

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2017054381601**

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

RE: Harry Seth Datys, Respondent
Former General Securities Representative
CRD No. 1877750

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent Harry Seth Datys submits 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 Respondent alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Respondent hereby accepts and consents, 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

Datys was registered with FINRA as a General Securities Representative (GSR) from 1990 to 2005 through his association with seven different FINRA members. In 2005, Datys associated with FINRA member WestPark Capital, Inc. and registered with FINRA as a GSR. On January 10, 2020, the firm filed a Uniform Termination Notice for Securities Industry Registration on Datys' behalf stating that Datys "voluntarily resigned" from the firm, "with a debit," on January 10, 2020. Pursuant to Article V, Section 4(a) of FINRA's By-Laws, Datys remains subject to FINRA's jurisdiction.

RELEVANT DISCIPLINARY HISTORY

In 2008, the New Jersey Bureau of Securities (NJ Bureau) issued a Summary Revocation Order and Assessment of Monetary Penalties revoking Datys' agent registration and assessing civil monetary penalties against Datys in the amount of \$6,000 for failing to comply with a heightened supervisory agreement with the firm. In 2006, the NJ Bureau had conditioned Datys' registration upon his entering into this agreement with the firm. The NJ Bureau found that Datys failed to comply with the agreement by failing to disclose four items to the NJ Bureau: (1) an action impacting Datys' registration in Colorado; (2) a New Jersey customer complaint; (3) a Texas civil litigation suit; and (4) a supervisory change.

In 2014, the NJ Bureau assessed a civil monetary penalty for Datys in the amount of \$15,000, as set forth in a Consent Order, after finding that Datys continued to actively transact business for up to four New Jersey residents between May 2008 and August 2012 and caused certain clients to change their principal address from their New Jersey residential addresses to their New York business addresses, despite the fact that the clients were still residing at the New Jersey addresses, after his registration in New Jersey had been revoked.

OVERVIEW

From 2012 to 2016, in connection with two securities offerings, Datys offered and sold 24 promissory notes issued by WestPark Capital Inc.'s parent company, WestPark Capital Financial Services LLC, to 14 customers, raising a total of \$2,713,200. Datys violated NASD Rule 2310 and FINRA Rules 2111 and 2010 by failing to have a reasonable basis to recommend these notes to customers. In addition, Datys made negligent misrepresentations and omissions in connection with the sale of the offerings, in violation of FINRA Rule 2010 and in contravention of Section 17(a)(2) and (3) of the Securities Act of 1933.

FACTS AND VIOLATIVE CONDUCT

FINRA Rule 2010 requires that FINRA members observe high standards of commercial honor and just and equitable principles of trade.

FINRA Rule 2111¹ and its predecessor, NASD Rule 2310,² require member firms or their associated persons to have a reasonable basis to believe that a recommended securities transaction is suitable for the customer. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of and risks associated with the security or investment strategy and the member's or associated person's familiarity with the security or investment strategy.³ A member's or associated person's reasonable diligence must provide the member or associated person with an understanding of the potential risks and rewards associated with the recommended security or strategy.⁴ For recommendations involving the private placement of securities, a registered representative's reasonable due diligence should include evaluation of the issuer and individuals associated with the issuer, the issuer's purported business and prospects and the use of the offering's proceeds.⁵

Violations of NASD Rule 2310 and FINRA Rule 2111 constitute violations of FINRA Rule 2010.

¹ FINRA Rule 2111 became effective on July 9, 2012.

² NASD Rule 2310 was effective until July 8, 2012.

³ FINRA Rule 2111.05(a).

⁴ *Id.*

⁵ *FINRA Regulatory Notice 10-22*, 2010 FINRA LEXIS 43, at *12-13 (Apr. 2010).

Section 17(a) of the Securities Act provides, in pertinent part:

It shall be unlawful for any person in the offer or sale of any securities. . .
by the use of any means or instruments of transportation or communication
in interstate commerce or by the use of the mails, directly or indirectly: . . .

- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

It is a violation of FINRA Rule 2010 to act in contravention of Section 17(a) of the Securities Act.

Datys lacked a reasonable basis to recommend the notes.

Between January 2012 and February 2016, in connection with two securities offerings, Datys solicited sales of 24 promissory notes issued by the firm's parent, to 14 customers, raising a total of \$2,713,200 and obtaining commissions of \$183,000.⁶

The offerings were structured as loans to the firm's parent in exchange for five-year promissory notes that could be extended twice, for one-year periods, at the parent's discretion. The terms of the notes included: (i) five-percent simple interest per year; (ii) equity participation in the form of a pro-rata portion of the stock and warrants that the parent retained in connection with investment banking transactions; and (iii) profit participation in the form of a pro-rata percentage of the parent's net profits.

Datys did not perform a reasonable review of the offering documents, which he received from the firm's CEO, including the subscription agreement and financial statements that contained red flags about the parent's ability to repay the notes. Datys failed to inquire about these red flags. For example, the offering documents from 2012 to 2014 stated that the parent had a \$1 million line of credit with a bank. Datys failed to investigate the current status of the line of credit. Therefore, he did not learn that the parent defaulted on the line of credit, that the parent had entered into successive forbearance agreements with the bank from March 2012 to April 2013, that the parent defaulted on each agreement, and that the bank filed suit against the parent and its CEO in April 2013.

⁶ For each customer that Datys solicited, the customer's note is currently either (1) repaid, (2) extended and not yet due, or (3) amended after default to allow repayment in installments over time.

In addition, Datys did not conduct reasonable due diligence on the offerings and failed to understand the risks they presented. For example, Datys failed to understand that the notes granted the noteholders distributions from the parent, rather than distributions from the firm, which had higher profits and greater opportunities to obtain equity through investment banking transactions. Datys did not perform a reasonable review of information about the parent's financial condition or operations. Datys also did not discuss the parent's financial condition or its prospects for future performance with the personnel of the parent or the firm, including the individual who served as the CEO for both entities.

By virtue of the foregoing, Datys violated NASD Rule 2310 and FINRA Rules 2111(a) and 2010.

Datys made negligent misrepresentations and omissions of material information.

While soliciting investments, Datys negligently claimed that noteholders were entitled to share in pro-rata distributions of equity and profits from the firm, which had higher profits and greater equity-producing opportunities than its parent, the actual issuer and source of profits and equity for the noteholders. Datys negligently misrepresented that noteholders would receive stock or warrants for every deal in which the firm participated, including the firm's private placements and IPOs.

In addition, Datys negligently failed to disclose conflicts of interest that presented risks. For example, the CEO of the parent and the firm had sole discretion as to whether the parent's subsidiaries, including the firm, would make distributions to the parent, and these distributions constituted the primary source of the parent's revenue. In addition, the CEO could waive the parent's right to retain equity in a transaction and instead obtain a commission for the firm or equity for other entities the CEO controlled. The CEO could also significantly impact the parent's profits by deciding whether to cause the parent to repay loans from the CEO and his family members.

Additionally, to solicit investments, Datys emailed customers a false "Historical Analysis" that he obtained from the CEO and negligently misrepresented that it showed investors what they could expect as a return on the notes, without disclosing that the information it contained was hypothetical, rather than historical. Datys did not request or obtain information about the basis for the assertions in the Historical Analysis. The document purported to depict the returns that investors would have obtained on a \$2 million investment in the notes if the notes existed, were offered, and were sold to customers during the period from 2006 to 2010. Specifically, the Historical Analysis stated that the notes would have generated over \$9.7 million in "returns to investors" from the parent's sale of equity in companies for which it participated in private placement and IPO transactions. The Historical Analysis stated that, "... the future cannot be predicted upon past returns ...". However, the Historical Analysis did not report past returns. Rather, the alleged "returns" were hypothetical and derived, in part, from private placement prices for private companies and IPO prices for public companies, data that would not represent any "return" to investors. In addition, the Historical Analysis included in the asserted "returns" the purported value of three companies that never went public and for which there was no IPO. The valuations also did not account for changes in the value of company equity post-IPO, which

would have affected any return. In fact, shortly after the IPOs for many of the relevant public companies, their stock trading was halted due to allegations of fraud. The Historical Analysis failed to explain how the valuations were performed.

Datys also negligently provided investors with offering documents he received from the firm's CEO that contained material misrepresentations and omitted material adverse facts. The offering documents from 2012 to 2014 stated that the parent had a \$1 million line of credit with a bank and that the parent was not in default on any "agreement or instrument material to its business." However, neither Datys nor the offering documents disclosed the parent's default on the line of credit, its defaults on successive forbearance agreements with the bank, or the bank's suit against the parent and its CEO. Datys, and the offering documents from 2012 to 2014, also did not disclose that the parent had approximately \$1.7 million in liabilities in addition to the approximately \$1 million line of credit, and that these additional liabilities included approximately \$600,000 owed to prior noteholders who had not been repaid their principal and a \$400,000 outstanding loan from the parent's CEO. Further, Datys, and the offering documents from 2015 to 2016, failed to disclose the bank line of credit, the default, or the settlement agreement with the bank regarding that default and significantly understated the parent's liabilities, which included loans from the parent's CEO.

Further, Datys negligently failed to disclose other material facts, which were also omitted from the offering documents. For example, the noteholders could be limited from selling any equity due to contractual "lock up/leak out" restrictions on those sales, and the noteholders could incur sales costs, such as fees for legal opinions and clearing fees, that could exceed the value of the equity itself.

Shortly after they invested, several noteholders inquired about the status of their investments because they had not received the equity they expected from the firm's deals. In his responses, Datys negligently did not disclose that the noteholders were not entitled to any equity from the firm and that the notes only entitled the noteholders to equity from the parent. Rather, Datys continued to tell noteholders that equity from the firm would be forthcoming.

By virtue of the foregoing negligent misrepresentations and omissions, Datys violated FINRA Rule 2010 by acting in contravention of Section 17(a)(2) and (3) of the Securities Act.

B. Respondent also consents to the imposition of the following sanctions:

- a 15-month suspension from associating with any FINRA member in any capacity and
- a \$20,000 fine.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

Respondent understands that if he is barred or suspended from associating with any FINRA member, he becomes 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, he may not be associated with any

FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension. See FINRA Rules 8310 and 8311.

The fine shall be due and payable either immediately upon reassociation with a member Firm, 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.

Respondent specifically and voluntarily waives any right to claim an inability to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against him;
- 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, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Legal Officer, 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.

Respondent further specifically and voluntarily waives 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

Respondent understands 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 Respondent; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action brought by FINRA or any other regulator against Respondent;
 - 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 - 4. Respondent 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. Respondent 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 Respondent's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. Respondent may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that he 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.

Respondent certifies that he has read and understand all of the provisions of this AWC and has been given a full opportunity to ask questions about it; Respondent understands and acknowledges that FINRA does not represent or advise him and Respondent cannot rely on FINRA or FINRA staff members for legal advice. Respondent has agreed to the AWC's provisions voluntarily; and 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 him to submit this AWC.

8.15.20
Date

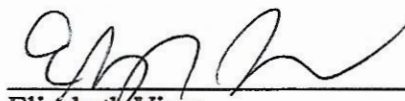


Harry Seth Datys
Respondent

Accepted by FINRA:

9-7-20
Date

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



Elizabeth Virga
Senior Counsel
FINRA
Department of Enforcement
200 Liberty Street
New York, New York 10281