

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2020067572701**

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

RE: Joshua D. Nicholas (Respondent)
Former General Securities Representative
CRD No. 6529944

Pursuant to FINRA Rule 9216, Respondent Joshua D. Nicholas 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 in this AWC.

I.

ACCEPTANCE AND CONSENT

- A. Respondent accepts and consents to the following findings by FINRA without admitting or denying them:

BACKGROUND

Respondent entered the securities industry in 2016 when he became associated with a FINRA member. He was registered as a General Securities Representative through his association with Merrill Lynch, Pierce, Fenner & Smith Inc. (the Firm), a FINRA member firm, from February 2020 to July 31, 2020. On August 14, 2020, the Firm filed an amended Uniform Termination Notice for Securities Industry Registration (Form U5) disclosing that Respondent's outside business activity (OBA) customers A and B filed an arbitration concerning Respondent, alleging unsuitable investment recommendations, selling away and omission of material facts.

In April 2021, a National Futures Association (NFA) Hearing Panel accepted a settlement offer from Respondent and JDN Capital LLC, his wholly-owned limited liability company, to resolve a complaint in which the NFA alleged that Respondent and JDN Capital failed to cooperate with the NFA in connection with an investigation regarding investment funds OBA Customers A and B had entrusted to JDN Capital. The settlement barred Respondent from NFA membership with a right to reapply after eight years, and ordered Respondent not to act or become a principal of an NFA member at any time in the future.¹

¹ The Hearing Panel imposed a deferred fine of \$125,000, payable if Respondent applies for NFA membership or reapplies for NFA associate membership after the expiration of the eight-year period.

Respondent is not currently associated with any FINRA member, however he remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of FINRA's By-Laws.²

OVERVIEW

In May 2020, Respondent induced OBA Customers A and B³ to enter into a promissory note with his wholly-owned entity JDN Capital LLC, pursuant to which the customers lent JDN Capital \$300,000 to invest in securities on their behalf. Instead of investing the funds as required, Respondent converted \$58,000 of the funds to pay for his own personal expenses in violation of FINRA Rule 2010.

In July 2020, the OBA customers asked Respondent to provide a copy of an account statement showing that JDN Capital had invested the proceeds of the promissory note in securities as it was obligated to do. In response, Respondent provided them with a fabricated account statement for a non-existent account containing material misrepresentations, in violation of FINRA Rule 2010.

Respondent also failed to provide prior written notice to his member firm that he was engaging in an outside business activity through JDN Capital, in violation of FINRA Rules 3270 and 2010. Finally, Respondent failed to provide prior written notice or receive prior written permission from his member firm prior to participating in the note transaction with OBA Customers A and B, in violation of FINRA Rules 3280 and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a complaint by OBA Customers A and B alleging unsuitable investment recommendations, selling away and omission of material facts involving the conduct of Respondent and JDN Capital described herein.

Respondent converted \$58,000 of OBA Customers A and B's Funds

FINRA Rule 2010 requires members in the conduct of their business to observe high standards of commercial honor and just and equitable principles of trade. Conversion of investor funds is a violation of FINRA Rule 2010.

Prior to joining the Firm and continuing after his association, Nicholas traded futures contracts through his corporate entity, JDN Capital, which was regulated by the NFA. Among the customers for whom Nicholas engaged in futures trading were OBA Customers A and B, a married couple. By February 2020, Nicholas' futures trading for OBA Customers A and B had resulted in losses of more than \$1 million in the trading account with Nicholas and JDN Capital.

² For more information about the respondent, including prior regulatory events, visit BrokerCheck® at www.finra.org/brokercheck.

³ OBA Customers A and B were not Firm customers.

In a purported effort to recoup some of their losses, in around April 2020, Respondent convinced OBA Customers A and B to invest an additional \$300,000 in a promissory note with JDN Capital so that entity could invest these additional funds in securities on their behalf. On April 30, 2020, JDN Capital and OBA Customer A executed the note, which called for OBA Customers A and B to lend JDN Capital \$300,000. The note obligated JDN Capital to pay 17% interest per annum and explicitly obligated JDN Capital to secure the principal balance by purchasing securities worth \$300,000. Respondent was JDN Capital's owner and agent, and he signed the note as agent for JDN Capital.

On May 4, 2020, OBA Customer A wired \$300,000 to JDN Capital's bank account, as called for by the terms of the note. That same day, Respondent removed most of the funds that JDN Capital was obligated to use to purchase securities from JDN Capital's custody, transferring \$280,000 from JDN Capital's bank account to his personal bank account. Respondent spent approximately \$58,000 of these funds on personal expenses.

By using approximately \$58,000 of OBA Customers A and B's funds on personal expenses, Respondent converted their funds. Therefore, Respondent violated FINRA Rule 2010.

Respondent provided OBA Customers A and B with a fictitious brokerage statement containing material misrepresentations

Making a misrepresentation to an investor violates FINRA Rule 2010.

After executing the promissory note in April 2020, OBA Customers A and B repeatedly asked Respondent to provide a copy of JDN Capital's account statement to show them whether and how the proceeds of the note had been invested. In response to these requests, in July 2020 Respondent prepared and emailed a copy of a brokerage statement purporting to show that JDN Capital had opened a brokerage account at Firm A, a FINRA member firm, and that the account owned a number of securities to secure the note. The brokerage statement stated, among other items, that the account was in the name of JDN Capital, that the account held shares of certain equity securities, and that the account had earned approximately \$72,000 in dividend income that month. In fact, Respondent had fabricated the document. Neither JDN Capital nor Respondent had an account at Firm A, and neither JDN nor Respondent owned any assets custodied at Firm A. These claims in the fabricated statement were therefore false.

By preparing and sending to OBA Customers A and B a fabricated account statement containing material misrepresentations, Respondent violated FINRA Rule 2010.

Respondent engaged in an undisclosed outside business activity

FINRA Rule 3270 provides that no registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person

as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. A violation of FINRA Rule 3270 also violates FINRA Rule 2010.

The Firm maintained written supervisory procedures that required registered individuals to disclose all OBAs in writing and to obtain Firm approval prior to engaging in the outside activity.

Respondent formed JDN Capital in 2018 as a commodity trading advisor and filed articles of incorporation with the State of Florida. Respondent was the owner and agent of JDN Capital and exercised control over its bank account. Respondent's work as principal of JDN Capital through which he expected and received compensation is an outside business activity under Rule 3270. Respondent engaged in futures trading through JDN Capital from its incorporation through the time that he was associated with the Firm. Respondent failed to provide prior written notice to the Firm that he was engaged in an outside business activity involving JDN Capital, and he did not receive the Firm's approval to do so. Moreover, Respondent falsely attested in June 2020 in a Firm annual compliance certification that he did not engage in any outside business activities.

By engaging in outside business activities involving JDN Capital without providing prior written notice to his member firm, Respondent violated FINRA Rules 3270 and 2010.

Respondent engaged in an undisclosed private securities transaction

FINRA Rule 3280(b) provides that "[p]rior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein." Under FINRA Rule 3280(e), a "private securities transaction" is defined as "any securities transaction outside the regular course or scope of an associated person's employment with a member." A violation of FINRA Rule 3280 also constitutes a violation of FINRA Rule 2010.

The Firm maintained written supervisory procedures that required registered individuals to obtain approval prior to engaging in private securities transactions.

In April 2020, while he was associated with the Firm, Respondent solicited OBA Customers A and B to invest \$300,000 in a promissory note with JDN Capital, through which JDN Capital would invest the proceeds in securities. The note provided for monthly interest payments at a rate of 17% per annum and a return of the principal after one year. Respondent solicited the note on behalf of JDN Capital, drafted the agreement governing the note and signed the note as the agent of JDN Capital. The promissory note that OBA Customers A and B entered with JDN Capital was a security. Respondent participated in this private securities transaction away from the Firm, and he failed to either provide prior written notice to the Firm or receive prior written permission from the Firm prior to engaging in the transaction.

By participating in a private securities transaction without providing prior written notice to, and receiving written approval from Merrill Lynch, his member firm employer, Respondent violated FINRA Rules 3280 and 2010.

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

- a bar from associating with any FINRA member in all capacities

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 sanctions imposed in this AWC shall be effective on a date set by FINRA. A bar or expulsion shall become effective upon approval or acceptance of this AWC.

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 its acceptance or rejection.

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 its subject matter 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 right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party. Nothing in this provision affects Respondent's testimonial obligations in any litigation or other legal proceedings.

Respondent certifies that he has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; 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 in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce him to submit this AWC.

January 21, 2022

Date

Joshua D. Nicholas

Joshua D. Nicholas
Respondent

Reviewed by:

Kawa Foad

Kawa Foad
Counsel for Respondent
1100 Brickell Bay Drive
Suite 65-M
Miami, FL 33131

January 21, 2022

Accepted by FINRA:

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

January 24, 2022

Date

Jason Mogel

Jason Mogel
Senior Counsel
FINRA
Department of Enforcement
99 High Street, Suite 900
Boston, MA 02110