cheese Wis. (In re Milwaukee Cheese Wis.)*, 112 F.3d 845, 849 (7th Cir. 1997). *See also SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1476 (2d Cir. 1996) (prejudgment interest involves considerations of fairness and the relative equities, the remedial purpose of the statute involved, and the need to fully compensate the wronged party).

[562] Guidelines at 11.

[563] *Dep't of Enforcement v. Sandlapper Sec., LLC*, No. 2014041860801, 2020 FINRA Discip. LEXIS 30, at *64 (NAC June 23, 2020) (quoting from the Guidelines at 4, General Principle No. 5).

[564] *Dep't of Enforcement v. Smith*, No. 2015043646501, 2020 FINRA Discip. LEXIS 43, at *71 (NAC Sept. 18, 2020) (quoting *Newport Coast Sec.*, 2020 SEC LEXIS 911, at *37).

[565] *Dep't of Enforcement v. Doherty*, No. 2015047005801, 2019 FINRA Discip. LEXIS 26, at *60 (OHO June 14, 2019), *modified*, 2020 FINRA Discip. LEXIS 16 (NAC June 15, 2020).

[566] Enf. Br. 28.

[567] CX-1.

and churning and not any market fluctuation.[568] The purpose of the restitution is to restore the customers to the status quo ante.[569]

Restitution for Excessive Trading and Churning

Customer	Date of Last Violative Transaction During the Complaint Period[570]	Total Trade Costs Due to Misconduct	Restitution Due
WN[571]	5/24/2018	$111,688.19	$111,688.19 + PJI from 5/24/2018
LJW[572]	7/23/2018	$34,564.35	$34,564.35 + PJI from 7/23/2018
DT[573]	7/2/2018	$35,749.55	$35,749.55 + PJI from 7/2/2018
MK[574]	3/23/2017	$20,084.10	$20,084.10 + PJI from 3/23/2017
BW[575]	4/3/2017	$8,599.99	$8,599.99 + PJI from 4/3/2017

Accordingly, for his excessive trading and churning, as alleged in the First and Second Causes of Action, we bar Flower from associating with any FINRA member firm in any capacity. We further order him to pay restitution to each customer in the amount of total trade

568 *Smith*, 2020 FINRA Discip. LEXIS 43, at *71-72.

569 *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *38 n.112.

570 Prejudgment interest ("PJI") runs from this date, which marks the end of the violative pattern of trading found in this decision as to each customer.

571 Source: CX-1; CX-2, at 7.

572 Source: CX-1; CX-4, at 5.

573 Source: CX-1; CX-5, at 5.

574 Source: CX-1; CX-3, at 4.

575 Source: CX-1; CX-6, at 3.

costs they each incurred, as shown in CX-1 and set forth above, plus prejudgment interest.[576] Because we have found Flower's churning to be a willful violation of the federal securities laws, he is by operation of law under the Exchange Act statutorily disqualified.

B. Third Cause of Action: Unauthorized Trading

1. Specific Sanction Guidelines

For unauthorized trading, the Guidelines recommend a fine of $5,000 to $116,000, and indicate that adjudicators should also order disgorgement, as set forth in General Principle No. 6. They further recommend that adjudicators consider suspending an individual respondent for a period of one month to two years. Where aggravating factors predominate, however, the Guidelines urge that adjudicators strongly consider barring an individual respondent.[577]

The Guidelines set forth certain Principal Considerations that apply in an unauthorized trading case. Two of them relate to whether the respondent was acting in bad faith—with knowledge that he or she was acting without authorization—or whether the respondent reasonably misunderstood his or her authority. Other considerations are the number of customers affected, the magnitude of the losses, the number and dollar value of unauthorized transactions, whether the respondent attempted to conceal the trading or evade regulatory investigative efforts, and whether the unauthorized transactions were made in furtherance of another violation such as churning.[578]

2. Aggravating Factors Predominate

The same aggravating factors discussed above in connection with the First and Second Causes of Action apply to the Third Cause of Action.

3. Specific Principal Considerations Are Aggravating

In addition, many of the specifically identified Principal Considerations weigh in favor of stringent sanctions. Flower was under no misunderstanding about his authority. He simply did not speak to WN to obtain authority for the transactions.[579] The transactions involved only one

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[576] Because we bar Flower and order restitution, we follow the recommendation in the Guidelines and do not fine him. *See* Guidelines at 10 ("Adjudicators generally should not impose a fine if an individual is barred and the Adjudicator has ordered restitution or disgorgement of ill-gotten gains as appropriate to remediate misconduct."); *see also* NASD Notice to Members 99-86 (Oct. 1999), https://www.finra.org/rules-guidance/notices/99-86 (discussing policies regarding the imposition and collection of monetary sanctions). If we were to impose a fine for Flower's financial exploitation of these five vulnerable customers, we would impose a fine of $150,000, which exceeds the high-end recommendations in the Guidelines for excessive trading and churning.

[577] Guidelines at 99.

[578] *Id.*

[579] *Id.* (Principal Consideration Nos. 1–2).

customer, and the total realized loss was $31,328.28.[580] But the total realized loss was significant to that customer. The loss was relatively large in proportion to the average funded account equity, which was a little over $70,000.[581] This violation also facilitated other violations—excessive trading and churning.[582]

4. Bar, Restitution, and Prejudgment Interest

Because the securities industry is built on trust, any ethical failure damages the industry generally by casting doubt on the integrity of its participants. An ethical failure also casts doubt on the ability of the particular miscreant to conform to ethical norms in the future. Enforcement of FINRA Rule 2010 is therefore fundamental to FINRA's regulatory mission, which, as expressed in FINRA's Sanction Guidelines, "is the building of public confidence in the financial markets."[583]

Flower's unauthorized trading in WN's account was egregious. WN clearly communicated to Flower when he transferred the account to SW Financial that he had a conservative approach to investing and that he was relying on the assets in the account for his retirement and medical needs. All but one of the unauthorized trades occurred during a period that WN was tending to serious medical problems that interfered with his daily living. He had no ability at that point to track what Flower was doing with the account. We separately bar Flower for the unauthorized trading in WN's account.

We do not order restitution for the trade costs of the unauthorized transactions. Those are already covered by the restitution ordered in connection with the First and Second Causes of Action.[584] But we order restitution in the form of the total trading losses that the account suffered because of the unauthorized trades, along with prejudgment interest. Those trading losses, amounting to $31,328.28, were proximately caused by the unauthorized trades Flower executed.

The chart below provides the specifics, which are also reflected in Appendix B to this decision.

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[580] CX-10, at 2–3.

[581] Guidelines at 99 (Principal Consideration Nos. 3–4).

[582] Guidelines at 99 (Principal Consideration No. 6).

[583] Guidelines at 1 (Overview).

[584] *Dep't of Enforcement v. Reyes*, No. 2016051493704, 2019 FINRA Discip. LEXIS 59, at *61 n.297 (OHO Dec. 17, 2019) (restitution not separately ordered where covered by sanctions for other causes of action), *appeal docketed* (NAC Jan. 10, 2020).

Restitution to WN for Unauthorized Trading in His Account

	Date of Unauthorized Trade Charged in Amended Complaint	Action	Symbol	Security Description	Realized Profit or (Loss)[585] to Be Netted to Calculate Restitution, and Date of Opposite Side Transaction
1.	4/4/2017	Buy	SLW	Silver Wheaton Corp	($1,092.94) Sell 4/19/2017
2.	4/4/2017	Sell	CCP	Care Cap PPTYS Inc	$934.71 Buy 3/28/2017
3.	4/19/2017	Buy	EMES	Emerge Energy Svcs LP	($1,890.74) Sell 5/15/2017
4.	4/19/2017	Sell	SLW	Silver Wheaton Corp	Loss recorded above
5.	5/15/2017	Sell	EMES	Emerge Energy Svcs LP	Loss recorded above
6.	5/22/2017	Buy	UA	Under Armour Inc CL C	($3,297.67) Sell 5/24/2017
7.	5/22/2017	Sell	OAKS	Five Oaks Investment Corp	($2,919.10) Buy 4/25/2017
8.	5/24/2017	Buy	ASH	Ashland Global Hldgs Inc	($779.46) Sell 6/20/2017
9.	5/24/2017	Sell	UA	Under Armour Inc CL C	Loss recorded above
10.	5/24/2017	Sell	M	Macys Inc	($8,160.54) Buy 5/11/2017
11.	5/25/2017	Buy	NTNX	Nutanix Inc CL A	$10,217.11 Sell 5/26/2017
12.	5/26/2017	Sell	NTNX	Nutanix Inc CL A	Profit recorded above
13.	6/5/2017	Sell	SNR	New Senior Investment Group Inc	($5,966.37) Buy 4/11/2017
14.	6/6/2017	Buy	CVNA	Carvana Company CL A	$5,934.93 Sell 6/7/2017

[585] CX-10, at 1 is the source of the dates and other information regarding unauthorized trades in WN's account. CX-10, at 2–3 contains information regarding the opposite sides of the unauthorized transactions and whether the transactions resulted in a profit or loss.

15.	6/7/2017	Sell	CVNA	Carvana Company CL A	Profit recorded above
16.	6/22/2017	Sell	NTNX	Nutanix Inc CL A	($4,379.66) Buy 5/31/2017
17.	3/9/2018	Buy	VUZI	Vuzix Corp New	($1,833.91) Sell 3/28/2018 ($2,166.98) Sell 4/4/2018 ($842.56) Sell 4/5/2018 ($1,252.24) Sell 4/10/2018 ($13,832.86) Sell 5/14/2018
					Total market losses on unauthorized trades after subtracting any profits **($31,328.28)**
Restitution Due to WN for Unauthorized Trading					**$31,328.28 + PJI** from 5/14/2018[586]

C. Fourth Cause of Action: Mismarking Transactions

1. Specific Sanction Guidelines

The Guidelines have specific recommendations for violations of FINRA Rules 4511 and 2010 and SEC Rules 17a-3 and 17a-4. They recommend a range of fines, starting as low as $1,000. But where aggravating factors predominate, they recommend a fine of $10,000 to $155,000. If significant aggravating factors predominate, then an even higher fine may be

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586 The restitution due is the total loss resulting from the unauthorized trading plus prejudgment interest from the date of the last loss suffered from an unauthorized trade charged in the Complaint. In connection with the unauthorized trading, the customer did not immediately suffer a loss on the date of many of the trades. The loss was only realized later. Accordingly, restitution and interest run from the point at which the loss was fully realized from the violative conduct. This redresses the harm caused by the misconduct and roughly restores the customer to the position he would have been in if Flower had not engaged in the unauthorized trades. *Newport Coast Sec.*, 2020 SEC LEXIS 917, at *38 & n.112.

considered. Adjudicators may consider suspending the responsible individual for 10 business days to three months. Where aggravating factors predominate, a suspension of up to two years or a bar may be appropriate.[587]

The Guidelines list five specific Principal Considerations in determining sanctions. Those relevant here are the nature and materiality of the inaccurate information; whether the inaccurate information was entered or omitted intentionally, recklessly, or as the result of negligence; whether the violations involved a pattern of misconduct; and whether the violations allowed other misconduct to occur or to escape detection.[588]

2. Aggravating Factors Predominate

The same aggravating factors discussed above in connection with the First and Second Causes of Action apply to the Fourth Cause of Action.

3. Specific Principal Considerations Are Aggravating

Mismarking trades as unsolicited when they were solicited fundamentally misreports the way a trade came about and the role the registered representative played in the transaction. That is a material inaccuracy. The inaccurate information also was entered intentionally. It was not a negligent action. The large number of mismarked trades involved a pattern of misconduct. In mismarking the trades, Flower facilitated his excessive trading and churning violations. Marking trades as unsolicited made it appear that the customers were taking an active role in managing their accounts when they were not. Flower was trading at will and generating higher commissions than he would otherwise have been able to receive.

4. Bar

Flower mismarked numerous trades in a consistent pattern. Often a sale of a stock occurred only a few days after the purchase and then the proceeds of the sale would fund the purchase of another stock. Mismarking the sales as unsolicited made it seem that the customers had made an independent investment decision, when, in fact, Flower had prompted the trade. He would tell the customers the existing position was losing money, or, sometimes, that they could take a small profit. And he would recommend a new purchase of a stock he characterized as having more upside potential. The mismarking of the transactions was purposeful; it obscured the fact that he was in de facto control of the accounts and was excessively trading and churning them. Accordingly, for this misconduct we bar Flower from associating with a FINRA member firm in any capacity.[589]

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[587] Guidelines at 29.

[588] *Id.*

[589] The Hearing Panel has considered all the parties' arguments, and we have rejected without discussion any other arguments made by the Parties that are inconsistent with this decision.

V. Order

As alleged in the First and Second Causes of Action, Respondent James W. Flower engaged in excessive trading and churned the accounts of five customers in willful violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and in violation of FINRA Rules 2020 and 2010. For this misconduct, he is barred from associating with any FINRA member firm in any capacity and ordered to pay restitution in the form of the trading costs the customers incurred because of the misconduct. Each customer is identified in the Addendum to this Decision.[590] As discussed above regarding the sanctions for excessive trading and churning, Respondent is ordered to pay each customer restitution in the amount shown in Appendix A, along with interest on the unpaid balances running from the date specified in Appendix A for each customer (the last day of the violative conduct with respect to each customer) until paid in full. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).[591] If this Decision becomes FINRA's final disciplinary action, payment of restitution shall be due within 60 days of the date of this Decision. Because his churning violation was a willful violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, Respondent is subject to statutory disqualification.

As alleged in the Third Cause of Action, Respondent James W. Flower engaged in unauthorized trading in one customer's account in violation of FINRA Rule 2010. For this misconduct, he is barred from associating with any FINRA member firm in any capacity and ordered to pay restitution to that customer in the form of the trading losses incurred because of the misconduct. As discussed above regarding sanctions for unauthorized trading, Respondent is ordered to pay restitution in the amount specified in Appendix B to this Decision, along with interest running from March 9, 2018, the last day of this violative conduct, on the unpaid balance until paid in full. Interest shall accrue at the rate set in 26 U.S.C. Section 6621(a)(2).

As alleged in the Fourth Cause of Action, Respondent James W. Flower mismarked 58 transactions in various accounts as unsolicited when, in fact, they were solicited, in violation of FINRA Rules 4511 and 2010. For this misconduct, he is barred from associating with any FINRA member in any capacity.

Respondent is also ordered to pay costs in the amount of $10,655.45, which includes a $750 administrative fee and $9,905.45 for the cost of the transcript. The costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action.

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[590] The Addendum is served only on the parties.

[591] 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.

If a customer cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the customer's last known address.

If this decision becomes FINRA's final disciplinary action, the separate bars shall become effective immediately.

Lucinda O. McConathy
Hearing Officer
For the Extended Hearing Panel

Copies to:

James W. Flower (via email, overnight courier, and first-class mail)
Robert Kennedy, Esq. (via email)
Michael Perkins, Esq. (via email)
Adam Balin, Esq. (via email)
Matthew Minerva, Esq. (via email)
Kay Lackey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

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Appendix A
to the Extended Hearing Panel Decision

Restitution for Excessive Trading and Churning

Customer	Date of Last Violative Transaction During the Complaint Period[1]	Total Trade Costs Due to Misconduct	Restitution Due
WN[2]	5/24/2018	$111,688.19	$111,688.19 + PJI from 5/24/2018
LJW[3]	7/23/2018	$34,564.35	$34,564.35 + PJI from 7/23/2018
DT[4]	7/2/2018	$35,749.55	$35,749.55 + PJI from 7/2/2018
MK[5]	3/23/2017	$20,084.10	$20,084.10 + PJI from 3/23/2017
BW[6]	4/3/2017	$8,599.99	$8,599.99 + PJI from 4/3/2017

[1] Calculate prejudgment interest ("PJI") from this date, which marks the end of the misconduct charged in the Amended Complaint as to each customer.

[2] Source: CX-1; CX-2, at 7.

[3] Source: CX-1; CX-4, at 5.

[4] Source: CX-1; CX-5, at 5.

[5] Source: CX-1; CX-3, at 4.

[6] Source: CX-1; CX-6, at 3.

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Appendix B
to the Extended Hearing Panel Decision

Restitution to WN for Unauthorized Trading in His Account

	Date of Unauthorized Trade Charged in Amended Complaint	Action	Symbol	Security Description	Realized Profit or (Loss)[1] and Date of Opposite Side Transaction
1.	4/4/2017	Buy	SLW	Silver Wheaton Corp	($1,092.94) Sell 4/19/2017
2.	4/4/2017	Sell	CCP	Care Cap PPTYS Inc	$934.71 Buy 3/28/2017
3.	4/19/2017	Buy	EMES	Emerge Energy Svcs LP	($1,890.74) Sell 5/15/2017
4.	4/19/2017	Sell	SLW	Silver Wheaton Corp.	Loss recorded above
5.	5/15/2017	Sell	EMES	Emerge Energy Svcs LP	Loss recorded above
6.	5/22/2017	Buy	UA	Under Armour Inc CL C	($3,297.67) Sell 5/24/2017
7.	5/22/2017	Sell	OAKS	Five Oaks Investment Corp	($2,919.10) Buy 4/25/2017
8.	5/24/2017	Buy	ASH	Ashland Global Hldgs Inc	($779.46) Sell 6/20/2017
9.	5/24/2017	Sell	UA	Under Armour Inc CL C	Loss recorded above
10.	5/24/2017	Sell	M	Macys Inc	($8,160.54) Buy 5/11/2017
11.	5/25/2017	Buy	NTNX	Nutanix Inc CL A	$10,217.11 Sell 5/26/2017
12.	5/26/2017	Sell	NTNX	Nutanix Inc CL A	Profit recorded above

[1] CX-10, at 1 is the source of the dates and other information regarding unauthorized trades in WN's account. CX-10, at 2–3 contains information regarding the opposite sides of the unauthorized transactions and whether the transactions resulted in a profit or loss.

13.	6/5/2017	Sell	SNR	New Senior Investment Group Inc	($5,966.37) Buy 4/11/2017
14.	6/6/2017	Buy	CVNA	Carvana Company CL A	$5,934.93 Sell 6/7/2017
15.	6/7/2017	Sell	CVNA	Carvana Company CL A	Profit recorded above
16.	6/22/2017	Sell	NTNX	Nutanix Inc CL A	($4,379.66) Buy 5/31/2017
17.	3/9/2018	Buy	VUZI	Vuzix Corp New	($1,833.91) Sell 3/28/2018 ($2,166.98) Sell 4/4/2018 ($842.56) Sell 4/5/2018 ($1,252.24) Sell 4/10/2018 ($13,832.86) Sell 5/14/2018
					Total market losses on unauthorized trades after subtracting any profits **($31,328.28)**
Restitution Due to WN for Unauthorized Trading					**$31,328.28 + PJI** from 5/14/2018[1]

[1] Restitution due is the total loss resulting from the unauthorized trading plus prejudgment interest ("PJI") from the date of the last loss suffered from an unauthorized trade charged in the Complaint.