

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2009019009101**

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

RE: David Alan Kepes, Respondent  
Registered Representative  
CRD No. 860991

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

**I.**

**ACCEPTANCE AND CONSENT**

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

**BACKGROUND**

David Alan Kepes ("Kepes") entered the securities industry in September 1983 with FINRA-regulated firm Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Between September 1983 and February 1, 2010, Kepes was registered as a General Securities Representative (Series 7) with Merrill Lynch. Merrill Lynch discharged Kepes on February 1, 2010, terminating his registration.

FINRA retains jurisdiction over Kepes pursuant to Article V, Section 4(a) of the FINRA By-Laws because the conduct that serves as the basis for this action commenced prior to his termination of registration from a FINRA regulated firm and this AWC has been filed within two years after the date of his termination of registration.

**OVERVIEW**

In 2008, Kepes borrowed \$50,000 for over six months from an elderly customer in violation of NASD Rules 2370 (Borrowing From or Lending to Customers) and 2110 and FINRA Rule 2010

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(requiring adherence to high standards of commercial honor and just and equitable principles of trade in conducting business). Kepes also persuaded the customer to lend \$30,000 to a realtor in violation of NASD Rule 2110. In 2008, Kepes accepted a \$1,000 check as a gift from the customer, in violation of NASD Rule 2110.

In September 2008, Kepes, contrary to firm policy and without informing his firm, entered into a contract to serve as an independent contractor for a privately held business and provided services to that business until he was terminated by Merrill Lynch. By virtue of that conduct he violated NASD Rules 3030 (Outside Business Activities of an Associated Person) and 2110 and FINRA Rule 2010.

### **FACTS AND VIOLATIVE CONDUCT**

#### **Borrowing \$50,000 from a Customer**

Kepes, contrary to Merrill Lynch's prohibition on accepting loans from customers, borrowed \$50,000 from customer MKL, an elderly widow, on July 10, 2008. The loan, not documented and not backed by collateral, was a "bridge loan" pending payment of Merrill's annual retention bonus, to assist Kepes with a number of immediate expenses. Kepes held the loan for six months and 20 days, repaying \$53,000 to MKL on January 30, 2009.

By virtue of this conduct, Kepes violated NASD Rule 2370 (Borrowing From or Lending to Customers) which prohibits loans from customers unless the FINRA regulated firm has written procedures that allow such loans. This conduct also violated NASD Rule 2110 and FINRA Rule 2010 (requiring adherence to high standards of commercial honor and just and equitable principles of trade in conducting business)

#### **Encouraging a Customer to Lend \$30,000 to a Third Party**

In 2008, Kepes encouraged MKL to loan \$30,000 to ER, a realtor, to assist in "flipping" (buying, repairing, and then selling) a house. MKL advanced the funds as a favor to Kepes, without documentation or collateral. The realtor never repaid the loan.<sup>1</sup> By virtue of this conduct, Kepes violated NASD Rule 2110.

#### **Accepting a Monetary Gift from a Customer**

In early December 2008, Kepes accepted a \$1,000 check as a gift from MKL. Merrill Lynch's policy prohibited accepting gifts in excess of \$100. By virtue of this conduct, Kepes violated NASD Rule 2110.

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<sup>1</sup> Merrill Lynch paid MKL \$30,000 in August 2009 to compensate her for the money that ER failed to repay.

## Outside Business Activity

In September 2008, Kepes signed an "Advisory Board Agreement" by which he became an independent contractor to a privately held manufacturing and distribution business (the "Company") in the lawn and garden industry effective as of August 12, 2008. Pursuant to the agreement, he was compensated by an option to purchase 300,000 shares of Company common stock at \$2 per share. Further, 25% of the shares were exercisable on the date the agreement was signed, in recognition of services already provided to the Company prior to signing the agreement.

NASD Conduct Rule 3030 (Outside Business Activities of an Associated Person) requires that a registered person who is employed by, or accepts compensation from, any other person as a result of any business activity outside the scope of his relationship with his employing firm, other than a passive investment, must provide his firm with written notice of the activity. Merrill Lynch required employees who wished to participate in activities outside their employment to request approval *prior* to engaging in the activity. Merrill Lynch specifically identified membership on an advisory board as an activity that required prior written approval.

Kepes was directly informed by his supervisor that he could not join the Company Advisory Board or engage in other activities called for by the agreement when compensated by stock options. Nevertheless, Kepes signed the agreement and engaged in various activities called for by the agreement. Subsequently, Kepes requested approval to participate on the Advisory Board without informing Merrill Lynch that, prior to his request, he signed the agreement and began service as an independent contractor to the Company. After the request was denied, Kepes continued his service to the Company as an independent contractor without informing Merrill Lynch.

By virtue of this conduct, Kepes violated NASD Rules 3030 and 2110 and FINRA Rule 2010.

\* \* \*

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

- (i) A suspension from associating with any FINRA member firm in any capacity for a period of seven months; and,
- (ii) A fine of \$20,000.

The fine shall be due and payable either immediately upon reassociation with a member firm following the seven-month suspension noted above, or prior to any application or request for relief from any statutory disqualification resulting from this or any other event or proceeding, whichever is earlier.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

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

The sanctions imposed herein shall be effective on May 16, 2011.

## **II.**

### **WAIVER OF PROCEDURAL RIGHTS**

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

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

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

I further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

### **III.**

#### **OTHER MATTERS**

I understand that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
  - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
  - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about my disciplinary record;
  - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
  - 4. I may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. I may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. I understand that I may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA or its staff.

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

4/11/11  
Date (mm/dd/yyyy)

David Alan Kepes  
David Alan Kepes  
Respondent

Reviewed by:  
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Reid E. Meyers, Esq.  
Attorney/Mediator  
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Accepted by FINRA:

4/21/11  
Date

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



David L. Fenimore

Senior Counsel

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