

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Mark E. Marek
(CRD No. 4794461)

Respondent.

DISCIPLINARY PROCEEDING
No. 2009019349001

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Registered representative Mark Marek made unsuitable investment recommendations to customer HM; made false and misleading representations regarding material facts to customer HM; sent written correspondence to customer HM that contained statements that were misleading, exaggerated, unwarranted and/or contained projections of investment performance; forged customer HM's signature on a customer account document; and executed an unauthorized investment transaction in customer HM's account.

RESPONDENT AND JURISDICTION

2. Marek entered the securities industry in May 2004 when he associated with a FINRA member firm, and a Form U4 was filed on his behalf. Marek subsequently registered with two other FINRA member firms, including Riverstone Wealth Management, Inc., from May 2006 to June 2009. Marek's registration with his most recent FINRA

member firm was terminated on September 7, 2010. During his career in the securities industry, Marek obtained Series 7, 31 and 66 securities licenses.

3. On March 16, 2011, Riverstone filed a Form U5 Amendment on Marek's behalf which disclosed a new customer complaint that alleged unauthorized use of margin and unsuitable investments. Based on the filing date of the Form U5 Amendment, FINRA retains jurisdiction over Marek through March 15, 2013.
4. Although Marek is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years of March 16, 2011 - the date of the amendment to Marek's Form U5, and (2) the Complaint charges him with misconduct committed while Marek was associated with a FINRA member.

FIRST CAUSE OF ACTION

(Unsuitable Investment Recommendations - Violation of NASD Conduct Rules 2310(a) and 2110 and FINRA Rule 2010)

5. The Department realleges and incorporates by reference paragraphs 1-4 above.
6. In March 2008, customer HM opened two individual accounts at Riverstone. Marek served as the registered representative on both accounts.
7. At the time that he opened his accounts, HM was a 60-year-old rancher. He had liquid net worth of approximately \$1.7 million, which consisted of proceeds from the sale of a ranch, and total net worth of approximately \$4.5 million. HM's annual income was approximately \$70,000. His risk tolerance was conservative, and his investment objectives were income and growth. HM had very limited investment knowledge and experience.

8. HM advised Marek that he wanted his funds be invested conservatively in order to generate income to supplement the approximately \$70,000 that he received from operating a recreational ranch. HM also wanted to leave an inheritance for his two college-aged children.
9. The new account forms for both of HM's accounts indicate that his risk tolerance was conservative, and that his investment objectives were growth and income.
10. At or about the time that HM opened his accounts, Marek prepared a financial plan for HM via *Envision Presentation*, a computerized proprietary financial planning tool that Riverstone made available to its registered representatives to assist them in determining asset allocations for clients. The *Envision Presentation* that Marek prepared for HM reflected HM's investment type as "*Conservative Growth and Income with Alternative Investments*."
11. Notwithstanding HM's conservative risk tolerance, Marek recommended that HM invest in high-risk, illiquid private placement investments and volatile, high-risk Exchange Traded Funds (ETFs). Marek also recommended that HM engage in short selling and margin trading.
12. Marek recommended that HM invest approximately one-third, or \$554,662, of his liquid net worth in four different high-risk private placement investments. (See Appendix A, Table 1, attached hereto and incorporated by reference).
13. Marek also recommended that HM purchase ETFs including Proshares Ultrashort Real Estate ETF, Proshares Ultrashort ETF Lehman 20+ year Treasury, Proshares Ultrashort Industrials, Proshares Ultrashort Consumer Services, Proshares Ultrashort Financials. Each of these leveraged ETF's is tied to a multiple of the inverse of a particular index, and is considered highly volatile and risky.

14. During the period from December 2008 through March 2009, Marek recommended that HM trade on margin. One of HM's accounts maintained a debit margin balance ranging from (\$82,546) to (\$210,714) during this period. The account incurred a total of \$3,030 in margin interest charges. (See Appendix A, Table 2).
15. Marek also recommend that HM engage in short selling. For example, during the period from October 2008 to December 2008, one of HM's accounts engaged in short selling in at least 10 securities including Amazon, Caterpillar, First Solar, Goldman Sachs, Morgan Stanley & Co., Peabody Energy, Praxair, Prudential Financial, Transocean and Union Pacific Corp. HM's account suffered losses of over \$85,000 as a result of engaging in the short sale transactions. (See Appendix A, Table 3).
16. Marek's investment recommendations, as detailed in herein, were unsuitable for HM based on his risk tolerance, investment objectives, investment knowledge and investment experience.
17. During the period from March 2008 to June 2009, as a result of implementing Marek's investment recommendations, HM's accounts suffered trading losses of over (\$598,000).
18. As a result of the foregoing, Marek violated NASD Conduct Rules 2310(a) and 2110 during the period from March 2008 to December 15, 2008, and NASD Conduct Rule 2310(a) and FINRA Rule 2010 during the period from December 16, 2008 to June 2009.

SECOND CAUSE OF ACTION

(Fraudulent Misrepresentations - Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, NASD Conduct Rules 2120 and 2110 and FINRA Rules 2020 and 2010)

19. The Department realleges and incorporates by reference paragraphs 1-18 above.
20. During the period from February 2008 to June 2009, Marek sent e-mail correspondence to customer HM in which he intentionally or recklessly made false and misleading representations regarding material facts.
21. The e-mails were sent by Marek from his Riverstone e-mail account and from personal e-mail accounts. Riverstone's policies prohibited registered representatives from using personal e-mail accounts for securities-related correspondence.
22. Marek used instruments of communication in interstate commerce when he sent e-mails to HM over wireless networks. Marek also executed transactions in HM's accounts via national securities exchanges.
23. On February 25, 2008, Marek sent an e-mail to HM, from his Riverstone e-mail account, regarding the *Envision Presentation*. In the e-mail, Marek states "*based upon the analysis that the Envision program provided, you will be able to exceed the goals we discussed with a minimum risk and a conservative asset allocation.*"
24. Following the receipt of the February 25th e-mail and other correspondence from Marek, HM opened accounts at Riverstone and implemented securities transactions recommended by Marek.
25. Marek's representations made in the February 25th e-mail were false and misleading. As alleged in the First Cause of Action, HM's funds were not invested conservatively, and many of the investments and investment strategies recommended by Marek carried a high degree of risk.

26. On April 29, 2008, Marek sent an e-mail from his Riverstone e-mail account to HM's CPA. He copied HM on the e-mail. Marek's e-mail states "[b]ased upon current outlook, for planning purpose you can include on a yearly basis of \$200k to \$400k of capital gains and income to be generated by the investments Mr. [HM] has with us in the capital markets."
27. Marek's representations made in the April 29th e-mail were false and misleading. According to HM's brokerage account statements for the period ending April 30, 2008, HM had only earned approximately \$4,000 in interest and dividends. Moreover, HM's projected annual earnings were \$52,225 based on the year-to-date performance of his accounts.
28. On July 30, 2008, HM sent Marek an e-mail, at his Riverstone e-mail address, wherein he advised Marek that he had inadequate income to meet his expenses and that he might have to borrow money. He also complained about the amount of money that Riverstone and Marek had earned off of his accounts.
29. Marek responded to HM's e-mail from a personal e-mail account, [REDACTED]. His e-mail states "[y]ou have booked/earned approximately \$75k of PROFITS from account management activity...this is net of any commissions charged....you will see a steady trend of less transactions (less commissions) and more PROFITS as we move forward....write yourself a check for \$50K and put it in your bank and use for your living expenses...this is your payment to yourself from PROFITS made thus far from our activities...expectations for your NET PROFITS of 200k to 300k is expected on annual basis."
30. In a separate e-mail on the same date from another personal e-mail account, [REDACTED] Marek made similar representations. The e-mail states "[y]ou have already BOOKED, MADE approximately \$70,000 from your investment

accounts with us SPEND THE PROFITS...that is what you pay us for...to make you money regardless!!" The e-mail continues "[o]ver the time period of twelve months I maintain a forecast of producing \$200,000 to \$300,000 in profits (net commissions) from your investment account with Riverstone. Thank you for your trust and confidence enjoy your wealth and prosperity."

31. Marek sent HM a third e-mail on July 30, 2008, from personal e-mail address

[REDACTED] regarding "Commissions." The e-mail states "[y]ou have paid commissions of approximately \$40K for realizing gross profits of approx. \$115K. Thanks for your trust and confidence enjoy your profits!"

32. Marek's representations made in the July 30th e-mails were false and misleading.

According to HM's Riverstone brokerage account statements as of July 31, 2008, he had earned \$14,555 year-to-date in income and dividends, had year-to-date realized gains of \$62,476.57, and had unrealized losses of (\$135,556.45).

33. On March 19, 2009, HM sent Marek an e-mail wherein he expressed concern about the status of his investments. HM states "[a]s you can see Mark, I am very concerned despite being in a low risk and conservative investment plan..."

34. In response, Marek sent an e-mail to HM, from his Riverstone e-mail account, in which he states "*obtaining \$200-\$400k per year of income and appreciation on a year over year basis is realistic...some years may be less and some years may be more, but this will be sufficient to provide you a modestly affluent lifestyle.*"

35. Marek's representations made in the March 19th e-mail were false and misleading.

According to HM's brokerage account statements for the period ending on December 31, 2008, he had \$38,262 year-to-date in income, dividends and distributions; and year-to-date realized losses of (\$512,107).

36. On June 19, 2009, HM sent an e-mail to Marek, at his Riverstone e-mail address, in which he complained about the losses in his accounts. HM also questioned whether Marek did in fact invest his funds in low-risk conservative investments.
37. In his response, from his Riverstone e-mail account, Marek assured HM that he was “invested in a conservative growth and income profile....”
38. Marek’s representations made in the June 19th e-mail were false and misleading. As alleged in the *First Cause of Action*, HM’s funds were not invested conservatively, and many of the investments and investment strategies recommended by Marek carried a high degree of risk.
39. Marek’s false and misleading statements were intentionally designed to deceive HM into believing that his funds had been invested conservatively, and that his investments were performing well.
40. As a result of the foregoing conduct, Marek willfully violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder; and violated NASD Conduct Rules 2120 and 2110 during the period from February 2008 to December 15, 2008, and FINRA Rules 2020 and 2010 during the period from December 16, 2008 to June 2009.

THIRD CAUSE OF ACTION

(FINRA Advertising Provisions: Violations of NASD Conduct Rules 2210(d)(1)(B), 2210(d)(1)(D) and 2110, and FINRA Rule 2010)

41. The Department realleges and incorporates by reference paragraphs 1-40 above.
42. During the period from February 2008 to March 2009, Marek sent e-mail correspondence, including most of the e-mails referenced in the *Second Cause of Action*, to customer HM that contained misleading, exaggerated and/or unwarranted statements. Several of the e-mails also contained projections of investment performance.

43. In an e-mail dated February 11, 2008, Marek made an unwarranted statement when he stated "*this would require a yield of approx. 6%, which is well within historical statistical measurements.*"
44. The statements made in Marek's e-mail dated February 25, 2008, referenced in the *Second Cause of Action*, are exaggerated and unwarranted.
45. The statements made in Marek's e-mail dated April 29, 2008, referenced in the *Second Cause of Action*, are misleading, exaggerated and unwarranted. The statements also contain projections of investment performance.
46. On June 2, 2008, Marek sent an e-mail to HM with the subject line "*Investment Account Update and Summary, 6/2/08.*" The e-mail states that HM's accounts have appreciated \$61,281 and have a "*YTD Rate of Return: 3.46%.*" The e-mail also states "*[t]arget range of appreciation and income of \$200k - \$400k has high (95%+) confidence level.*"
47. On July 18, 2008, Marek sent an e-mail to HM with the subject line "*Investments account update, 7/18/08.*" The e-mail states that HM's accounts have a "*Yield (dividends and income): 2.8%.*" The e-mail also states "*High degree of confidence (>95%) that portfolio will achieve \$200K.*"
48. The statements made in the June 2nd, July 18th and July 30th e-mails, referenced in the *Second Cause of Action*, were misleading, exaggerated and unwarranted, and contained projections of investment performance. The statements in the March 19th letter, referenced in the *Second Cause of Action*, were misleading, exaggerated and unwarranted.
49. As a result of the foregoing conduct, Marek violated NASD Conduct Rules 2210(d)(1)(B), 2210(d)(1)(D) and 2110 during the period from February 2008 to

December 15, 2008, and NASD Conduct Rules 2210(d)(1)(B), 2210(d)(1)(D) and FINRA Rule 2010 during the period from December 16, 2008 to March 2009.

FOURTH CAUSE OF ACTION

(Forgery: Violations of NASD Conduct Rule 2110)

50. The Department realleges and incorporates by reference paragraphs 1-49 above.
51. On or about September 26, 2008, Marek signed HM's signature on a Riverstone customer account document entitled "*Account Profile/Investment Policy*."
52. HM did not give Marek permission to sign his name on the *Account Profile/Investment Policy* document or any other document. As a result of the foregoing, Marek violated NASD Conduct Rule 2110.

FIFTH CAUSE OF ACTION

(Unauthorized Trade - Violations of FINRA Rule 2010)

53. The Department realleges and incorporates by reference paragraphs 1-52 above.
54. On June 19, 2009, HM directed Marek, via an e-mail to Marek at his Riverstone e-mail address, to cease all trading activity in his accounts.
55. Later that same day, Marek sold or caused to be sold 600 shares of Palm common stock from one of HM's accounts without HM's knowledge, authorization, or consent.
56. As a result of the foregoing, Marek violated FINRA Rule 2010.

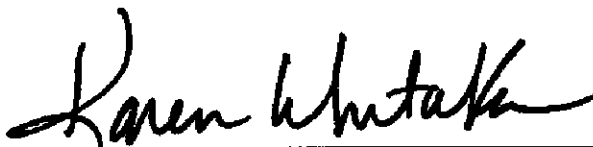
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent Marek committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed.
- C. order that Respondent Marek bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330;
- D. make specific findings that Respondent Marek willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

FINRA DEPARTMENT OF ENFORCEMENT

Date: October 3, 2012



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Appendix A

Table 1. Private Placement Investments

<i>Investment</i>	<i>Amount Invested</i>	<i>Prospectus Excerpts</i>
Palladin Realty Income Properties	\$100,000	"high degree of risk"
Quadriga Superfund	\$250,000	"these are speculative securities"
GMI ES 14	\$104,000	"substantial degree of risk"
Villa West Investors	\$100,000	"highly speculative and involve a substantial degree of risk"

Table 2. Margin Balance

<i>Month</i>	<i>Asset Value</i>	<i>Margin Balance</i>	<i>Account Equity</i>	<i>% Margin to Total Assets</i>
December 2008	\$486,718	(\$210,714)	\$276,004	43%
January 2009	\$414,534	(\$169,581)	\$244,952	41%
February 2009	\$277,979	(\$82,546)	\$195,433	29%
March 2009	\$286,324	(\$129,831)	\$156,493	45%

Table 3. Examples of Short Sell Transactions

<i>Security</i>	<i>Number of Shares</i>	<i>Open Date</i>	<i>Close Date</i>	<i>Loss</i>
Amazon	-500	12/3/08	12/4/08	(\$3,978)
Caterpillar	-2,200	Various in 11/08-12/08	Various in 12/08	(\$16,662)
First Solar	-400	Various in 10/08-11/08	Various in 12/08	(\$12,419)
Goldman Sachs	-400	Various in 11/08	Various in 12/08	(\$9,719)
Morgan Stanley	-2,900	Various in 10/08	Various in 12/08	(\$19,678)
Peabody Energy	-1,600	Various in 12/08	Various in 12/08	(\$3,132)
Praxair	-400	Various in 12/08	12/8/2008	(\$2,174)
Prudential Financial	-1,600	Various in 12/08	Various in 12/08	(\$14,520)
Transocean	-500	11/21/08	12/11/08	(\$2,502)
Union Pacific	-200	12/12/08	12/17/08	(\$642)
Total				(\$85,426)