

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DAVID LERNER ASSOCIATES, INC.
(CRD No. 5397),

Respondent.

DISCIPLINARY PROCEEDING
No. 2009020741901

HEARING OFFICER:

Note for Electronic Transmission of This Complaint:

The issuance of a disciplinary complaint represents the initiation of a formal proceeding by FINRA in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. Because this complaint is unadjudicated, interested persons may wish to contact the respondent before drawing any conclusions regarding the allegations in the complaint.

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Since January 2011, David Lerner Associates, Inc. ("DLA") has recommended and sold over \$300 million of a \$2 billion real estate investment trust (REIT) — Apple REIT Ten — without performing adequate due diligence in violation of its suitability obligations. Earlier Apple REITs under the same management inappropriately valued the REITs' shares at a constant artificial price of \$11 notwithstanding years of market fluctuations, performance declines, increased leverage and excessive return of capital to investors. DLA, in its capacity as best efforts underwriter for all of the Apple REITs, continues to solicit numerous customers to purchase Apple REIT Ten without performing adequate due diligence to determine that there is a reasonable basis to recommend the security to any customer. DLA has sold and continues to sell Apple REIT Ten targeting unsophisticated and elderly customers to buy the illiquid security.

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2. DLA has misleadingly marketed Apple REIT Ten on its website by presenting performance information for earlier Apple REITs, which implies that Apple REIT Ten may be able to achieve similar results. The performance results for several of the earlier Apple REITs are themselves misleading because (1) they do not reflect the recent reduction in distribution rates and (2) DLA does not disclose that income from those REITs was insufficient to support their 7–8 percent returns and that the distributions were partially funded by debt that further leveraged the REITs. The website misleadingly and inaccurately characterized the source of distributions as “net income and a return of capital, primarily in the form of depreciation” when in fact the return of capital was not primarily from depreciation.

3. Accordingly, DLA has violated NASD Rules 2310 and 2210(d)(1), and FINRA Rules 2310(b) and 2010, by failing to conduct adequate due diligence, thereby leaving it without a reasonable basis for recommending its customers purchase Apple REIT Ten, in addition to using misleading statements regarding the performance of earlier Apple REITs.

RESPONDENT AND JURISDICTION

4. DLA has been a member of FINRA since 1976 and is a privately-held broker dealer that operates a total of six branches in the New York tri-state area and Florida. DLA employs approximately 370 registered representatives. At all times relevant to the Complaint, DLA was a member of FINRA and remains subject to the jurisdiction of FINRA under Article IV, Section 1 of FINRA’s By-Laws.

FACTS

The Apple REITs

5. Since 1992, DLA has served as best efforts underwriter and sole distributor of a series of ten REITs that have issued nearly \$6.8 billion in securities to date. A REIT is a company that owns and usually operates income-producing real estate. To qualify as a REIT, a

company must have most of its assets and income tied to a real estate investment and must distribute at least 90 percent of its taxable income to shareholders annually in the form of dividends.

6. All of the REIT companies at issue were founded and managed by GK and his affiliates, and as each REIT closed to new investors, GK opened another. The last seven REITs, the so-called "Apple REITs," have invested almost exclusively in the same sector: extended stay hotels of only two national chains.¹ GK currently serves as Chairman and Chief Executive Officer of Apple REIT Ten.

7. The securities of each Apple REIT company were registered with the Securities and Exchange Commission and each Apple REIT company became a reporting, non-traded public company. Although many REITs are traded on national stock exchanges, the Apple REITs do not trade on any exchange and are illiquid. Several of the earlier Apple REITs have been acquired by other companies. Apple REIT Six, Apple REIT Seven, Apple REIT Eight, and Apple REIT Nine continue to operate but are closed to new investors. Apple REIT Ten opened in January 2011 and is still open to new investors.

8. Apple REITs Six through Nine opened between April 2004 and April 2008 and all completed offerings at a price of \$11 per share.² Apple REITs Six through Nine have never changed the value of their shares from the \$11 price despite (1) market fluctuations, including the economic downturn for commercial real estate in general and the hotel and hospitality industry in particular; (2) net income declines; (3) increased leverage through borrowings; and (4) return of capital to investors through distributions. Nearly all other participants in the non-

¹ The only exception is Apple REIT Nine, which invested \$147 million of its assets in income producing oil or natural gas property, with the rest invested, like the other Apple REITs, in extended stay hotels of two national chains.

² The Apple REITs all offered the first 5 percent of shares at \$10.50, and \$11 thereafter.

traded REIT industry performed revaluations during this period. The \$11 per share valuation Apple REITs Six through Nine adopted is currently inaccurate and has been inaccurate in the past.

9. Each of the Apple REITs pays out monthly distributions, which are ordinarily funded by income producing properties. Each of the Apple REITs provides for both dividend reinvestment at \$11 per share through its Dividend Reinvestment Plan ("DRIP") and limited redemption of shares at \$11 (after being held for three years) under its Unit Redemption Program ("URP"). DRIP reinvestment is unlimited, whereas URP redemption has been limited to three percent of the weighted average number of Units outstanding during the 12-month period immediately prior to the date of redemption. In May 2011, after redemption requests exceeded the 3 percent limit in the first quarter of 2011 (investors sought to redeem triple the amount of shares over the first quarter of 2010), Apple REIT Eight raised the redemption percentage to 5 percent but lowered the payout on non-DRIP shares to 92 percent of the purchase price.

Most of DLA's Revenue Derives From Sales of Apple REITs

10. Although there is no formal affiliation between DLA and the Apple REIT companies, DLA has sold nearly \$6.8 billion of Apple REIT securities into approximately 122,600 customer accounts in its role as sole distributor (managing dealer) of the offerings.

11. Although all of the Apple REITs are illiquid and concentrated in one subsector, extended stay hotels, a substantial number of DLA's customers own two or more of the Apple REITs. Many of DLA's customers are senior and/or unsophisticated, and DLA solicits customers by general means such as the internet, radio, cold calling, mailings, and open-invitation seminars at senior centers.

12. DLA earns 10 percent of all offerings of Apple REIT securities, composed of 7.5 percent in commissions and 2.5 percent in selling fees. The firm also earns fees for account

maintenance services. The nearly \$600 million generated from Apple REIT sales has accounted for 60–70 percent of DLA’s business annually since 1996.

13. DLA has earned over \$30 million in commissions and marketing allowances related to sales of Apple REIT Ten shares alone.

14. All or nearly all of DLA’s sales of the Apple REITs were solicited.

***Earlier Apple REITS Artificially Valued Their Shares at \$11,
Which Was a Red Flag Requiring DLA to Conduct Further
Due Diligence Before Recommending Apple REIT Ten***

15. When it began to recommend and sell Apple REIT Ten, DLA was aware or should have been aware of valuation irregularities and other improprieties relating to earlier Apple REITs that should have caused it not to recommend and sell Apple REIT Ten before performing appropriate due diligence. DLA’s due diligence into Apple REIT Ten was inadequate and has not rebutted the concerns underlying the issue of suitability of Apple REIT Ten. DLA therefore did not have a reasonable basis for recommending and selling Apple REIT Ten.

16. Apple REIT Ten invests in the same real estate subsector, nationally branded extended stay hotels, as the previous four Apple REITs. In fact, Apple REITs Six through Ten all invest primarily in properties of the same two hotel chains. The Apple REITs are managed by the same individual and are closely interrelated.

17. Apple REITs Six through Nine all issued shares at \$11 per share and never changed that valuation since Apple REIT Six commenced its offering in April 2004. The Apple REITs based their unchanging valuations solely upon the fact that they were currently selling shares at \$11 to existing shareholders under the DRIP and redeeming shares at \$11 under the URP. DLA accepted this justification and has always recorded the Apple REITs at \$11 per share on customer account statements.

18. The Apple REITs' unsupported \$11 valuations, which are currently inaccurate and have been inaccurate in the past, also substantially affected the financial condition and performance of those REITs. Customers purchasing additional shares at \$11 per share through the DRIP either overpaid or underpaid, depending upon whether \$11 per share was an overvaluation or undervaluation. Likewise, customers redeeming shares at \$11 through the URP (which was capped at three percent) were either overcompensated to the detriment of the REITs' remaining investors or undercompensated.

19. As alleged below, numerous factors should have caused the Apple REITs to revisit and adjust their valuation using timely market data, but they never did so. These failures were red flags requiring DLA to conduct further due diligence before recommending Apple REIT Ten to customers.

***The Apple REITs Failed to Adjust Their \$11 Share Value
Throughout Years of Significant Market Fluctuations***

20. Since April 2004, when Apple REIT Six commenced its offering, Apple REITs Six through Nine have steadfastly maintained that their illiquid shares are worth the same \$11 per share price at which they were issued. During this period, the general economy and market in which the Apple REITs invest has undergone substantial market fluctuation. For example, the sector in which Apple REITs invest, extended stay hotels, suffered a significant, material downturn in 2008 and 2009 due to the overall economic crisis. Unlike most other market participants, the Apple REITs did not adjust their valuations.

21. DLA knew or should have with adequate due diligence known that market conditions were affecting the value of Apple REITs Six through Nine. Most or all of the data reflecting market conditions was available in public filings by the Apple REIT companies.

22. The failure of Apple REITs Six through Nine to adjust their uniform \$11 valuations notwithstanding changes in market conditions was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

***The Apple REITs Failed to Adjust Their \$11 Share Value
Notwithstanding Substantial Performance Declines***

23. The performance of all of the Apple REITs has varied due to a number of factors since each REIT's inception. In particular, Apple REIT Six and Apple REIT Seven suffered substantial performance declines in 2008 and 2009, which did not fully recover in 2010. For example, in 10-K filings with the SEC, Apple REIT Six disclosed substantial declines in all material financial metrics from 2008 to 2009:

- a. Cash flows from operations declined from \$88,747,000 in 2008 to \$66,029,000 to 2009.
- b. Total revenues declined from \$258,913,000 in 2008 to \$216,323,000 in 2009.
- c. Net income declined from \$58,502,000 in 2008 to \$33,379,000 in 2009.
- d. Funds from Operations in 2009 was down 27 percent from 2008.
- e. Revenue per room in 2009 declined 15.7 percent from 2008.

24. Likewise, Apple REIT Seven suffered substantial declines in all material financial metrics from 2008 to 2009:

- a. Cash flows from operations declined from \$69,025,000 in 2008 to \$55,460,000 to 2009.
- b. Total revenues declined from \$214,291,000 in 2008 to \$191,715,000 in 2009.
- c. Net Income declined from \$38,063,000 in 2008 to \$20,713,000 in 2009.
- d. Funds from Operations in 2009 was down 20 percent from 2008.
- e. Revenue per room in 2009 declined 14 percent from 2008.

25. DLA knew or should have with adequate due diligence known of changes and declines in performance that were affecting the value of Apple REITs Six through Nine. Most or all of the data reflecting performance changes and declines were available in public filings by the Apple REIT companies.

26. The failure of Apple REITs Six through Nine to adjust their uniform \$11 valuations notwithstanding changes or declines in financial performance was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

***The Apple REITs Failed to Adjust Their \$11 Share Value
Or Sufficiently Adjust Their Distribution Levels After Incurring Debt
and Increasing Leverage to Maintain Distributions and Meet Redemption Requests***

27. Even during performance declines, and even before they acquired more than a handful of income-producing assets, the Apple REITs have distributed 7–8 percent returns to investors since the inception of the REITs. As alleged below, DLA has used this prior performance to sell shares of newly opened Apple REIT Ten.

28. The returns Apple REITs Six through Nine distributed to investors were not paid entirely from income generated by those REITs. Similar to other non-traded REITs, Apple REITs use Funds from Operations (“FFO”), a non-GAAP measurement, in their public financial documents as a means to calculate income generated by properties that support distributions.³ Because 90 percent of a REIT’s taxable income must be distributed to investors, a REIT that makes distributions that are fully covered by income will have a distribution/FFO payout ratio of approximately 90–100 percent or less. However, as illustrated below, since 2008, Apple REITs Six through Nine did not achieve anywhere near the FFO necessary to pay investors 7–8 percent returns and the payout ratio nearly always exceeded 100 percent. Further illustrating the

³ FFO as defined by NAREIT, means net income, computed in accordance with U.S. GAAP, excluding gains (or losses) from sales of real estate, plus real estate depreciation and amortization, and after adjustments for unconsolidated partnerships and joint ventures.

declining performance trends, “cumulative distributions greater than net income” has steadily worsened:

Apple REIT Six (offered April 2004 – March 2006)

Year	Total Distribution (Rate)	Funds From Operations	Payout Ratio	Cumulative Distributions Greater than Net Income
2008	\$81.7M (8.0%)	\$87.8M	93%	(\$95.9M)
2009	\$82.2M (7.2%)*	\$64.3M	128%	(\$144.7M)
2010	\$72.3M (7.2%)	\$69.2M	105%	(\$182.6M)
Q1 2011	\$17.6M (7.2%)	\$11.4M**	154%	(\$190.8M)

Apple REIT Seven (March 2006 – July 2007)

Year	Total Distribution (Rate)	Funds From Operations	Payout Ratio	Cumulative Distributions Greater than Net Income
2008	\$81.4 (8.0%)	\$66.5M	122%	(\$79.5M)
2009	\$75.4M (7.0%)*	\$53.1M	142%	(\$134.2M)
2010	\$71.3M (7.0%)	\$58.4M	122%	(\$177.2M)
Q1 2011	\$17.7M (7.0%)	\$8.6M**	206%	(\$189.7M)

⁴ Apple REIT 6 Cumulative distributions greater than net income on a per share basis: -\$1.05 (2008); -\$1.58 (2009); -\$2.00 (2010); -\$2.08 (Q1 2011).

⁵ Apple REIT 7 Cumulative distributions greater than net income on a per share basis: -\$0.85 (2008); -\$1.43 (2009); -\$1.93 (2010); -\$2.06 (Q1 2011).

Apple REIT Eight (July 2007 – April 2008)

Year	Total Distribution (Rate)	Funds from Operations	Payout Ratio	Cumulative Distributions Greater than Net Income
2008	\$76.4M (8.0%)	\$36.3M	210%	(\$71.2M)
2009	\$74.9M (7.0%)*	\$38.4M	195%	(\$140.6M)
2010	\$72.5M (7.0%)	\$45.9M	158%	(\$202.2M)
Q1 2011	\$18.2M (7.0%)	\$4.7M**	387%	(\$222.5M)

Apple REIT Nine (May 2008 – December 2010)

Year	Total Distribution (Rate)	Funds from Operations (Modified)	Payout Ratio	Cumulative Distributions Greater than Net Income
2008	\$13M (8.0%)	\$4.4M	295%	(\$10.9M)
2009	\$57.3M (8.0%)	\$33.1M	173%	(\$51.4M)
2010	\$118.1M (8.0%)	\$60.2M	196%	(\$153.2M)
Q1 2011	\$39.9M (8.0%)	\$17.9M**	223%	(\$178.2M)

*Distribution rate reduction effective May 2010.

** Cash flow from operations instead of FFO (not reported quarterly).

29. The Apple REITs were able to make distributions — 8 percent at the outset, reduced to 7 or 7.2 percent in May 2010 — that well exceeded FFO in two ways. First, the Apple REITs borrowed funds and used the loan proceeds to fund the distributions. For example,

⁶ Apple REIT 8 Cumulative distributions greater than net income on a per share basis: -\$0.77 (2008); -\$1.50 (2009); -\$2.14 (2010); -\$2.35 (Q1 2011).

⁷ Apple REIT 9 Cumulative distributions greater than net income on a per share basis: -\$0.27 (2008); -\$0.52 (2009); -\$0.85 (2010); -\$0.98 (Q1 2011).

in October 2010, shortly before DLA began selling Apple REIT Ten, Apple REIT Eight opened a \$75 million credit line “for general corporate purposes, including capital expenditures, redemptions and distributions.” As recently as April 19, 2011, months after DLA began selling Apple REIT Ten, Apple REIT Eight secured a \$20 million loan, personally secured by a guarantee from the Apple REITs’ founder GK, for “working capital purposes, including the payment of redemptions and distributions.” Apple REIT Eight has also recently announced that it expects to default on five loans totaling \$36.7 million and record an impairment loss of \$7–11 million yet its \$11 per share valuation remains unchanged.

30. Second, to the extent a shortfall remained after borrowing funds, the Apple REITs made up the difference by including a return of capital to investors. In other words, to maintain an artificially high return *on* investment, the Apple REITs made a return *of* investment with the monthly dividend.

31. Returning capital to investors and taking on debt (which must be serviced out of future income and new investor proceeds) would reduce the REIT’s ability to acquire income producing assets to generate future income for distribution to investors. Increasing leverage in this manner decreased the REIT’s ability to maintain distribution levels in the future and reduced the value of the REIT.

32. DLA knew or should have with adequate due diligence known that making distributions well exceeding FFO, leading to ever higher “cumulative distributions greater than net income,” was affecting the value of Apple REITs Six through Nine. All of the data reflecting FFO and cumulative distributions greater than net income were available in public filings by the Apple REIT companies.

33. The failure of Apple REITs Six through Nine to adjust their uniform \$11 valuations or sufficiently reduce their 7–8 percent distribution levels notwithstanding that

distributions were increasingly unsupported by FFO was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

DLA's Insufficient Due Diligence

34. DLA sold and continues to sell Apple REIT Ten without having conducted adequate due diligence to determine that it is suitable for investors. DLA has relied mostly upon information in the Apple REITs' securities filings and the opinions issued by the Apple REITs' outside auditors that did not address the Apple REITs' valuation practices.

35. As sole underwriter for the Apple REITs, DLA cannot merely accept the valuation and other material disclosures in the public filings of the Apple REIT companies and must conduct its own due diligence regarding the offerings. As alleged above, the unreasonable valuation and other practices of Apple REITs Six through Nine raised substantial red flags indicating that Apple REIT Ten would engage in similar misconduct.

36. Through its position as underwriter and sole distributor of Apple REITs, DLA was uniquely empowered and had the duty to conduct thorough due diligence of Apple REIT Ten prior to selling it to customers. For example, pursuant to an agency agreement with each of the Apple REITs, DLA can request certain non-public information concerning the "business and financial condition" of the Apple REITs. DLA has not sufficiently availed itself of this opportunity.

37. Instead, the only due diligence DLA has performed has consisted of reviewing public filings (which themselves raised red flags), briefly meeting with Apple REIT management, and performing inadequate analyses that, among other failures, do not sufficiently address any of the red flags identified above.

***DLA's Advertising on its Website Provides
Misleading Return Figures for Apple REITs Six Through Nine***

38. To market Apple REIT Ten, DLA's website currently provides a page titled "REIT History at David Lerner Associates." In addition to identifying Apple REIT Ten, the page provides a description of each of the previously offered Apple REITs, which are no longer open to new investors.

39. This page provides return information for each previously offered Apple REIT and does so in a misleading manner. First, although the recitation of "REIT History" includes year-by-year "annual yields" for the earliest REITs, it only provides a single figure, "average annualized distribution" since inception, for Apple REITs Six through Nine. Describing the performance of Apple REITs Six through Eight using average distribution since inception is misleading, because it masks that distribution rates for those REITs were cut in May 2010:

- a. DLA's website represents that Apple REIT Six has achieved average annualized distribution of "7.9% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.2 percent in May 2010.
- b. DLA's website represents that Apple REIT Seven has achieved average annualized distribution of "7.62% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.0 percent in May 2010.
- c. DLA's website represents that Apple REIT Eight has achieved average annualized distribution of "7.48% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.0 percent in May 2010.

40. Second, DLA's presentation of returns for Apple REITs Six through Nine is misleading because it does not disclose that income from operations was insufficient to support the 7-8 percent returns the Apple REITs sought to pay.

41. Third, DLA's presentation of returns for Apple REITs Six through Nine was misleading because it failed to disclose that those REITs made distributions that were partially funded by debt that further leveraged the REITs.

42. Fourth, DLA's presentation misleadingly and inaccurately characterized the source of the distributions as "net income and a return of capital, primarily in the form of depreciation" when in fact the return of capital was not primarily from depreciation.

43. By including misleading return figures of previous Apple REITs and failing to disclose significant caveats thereto, and masking the declining returns, DLA's website omitted material information and was misleading.

44. Twice this year, FINRA's Advertising Regulation Department has specifically warned DLA not to promote Apple REIT Ten using the returns of prior Apple REITs. On March 11, 2011, FINRA's Advertising Regulation Department issued a review letter advising the firm not to use a sales presentation DLA submitted for review, in part because it "contains and discusses returns of REIT programs that are no longer available." As Advertising Regulation explained, "the presentation is misleading, as it promotes investment in a new real estate program based on historical results of closed programs, contrary to Rule 2210(d)(1)." When DLA submitted a revised version of these materials, along with the prospectus that would be provided during the presentation, Advertising Regulation noted in an April 13, 2011 letter that "the performance of prior REIT programs are not substantiated contrary to Rule 2210(d)(1)(A) and must be deleted"

FIRST CAUSE OF ACTION

**Reasonable Basis Suitability (NASD Rule 2310; FINRA Rule 2310(b));
Just and Equitable Principles of Trade (FINRA Rule 2010)**

45. The Department realleges and incorporates by reference paragraphs 1–44 above.

46. In addition to its customer-specific suitability obligation, DLA and its registered representatives have a duty to perform reasonable diligence to understand the potential risks and rewards associated with a security it recommends to customers, and to determine whether the recommendation is suitable for at least some investors based upon that understanding.

47. Based upon sales and account maintenance of all issued Apple REITs, DLA management was or should have been aware of red flags indicating that management of Apple REIT Ten may adopt improper valuation practices and may unreasonably leverage the REIT in order to continue to issue returns unsupported by the REIT's performance.

48. Especially in light of these red flags, and DLA's role as sole underwriter, DLA personnel did not conduct reasonable diligence to understand the potential risks and rewards of Apple REIT Ten before recommending the security to customers. As a result, DLA was not in a position to determine whether Apple REIT Ten would be suitable for any investor prior to recommending it to customers.

49. By failing to conduct adequate due diligence to fulfill its reasonable-basis suitability obligation, which also violates its duty to observe high standards of commercial honor and just and equitable principles of trade, DLA violated NASD Rule 2310 and FINRA Rules 2310(b) and 2010.

SECOND CAUSE OF ACTION
Misleading Statements, Misleading Omissions
of Material Information (NASD Rule 2210(d)(1));
Just and Equitable Principles of Trade (FINRA Rule 2010)

50. The Department realleges and incorporates by reference paragraphs 1–49 above.

51. By providing performance figures for all of the Apple REITs in conjunction with the presentation of Apple REIT Ten on its website, DLA misleadingly implied that Apple REIT Ten would achieve similar results.

52. The performance figures DLA provided were further misleading because they masked reductions in the distributions made by some of the Apple REITs.

53. DLA also failed to disclose material information regarding the prior Apple REIT distributions, including the fact that income from those REITs was insufficient to support the 7–8 percent returns the REITs sought to pay and that the REITs had to borrow funds to meet their distribution goals.

54. The website misleadingly and inaccurately characterized the source of the distributions as “net income and a return of capital, primarily in the form of depreciation” when in fact the return of capital was not primarily from depreciation.

55. By distributing communications with the public that contained misleading statements and omitted material information, which also violates its duty to observe high standards of commercial honor and just and equitable principles of trade, DLA violated NASD Rule 2210(d)(1) and FINRA Rule 2010.

RELIEF REQUESTED

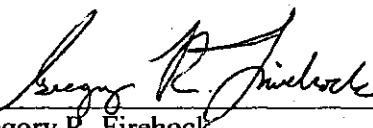
WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed;

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

FINRA DEPARTMENT OF ENFORCEMENT

Date: May 27, 2011


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