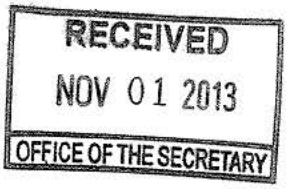
October 30, 2013



The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090 – Room 10915
Washington, DC 20549

Re: Disciplinary Proceeding No. 2008011762801
Mitchell H. Fillet Application for Review

3-15601

To Whom It May Concern:

My name is Mitchell H. Fillet. I appeared in the above-referenced matter pro se and I intend to continue to represent myself in connection with this application for review. On October 7, 2013 I received an undated decision of the National Adjudicatory Council ("NAC") of the Financial Industry Regulatory Authority ("FINRA") in the above-referenced Disciplinary Proceeding. In that decision the NAC made two determinations:

(1) It determined that I falsified firm records by incorrectly dating my review of certain annuity contracts and providing those records to FINRA[1]; and

(2) It determined that I committed securities fraud by supposedly misrepresenting and omitting material facts in connection with the sale of securities to an investor.[2]

These determinations were the culmination of a five year "witch hunt". While the punishment in connection with the falsification of firm records charge is disproportionate - - the violation was de minimus as no customer was harmed or disadvantaged in any way and no member of my firm profited from this activity - - I am not asking for a review of that portion of the NAC's decision. I have already been out of the financial services industry for more than two (2) years and do not plan on returning to it.

I am, however, complaining of - - and by this letter, applying to the SEC for review of - - the part of the NAC's decision that determined that I committed securities fraud.

Pursuant to SEC Rule 420 (c), the following sets forth ". . . in summary form a brief statement of the alleged errors in the determination and supporting reasons therefor":

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[1] For this violation the NAC suspended me for two years and fined me $10,000.
[2] For this violation the NAC suspended me for an additional 18 months and fined me an additional $10,000.

In determining that I defrauded a single investor in connection with the sale of securities, the NAC ignored certain dispositive and uncontroverted facts, improperly shifted the burden to me to prove a negative, and misapplied the applicable law.[3] The NAC's determination of the fraud charge was premised entirely on alleged misstatements and omissions in a Term Sheet that I had prepared. The NAC completely ignored the facts that (a) I did not give the term sheet to the investor; (b) the term sheet was a draft document that recited certain events that were anticipated to occur, but had not yet occurred; (c) I explicitly told the principal of the Company seeking to raise money not to distribute the term sheet to potential investors; (d) I explicitly told that same principal that, given some matters I had discovered during my due diligence, I could not raise any money for his company; and (e) I terminated my engagement for the company prior to the investor receiving, from an unknown source, the term sheet.

The improper burden shifting error involved the NAC's making it incumbent on me to prove that the term sheet was a draft, that I did not forward it to the investor, and that I did not authorize its dissemination. This turned the entire process upside down. FINRA had the burden - - which it could not, and did not, meet - - to prove that I disseminated, or authorized the dissemination of, the misrepresentations to the investor.

The misapplication of the law involved the NAC's finding that I committed securities fraud, notwithstanding the fact that I did not profit from the acts complained of. It is my understanding that the law on this point is clear: there can be NO FRAUD without profit.

I can be served at my home, [redacted]. Please advise me of what the next steps in this review process are. Thank you for your courtesies, and anticipated cooperation, in this matter.

Respectfully,

Mitchell H. Fillet

cc: FINRA, Office of General Counsel
1735 K Street, NW
Washington, DC 20006
Attention: Jennifer Brooks, Esq.

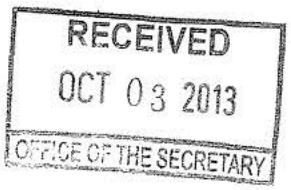
[3] Even if the SEC affirms the NAC's determination, the sanction against me was disproportionate and vindictively punitive. The NAC inexplicably increased the suspension of the initial hearing panel from six (6) months to eighteen (18) months and decided that the suspensions should run consecutively rather than concurrently.

FINRA

Financial Industry Regulatory Authority

Jennifer C. Brooks
Associate General Counsel

Direct: (202) 728-8083
Fax: (202) 728-8264



October 2, 2013

VIA MESSENGER

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549

RE: Complaint No. 2008011762801: Mitchell H. Fillet

Dear Ms. Murphy:

Enclosed is the decision of the National Adjudicatory Council in the above-referenced matter. This decision constitutes final action by the Financial Industry Regulatory Authority with respect to this matter.

Very truly yours,

Jennifer C. Brooks

Enclosure

cc: Ciara Gray

FINRA
Financial Industry Regulatory Authority

Marcia E. Asquith
Senior Vice President and
Corporate Secretary

Direct: (202) 728-8831
Fax: (202) 728-8300

RECEIVED
OCT 03 2013
OFFICE OF THE SECRETARY

October 2, 2013

VIA CERTIFIED MAIL:
RETURN RECEIPT REQUESTED/FIRST-CLASS MAIL

Mitchell H. Fillet
[redacted]

Re: Complaint No. 2008011762801: Mitchell H. Fillet

Dear Mr. Fillet:

Enclosed is the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The Board of Governors of the Financial Industry Regulatory Authority ("FINRA") did not call this matter for review, and the attached NAC decision is the final decision of FINRA.

In the enclosed decision, the NAC suspended you for two-years and fined you $10,000 for falsifying firm records and providing them to FINRA. The NAC also suspended you for an additional 18 months and fined you an additional $10,000 for the fraud violation. The suspensions are to be served consecutively. Further, the NAC affirmed the Hearing Panel's order that you pay $2,584.65 in hearing costs.

The suspensions imposed by the NAC shall begin with the opening of business on Monday, December 2, 2013, and end at the close of business on Friday, June 2, 2017. Please note that under Rule 8311 ("Effect of a Suspension, Revocation or Bar"), you are not permitted to associate with any FINRA member firm in any capacity, including a clerical or ministerial capacity, during the period of your suspension. Further, member firms are not permitted to pay or credit any salary, commission, profit or other remuneration that results directly or indirectly from any securities transaction that you may have earned during the period of your suspension.

Pursuant to Article V, Section 2 of the FINRA By-Laws, if you are currently employed with a member of FINRA, you are required immediately to update your Form U4 to reflect this action.

You are also reminded that the failure to keep FINRA apprised of your most recent address may result in the entry of a default decision against you. Article V, Section 2 of the FINRA By-Laws requires all persons who apply for registration with FINRA to submit a Form U4 and to keep all information on the Form U4 current and accurate. Accordingly, you must keep your member firm informed of your current address.

In addition, FINRA may request information from, or file a formal disciplinary action against, persons who are no longer registered with a FINRA member for at least two years after their termination from association with a member. *See* Article V, Sections 3 and 4 of FINRA's By-Laws. Requests for information and disciplinary complaints issued by FINRA during this two-year period will be mailed to such persons at their last known address as reflected in FINRA's records. Such individuals are deemed to have received correspondence sent to the last known address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with a FINRA member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions against them. *See NASD Notice to Members 97-31*. Letters notifying FINRA of such address changes should be sent to:

CRD
P.O. Box 9495
Gaithersburg, MD 20898-9401

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the SEC within 30 days of your receipt of this decision. A copy of this application must be sent to the FINRA Office of General Counsel, as must copies of all documents filed with the SEC. Any documents provided to the SEC via facsimile or overnight mail should also be provided to FINRA by similar means.

The address of the SEC is:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Mail Stop 1090 – Room 10915
Washington, DC 20549

The address of FINRA is:

Attn: Jennifer Brooks, Esq.
Office of General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006

If you file an application for review with the SEC, the application must identify the FINRA case number and state the basis for your appeal. You must include an address where you may be served and a phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and FINRA. Attorneys must file a notice of appearance.

The filing with the SEC of an application for review shall stay the effectiveness of any sanction except a bar or expulsion. Thus, the suspensions imposed by the NAC in the enclosed decision will be stayed pending appeal to the SEC. Additionally, orders in the enclosed NAC decision to pay fines and costs will be stayed pending appeal. Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is (202) 551-5400.

If you do not appeal this NAC decision to the SEC and the decision orders you to pay fines or costs, you may pay these amounts after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid (via regular mail) to FINRA, P.O. Box 7777-W8820, Philadelphia, PA 19175-8820 or (via overnight delivery) to FINRA, W8820-c/o Mellon Bank, Room 3490, 701 Market Street, Philadelphia, PA 19106.

Very truly yours,

Marcia E. Asquith

Marcia E. Asquith
Senior Vice President and Corporate Secretary

Enclosure

cc: David F. Newman, Esq.
Leo F. Orenstein, Esq.
Jeffrey Pariser, Esq.
Ciara Gray

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

RECEIVED
OCT 03 2013
OFFICE OF THE SECRETARY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Mitchell H. Fillet
Rockville, MD,

Respondent.

DECISION

Complaint No. 2008011762801

Dated: October 2, 2013

Respondent made material misrepresentations and omissions in connection with the sale of securities to an investor, and falsified his firm's records related to variable annuity transactions and provided these false records to FINRA. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: David F. Newman, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Pursuant to NASD Rule 9311, Mitchell H. Fillet ("Fillet") appeals the Hearing Panel's decision in this matter and FINRA's Department of Enforcement ("Enforcement") cross appeals a component of the sanctions. The Hearing Panel found that Fillet engaged in securities fraud by misrepresenting and failing to disclose certain material facts in offering documents to one investor. The Hearing Panel further found that Fillet falsified documents related to seven customers' variable annuity transactions that caused his firm's books and records to be inaccurate and provided these falsified documents to a FINRA examiner. The Hearing Panel suspended Fillet for two years and fined him $10,000 for the falsification of records and concurrently suspended Fillet for six months and fined him an additional $10,000 for the fraud. After a complete review of the record, we affirm the Hearing Panel's findings of violation, but modify the sanctions imposed.

I. Background

Fillet entered the securities industry in 1981 and has been associated with several FINRA member firms. Fillet was registered as a general securities representative and principal with The Riderwood Group ("Riderwood" or the "Firm") from July 2004 until March 4, 2009. In addition to a traditional brokerage business, Riderwood conducted an investment banking business, including private placements, mergers, and acquisitions. Fillet held an ownership interest in Riderwood and was the Firm's CEO, President, and senior investment banker. Riderwood withdrew from FINRA membership in February 2009 and is no longer in business.

The relevant conduct occurred during the time when Fillet was associated with Riderwood. Fillet is not currently associated with a FINRA member.

II. Facts

This case arose out of both a FINRA examination for cause subsequent to an investor's complaint and a FINRA 2008 routine examination of Riderwood. The central issue in dispute is whether Fillet committed fraud when he drafted a securities offering document that contained inaccurate information and failed to disclose to an investor the criminal history of the person instrumental to the offering.

A. The Securities Offering

Fillet entered into an engagement agreement with Catering Acquisition Corp. ("CAC"), and its President and CEO Allan Sloan ("Sloan"), on behalf of Riderwood in June 2007. CAC was a shell company created for the purpose of acquiring food service companies. CAC had no assets or business operations. Pursuant to the engagement agreement, Riderwood agreed to provide CAC "advisory, investment banking, and placement services" in connection with "the design and execution of the acquisition of a series of food-related enterprises" in New York City and "the creation of a food and food service brand" that was intended to be expanded nationally. Riderwood agreed to conduct due diligence, help structure a financing plan, draft transactional documents, identify prospective investors, and act as a placement agent in connection with CAC's private offering of its securities. Sloan paid Riderwood between $20,000 and $30,000 for its services.

1. Offering Documents that Fillet Drafted

Pursuant to the engagement agreement, Fillet drafted several documents for a private placement of securities to be issued by CAC and FAO Sweet Shoppes, Inc. ("Sweet Shoppes"). Sweet Shoppes had no operations, but its intended business model was a retail store that combined toys, food, and party facilities and was fashioned after FAO Schwarz's ("FAO") Fifth Avenue store in New York City. Fillet drafted a "Confidential Term Sheet" ("Term Sheet"), promissory notes, and a subscription agreement (together, "offering documents") for the offering. The Term Sheet prominently identified Riderwood as the "sole" and "exclusive" "marketing agent" for the $3,000,000 offering of 20 units. Each $150,000 unit consisted of an $80,000 CAC "Series A 10% Corporate Note" due December 1, 2009, a $70,000 Sweet Shoppes "Series A 10% Corporate Note" due December 1, 2009, and detachable warrants to purchase

shares of CAC and Sweet Shoppes. Sloan was identified in the offering documents as the President and CEO of both CAC and Sweet Shoppes.

The Term Sheet, dated January 14, 2008, made numerous representations about CAC and Sweet Shoppes. For example, the Term Sheet represented that CAC "was founded in 2007 to create a vertically-integrated, brand name food service company that started in New York City but became national in scope." The Term Sheet further represented that CAC had "completed the first leg of this process through the acquisition of MyBefana, a Houston Street, New York City based food commissary that is one of the largest food preparation facilities in the City of New York." "The next step in this transaction," the Term Sheet stated, was "the acquisition of one of New York City's largest and oldest catering companies [Glorious Food]." The Term Sheet stated that "[t]his transaction has been negotiated with a current agreement between the principals . . . and it is planned that this transaction will close in 1Q2008."

With respect to Sweet Shoppes, the Term Sheet stated that Sweet Shoppes operated "under a global license from FAO Schwarz and the FAO Family Trust." "Though not part of the corporate entity that owns and manages FAO," the Term Sheet added that "Sweet Shoppes is closely aligned with FAO, itself." The Term Sheet further represented that "Sweet Shoppes has contracted with CAC to have CAC manufacture food for the first Sweet Shoppe store in Greenwich."

In reality, CAC was not an operating company nor was it national in scope. CAC was a shell company with no assets or operations. Sweet Shoppes was merely a concept and had not secured a global license from FAO and the FAO Family Trust. Fillet admitted that the Term Sheet's description of CAC's and Sweet Shoppes' businesses was subject to contingencies that had not occurred as of the date of the Term Sheet, January 14, 2008.

2. PM's Investment in CAC

In December 2007, Edward Schmults ("Schmults"), the then CEO of FAO, told his friend PM about the Sweet Shoppes venture. Schmults told PM that he planned for the first Sweet Shoppe to be located in Greenwich, Connecticut, the town where PM resided. Schmults asked PM, who is a lawyer and a specialist in real estate investment and management, to speak with Sloan regarding the location. Schmults told PM that Sloan was an experienced food services operator and that FAO was relying on Sloan to run the business. After several phone calls between PM and Sloan regarding the Greenwich location, Sloan invited PM to meet with him and his investment banker, Fillet, who was putting together the Sweet Shoppes private placement.

The only meeting between Fillet and PM took place on January 16, 2008. PM could not recall with certainty whether Sloan was also present at the meeting, but testified that he believed he was there to introduce Fillet, which Fillet's testimony corroborated. Fillet testified that the purpose of the meeting was to determine whether PM would be interested in investing in the CAC/Sweet Shoppes offering. PM had the impression that Fillet "was an investment banker who had done a lot of offerings," that Fillet was "participating to add credibility" to Sloan, and was "involved in raising the money." During the meeting, PM and Fillet discussed Sloan's

business plan, the businesses of CAC and Sweet Shoppes, the terms of the offering, PM's qualifications as an accredited investor, and PM's investment amount of $150,000. Through PM's conversations with Fillet and Sloan, PM understood that CAC was on the verge of acquiring Glorious Food, which PM knew to be a prominent catering company in New York, and that Sloan was in lease negotiations for the Sweet Shoppe in Greenwich. PM also understood that CAC was already operating a food preparation business that would provide the food for the Sweet Shoppes and that there was a license agreement in place with FAO.

Soon after the January 2008 meeting, PM received the Term Sheet, subscription agreement, and accompanying promissory notes.[1] The Term Sheet described in greater detail the transaction that PM had discussed with Fillet at the January meeting. After PM's attorneys reviewed these documents, PM completed and signed the subscription agreement that he dated February 21, 2008. PM also issued a check payable to "Catering Acquisition Corp." for $150,000. The memo portion of the check states "re notes and warrants." Sloan picked up the completed documents and check from PM.

After several conversations with Sloan in the following months, PM became "uncomfortable" with his investment in CAC and Sweet Shoppes. For example, Sloan told PM that the Glorious Food acquisition had been delayed repeatedly. PM also was concerned that the Greenwich location was not ideal.

Sometime thereafter, Schmults told PM that FAO's "arrangement" with Sloan had been terminated. Schmults said that a confidentiality agreement precluded him from explaining further, but instructed PM to "Google" Sloan. After having one of his employees run Internet searches on Sloan, PM discovered that Sloan had a criminal history and had been disbarred.

PM subsequently requested reimbursement of his investment from Fillet and Sloan. Fillet disclaimed any responsibility to return the money, noting that the money had been paid to Sloan, and insisting that he was merely Sloan's agent. Sloan agreed to repay PM. On three different occasions thereafter, Sloan gave PM a check for $150,000. Each of the checks bounced, however. PM never recovered any of his investment.

3. Fillet Knew of Sloan's Criminal History

In late 2007, while conducting due diligence pursuant to the terms of the engagement agreement, Fillet learned that Sloan had been convicted of possession of stolen property (a rental car) in 2002, for which he was sentenced to three to six years in prison. Sloan subsequently provided Fillet with a letter from Sloan's criminal defense attorney in which the attorney described the stolen property prosecution as "absurd," despite Sloan's conviction. Fillet and Riderwood's only due diligence on Sloan consisted of running a misspelled Pacer search of

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[1] Fillet stated that he provided the documents to Sloan's attorney and later became aware that the Term Sheet was provided to PM. PM stated that the documents were delivered to his office, but PM could not recall who sent them.

"Alan Sloan" and searching the SEC's website for "TriBakery Capital," which Fillet described as CAC's predecessor. Fillet undertook no further research of Sloan's background.[2]

At the time of Fillet's meeting with PM and PM's subsequent investment, Fillet knew of Sloan's stolen property conviction, but he did not disclose it to PM. Instead, Fillet told Sloan to disclose it to PM and FAO. Fillet also did not include Sloan's criminal history in any of the CAC and Sweet Shoppes offering documents.

B. Falsified Variable Annuity Documents

In July 2008, during a routine on-site examination of Riderwood's main office in Towson, Maryland, FINRA examiner Stephen Marchese ("Marchese") undertook a review of the Firm's variable annuity transactions to evaluate their suitability. Marchese interviewed Fillet, who was the supervisor overseeing these transactions. Fillet told Marchese that most of the variable annuity business was done in Riderwood's Michigan and Indiana branch offices. Fillet told Marchese that after the registered representative in the branch completed the relevant forms, the forms were faxed to Fillet for him to review for suitability. The forms included date and signature lines for the reviewing supervisor. Fillet further told Marchese that he would review the transactions for suitability and then fax the forms back to the branches, where the documents were maintained.

Marchese requested a sampling of the Firm's variable annuity account documents for his review.[3] Marchese testified that the Firm produced the documents extremely slowly. Marchese discovered that Fillet had not signed the requested documents being faxed by the branch offices. Marchese explained that while waiting in a Firm conference room for Fillet to produce documents, unbeknownst to Fillet, Marchese saw several faxes of variable annuity documents that were sent from the Firm's Michigan and Indiana branch offices. These documents contained none of the required supervisory signatures. In addition, a fax cover sheet from a registered representative at the Indiana branch requested Fillet's signature on the documents. Fillet subsequently produced these same documents to Marchese, but not until he had signed and dated them as though Fillet's supervisory review occurred around the time of the transactions. Marchese, suspecting that Fillet was backdating the documents, requested that the registered representative from the Indiana branch refax a complete set of these documents. Marchese received documents that contained none of the supervisory signatures. FINRA staff further

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[2] Had he done so, he would have learned that Sloan had been disbarred from practicing law as a result of a 1987 felony conviction for offering a false affidavit to a New York court. Fillet testified that he learned in early 2008 that Sloan was disbarred. Prior to being disbarred, Sloan was disciplined for violating various New York attorney disciplinary rules related to converting client funds. Sloan also had hundreds of thousands of dollars in civil judgments and liens against him and had filed for bankruptcy in 2003.

[3] Marchese testified that he requested that the Firm produce the relevant variable annuity documents for the calendar quarter preceding commencement of the examination. Marchese reviewed approximately 17 of the Firm's variable annuity transactions.

confirmed what Fillet was doing by conducting an on-site review at Riderwood's Indiana branch office and comparing the forms there with the copies that Fillet had provided to Marchese at the July on-site at Riderwood's main office in Maryland.

Fillet denied to FINRA that he engaged in backdating, including in his response to FINRA staff's examination report and repeatedly in on-the-record investigative testimony that he provided to FINRA. After witnessing Marchese's hearing testimony, however, Fillet fully admitted to backdating the documents at issue.[4]

III. Procedural History

Enforcement filed a two-cause complaint against Fillet on August 23, 2010. The first cause of the complaint alleged that Fillet violated Securities Exchange Act of 1934 ("Exchange Act") Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2, including "by making misrepresentations and omissions through the offering document" to investor PM in connection with the sale of CAC and Sweet Shoppes securities.[5] The second cause alleged that, in violation of NASD Rules 3110 and 2110, Fillet falsified Firm documents

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[4] Fillet testified at the hearing in relevant part as follows:

> And had I had personally any inkling that this was such a big deal that . . . a relatively small percentage of the VAs that our firm sold were misdated, I would not have done what I did. I did what I did in part to protect [the Indiana registered representative]. He was a little sloppy in his procedures. It was not unusual for him to hold onto contracts and send them through at some fairly, late date.
>
> We had numerous phone calls in the course of the, of the firm examination, where he asked me if I would just date them somewhere around where the contract was written. So he didn't look like he was being bad at getting them back to us. I didn't think there was any real import. . . . I had never heard of anything in the course of the examinations of firms or contracts—for variable annuity contracts that spoke to backdating. . . . And I, frankly, just didn't think that it was just that big of a deal. . . .
>
> And I did have one bad habit, which I have to admit to, which is that I was not careful about dating things. I think even, frankly, even blotters, you know. I might have reviewed them a week later, two weeks late and dated them the date of the blotter. I just never even thought about it. I mean, the date came into my head and I used it. And that, I see now, is wrong.

[5] The conduct rules that apply are those that existed at the time of the conduct at issue.

related to seven customers' variable annuity transactions, which resulted in Riderwood's books and records being inaccurate, and provided these documents to FINRA.

The Hearing Panel found that Fillet engaged in the alleged misconduct. The Hearing Panel suspended Fillet for two years and fined him $10,000 for falsifying the documents that caused the Firm's inaccurate books and records. The Hearing Panel imposed a concurrent six-month suspension and additional $10,000 fine for the fraud. This appeal followed.

IV. Discussion

We affirm the Hearing Panel's findings that Fillet made material misrepresentations and omissions to PM in connection with the CAC and Sweet Shoppes offering. We further find that Fillet backdated Firm documents, which caused his Firm's books and records to be inaccurate, and provided these documents to FINRA. We discuss the violations in detail below.

A. Fillet Engaged in Fraud

Exchange Act Section 10(b) and Exchange Act Rule 10b-5 prohibit fraudulent and deceptive acts and practices in connection with the purchase or sale of a security.[6] Those who make affirmative representations have an "ever-present duty not to mislead." *Basic Inc. v. Levinson*, 485 U.S. 224, 241 n.18 (1988). An omission is actionable under the securities laws when a person is under a duty to disclose. *See id.* at 239 n.17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."). The federal courts, the Commission, and FINRA have held that a registered representative has a duty to disclose material information fully and completely when recommending an investment. *See De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002) (a broker "is obliged to give honest and complete information when recommending a purchase or sale"); *Hanly v. SEC*, 415 F.2d 589, 596-97 (2d

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[6] Exchange Act Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 makes it unlawful "[t]o employ any device, scheme, or artifice to defraud; to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

Conduct that violates other Commission or FINRA rules is inconsistent with the high standards of commercial honor and just and equitable principles of trade and therefore also violates NASD Rule 2110. *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). "Misrepresentations also are inconsistent with just and equitable principles of trade and violate NASD . . . Rule 2110." *Dane S. Faber*, 57 S.E.C. 297, 306 (2004).

Cir. 1969); *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992); *Richard H. Morrow*, 53 S.E.C. 772, 781 (1998); *Dep't of Mkt. Regulation v. Field*, Complaint No. CMS040202, 2008 FINRA Discip. LEXIS 63, at *32-33 (FINRA NAC Sept. 23, 2008). This duty is derived from the broker's "special relationship" to an investor. *Hanly*, 415 F.2d at 597. A broker's duty is to link his recommendation with any additional significant facts necessary for an investor to assess the nature and reliability of that recommendation. *See Morrow*, 53 S.E.C. at 781 (requiring broker who recommends a security to disclose "material adverse facts"); *Field*, 2008 FINRA Discip. LEXIS 63, at *32-33; *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *27 (NASD NAC July 26, 2007).

With respect to private placements in particular, FINRA has reminded brokers of their obligation to conduct a reasonable investigation of the issuer and the securities recommended in the offerings. *See FINRA Regulatory Notice 10-22*, 2010 FINRA LEXIS 43, at *1 (Apr. 2010). FINRA also expects brokers to deal fairly with the public, and any sales efforts undertaken must be within the ethical parameters of FINRA's rules. *See* NASD Rule 2110; NASD IM-2310-2. In recommending an investment in a private placement, a broker represents to a potential investor "that a reasonable investigation has been made and that [its] recommendation rests on the conclusions based on such investigation." *Hanly*, 415 F.2d at 597; *see FINRA Regulatory Notice 10-22*, 2010 FINRA LEXIS 43, at *6.

To establish that Fillet misrepresented information, or omitted information he had a duty to disclose, in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, it is necessary that Enforcement prove by a preponderance of the evidence that Fillet made material misrepresentations or omitted material information in connection with the purchase and sale of a security and that he acted with scienter.[7] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996); *Gonchar*, 2008 FINRA Discip. LEXIS 31, at *27.

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[7] In addition, there must also be proof that Fillet used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange." 17 C.F.R. § 240.10b-5. Fillet does not dispute that he communicated through telephone calls or the U.S. mail service, thereby satisfying the interstate commerce requirement. *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (determining that the jurisdictional requirements of the federal antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls or the use of the U.S. mail), *aff'd*, 159 F.3d 1348 (2d Cir. 1998).

Fillet argues that Enforcement has not proven that PM relied upon anything that Fillet may have misrepresented or omitted and therefore he did not violate Rule 10b-5. Unlike a private litigant, however, FINRA need not show justifiable reliance upon the alleged misrepresentation, omission or fraudulent device, nor damages resulting from such reliance. *See Dep't of Enforcement v. Gonchar*, Complaint No. CAF040058, 2008 FINRA Discip. LEXIS 31, at *33 (FINRA NAC Aug. 26, 2008), *aff'd*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797 (Aug. 14, 2009), *aff'd*, No. 09-4215, 2010 U.S. App. LEXIS 25763 (2d Cir. Dec. 17, 2010); *cf. SEC v. Rana Research*, 8 F.3d 1358, 1364 (9th Cir. 1993) (explaining that SEC need not show customer reliance to prove fraud).

1. The CAC and Sweet Shoppes Offering Was a Sale of Securities

At the outset, we find that the CAC and Sweet Shoppes offering involved securities. Fillet argues that PM's investment was merely a personal loan to Sloan and was not an offer and sale of securities to PM. The offering documents that Fillet drafted show otherwise.

Exchange Act Section 3(a)(10) defines a "security" to include a warrant to purchase stock. 15 U.S.C. §78c(a)(10). The CAC and Sweet Shoppes Term Sheet and subscription agreement described each $150,000 investment unit to include warrants to purchase shares of CAC and Sweet Shoppes. PM testified that he was told at the meeting with Fillet that that notes and warrants "would be coupled, . . . if you bought the notes you would get the warrants." The Term Sheet described the warrants as "having a term of 36 months from the date of the issuance of the Note that is part of the Unit offering. Therefore the warrant will survive the satisfaction of the Note." Each CAC warrant was "entitled to purchase 1/20th of 10% (or .005) of the outstanding and voting common shares of CAC at a cost of $10,000 per warrant . . . ." Whereas each Sweet Shoppe warrant was "entitled to purchase 1/20th of 5% (or .0001) of the outstanding and voting common shares of Sweet Shoppes at a cost of $10,000 per warrant . . . ." The Term Sheet also described the offering as "A HIGH RISK TRANSACTION AND CAN ONLY BE PURCHASED BY AN ACCREDITED INVESTOR AS DEFINED UNDER THE SECURITIES ACT OF 1933." The subscription agreement required an investor's acknowledgment that the units were "restricted securities under the 1933 Act inasmuch as they are being acquired from the Companies in the transaction not involving a public offering."

We conclude that Fillet's participation in the CAC and Sweet Shoppes offering involved the offer and sale of securities.[8]

2. Fillet Made Misrepresentations and Omissions in Connection with the Sales of Securities

Under Exchange Act Rule 10b-5, it is unlawful for "any person, directly or indirectly, . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading" in connection with the purchase or sale of securities. The Supreme Court in *Janus Capital Group v. First Derivative Traders*, held that only the "maker" of a misleading statement can be held liable under Rule 10b-5(b). 131 S. Ct. 2296, 2301-02 (2011). The "maker of a statement," according to the Court, "is the person or entity with the ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302. We find that the evidence supports a finding that Fillet was the "maker" of the misstatements.

In *Janus*, only one entity, the investment fund, filed the prospectus that contained the allegedly false statements. *Id.* at 2304-05. The Court determined that nothing in the prospectus "indicate[d] that any statement therein came from" the investment adviser rather than the

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[8] Because the offering included warrants, which clearly are securities, we need not reach the question of whether the attached notes were securities.

investment fund. *Id.* at 2305. When a statement does identify an entity, the Court explained that "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by . . . the party to whom it is attributed." *Id.* at 2302. The Court placed importance on whether "anything on the face of the prospectuses indicate[d] that any statements therein came from [defendant]." *Id.* at 2305. Since *Janus*, district courts have addressed the issue of whether an underwriter can be held primarily liable under Rule 10b-5(b) for misstatements contained within a document on which the underwriter's name is prominently displayed in the offering materials.[9] In *Scott v. ZST Digital Networks, Inc.*, the court permitted a Section 10(b) claim against an underwriter who the plaintiff alleged was featured prominently on offering documents, who authored the misstatements, and who distributed the offering documents to the investing public. 896 F. Supp. 2d 877, 890-91 (C.D. Cal. 2012). Similarly, the court in *In re Allstate Life Ins. Co. Litig.*, also permitted to proceed a Rule 10b-5 claim for misstatements where the names of the underwriters were featured prominently on the first page of the private placement memorandum's ("PPM") official statements.[10] CV-09-8174-PCT-GMS, 2012 U.S. Dist. LEXIS 7678, at *18-19 (D. Ariz. Jan. 23, 2012). Finally, the court in *In re Nat'l Century Fin. Enters.*, determined that a PPM can be a "shared product" between the issuer and the underwriter. 846 F. Supp. 2d 828, 861-62 (S.D. Ohio 2012). In that case, the PPM prominently displayed the underwriter's name on front pages and informed potential investors that the underwriter was "'specifically designated' to make representations about the [investment]." *Id.* at 861. The court determined that the evidence showed that the underwriters played a role in drafting and preparing the PPM and exercising control over the content, thereby creating a triable issue of whether the underwriter could be held liable for misrepresentations in the PPM. *Id.*

The evidence shows that the misstatements were attributable to Fillet. Similar to the underwriters in the three cases we have discussed, Fillet's and Riderwood's names were conspicuously displayed in the Term Sheet. Fillet, as President of Riderwood, and the Firm itself were listed prominently in the Term Sheet as the sole and exclusive marketing agent of the offering. Fillet and a managing director of Riderwood are the only contact persons listed for the offering.

In addition to the misstatements being attributed to him, Fillet had authority over the content of the statements that he admittedly drafted. We find that the engagement agreement between Riderwood and CAC establishes that Fillet had this authority. Moreover, we find that the purpose and function of the engagement agreement—performing due diligence, drafting the Term Sheet, and serving as placement agent, convincingly establishes that Fillet was designated

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[9] Although we acknowledge that these district court cases are related to underwriters, these cases are persuasive authority post-*Janus* and relevant to Fillet's duties here as a broker. Both underwriters and brokers have a special set of responsibilities related to the marketing and sales of securities.

[10] The courts in *Allstate* and *Scott* noted, however, that the plaintiffs at trial would ultimately need to prove that the defendants exercised ultimate authority over the statements.

to speak for CAC. *See, e.g.*, *SEC v. Pentagon Capital Mgmt. PLC*, No. 12-1680-cv, 2013 U.S. App. LEXIS 16402, at *20 (2d Cir. Aug. 8, 2013) (determining that investment advisor and its CEO were the makers of false statements despite not communicating directly with defrauded mutual funds when defendants controlled the content of the communications and orchestrated the fraudulent misconduct); *SEC v. Daifotis*, 874 F. Supp. 2d 870, 879 (N.D. Cal. 2012) (finding that speaker of statements with intent and reasonable expectation that statement would be relayed to investors is the maker of a statement).

Fillet's oral statements made to PM during the meeting to determine whether PM was interested in investing in CAC and Sweet Shoppes also violated Rule 10b-5. PM testified that Fillet, during their meeting, made oral representations to him that were similar to the misrepresentations in the Term Sheet, including that CAC was a "going business" and that there was an agreement in place with FAO. Fillet knew when he met with PM and made these statements concerning CAC and Sweet Shoppes that they were inaccurate at that time. In addition, Fillet failed to disclose to PM that Sloan, the intended President and CEO of CAC and Sweet Shoppes, previously had been convicted of possessing stolen property. Instead, Fillet told Sloan to disclose it to PM and FAO. Fillet made statements in a securities transaction, and therefore, assumed a duty to speak truthfully and completely about that transaction, which included disclosing Sloan's criminal history. *See Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 269 (6th Cir. 1998) (en banc).

While Fillet admitted that he drafted the offering documents, including the Term Sheet that included inaccuracies, Fillet argues that he cannot be held liable for the offering documents' contents, including the Term Sheet, because they were drafts, not in final form, and he did not provide the documents to PM. In an effort to show that the documents were drafts, Fillet claimed that he sent the documents to Sloan's lawyer to review, but he could provide no evidence to substantiate this claim. The Hearing Panel found Fillet's claims that the offering documents were drafts and that Fillet had sent them to Sloan's attorney for review to be not credible. None of the documents indicate that they were drafts or preliminary versions. Fillet had no other drafts or documentation to prove that there were multiple drafts or that he sent them for attorney review. Fillet admitted at the hearing that once he learned that PM received the Term Sheet, Fillet did nothing to determine whether the version that PM received was substantively the same as the version Fillet knew was inaccurate. Fillet's actions were consistent with an expectation that the Term Sheet that he wrote would be sent to investors. As the evidence shows, PM received the version that Fillet drafted and dated January 14, 2008. The Hearing Panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence." *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Release No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We find that Fillet has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determinations.

We find that the misstatements in the Term Sheet were made by Fillet.

3. The Information Was Material

Whether information is material "depends on the significance the reasonable investor would place on the . . . information." *Basic*, 485 U.S. at 240. Information is material "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 231-32 (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011) (relying upon materiality standard set forth in *Basic*). When a securities salesman recommends a securities transaction to an investor, he must avoid affirmative misstatements and also "disclose material adverse facts of which he is or should be aware." *Richard J. Buck & Co.*, 43 S.E.C. 998, 1006 (1968), *aff'd sub nom. Hanly*, 415 F.2d 589, at 589.

We find Fillet's misrepresentations and his failure to disclose certain information to PM to be material. The Term Sheet stated that CAC was a nationally operating company when, in reality, it was merely a shell with no assets or operations. A reasonable investor would certainly consider information pertaining to an issuer's operating status and financial condition significant and material. *See, e.g.*, *SEC v. Murphy*, 626 F. 2d 633, 643 (9th Cir. 1980) (holding that information about the financial condition, solvency, and profitability of the entity responsible for the success or failure of an enterprise is material); *Riedel v. Acutote of Colorado LLP*, 773 F. Supp. 1055, 1063 (S.D. Ohio 1991) ("[A] company's financial condition, solvency, and profitability [are] clearly material.").

The Term Sheet also stated that Sweet Shoppes had secured (and was operating pursuant to) a global license from and was "aligned with FAO," which was untrue. In fact, as Fillet knew, Sweet Shoppes was just a concept and had no agreement with FAO and the FAO Family Trust at the time these representations were made. We find that a reasonable investor would view as important the fact that the success of the primary business venture was contingent on receipt of a license that had not been obtained. *See, e.g.*, *Warshaw v. Xoma Corp.*, 74 F.3d 955 (9th Cir. 1996) (dismissal of action unwarranted where defendant company had made public assurances that FDA approval of a drug crucial to company's success was imminent because company knew approval was unlikely, and a reasonable juror could find that such information was materially misleading, notwithstanding company's cautionary statements); *Gold Props. Restoration Co.*, 50 S.E.C. 1236, 1242 (1992) (finding materially misleading statements in an offering document concerning the value of certain gold reserves where inadequate sampling and testing had been performed to support such representations); *Thomas J. Fittin, Jr.*, 50 S.E.C. 544, 546 (1991) (finding the characterization of certain drilling programs as involving developmental wells, when they were actually exploratory, to be materially misleading); *Buck & Co.*, 43 S.E.C. at 1006 (company's failure to inform investors that negotiations with electronic companies for the sale or licensing of its product were producing negative results was materially misleading in light of other optimistic statements); *see also San Leandro Emergency Med. Group v. Phillip Morris Cos.*, 75 F.3d 801, 809-10 (2d Cir. 1996) ("Material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities."). Investors were entitled to rely on the representations in the Term Sheet

about CAC and Sweet Shoppes as being materially accurate and complete. The materiality of the information is demonstrated by PM's testimony that his main reason for investing was that he believed that the companies were legitimate businesses that were going to be expanding the FAO brand.

Fillet also failed to disclose to PM that Sloan had a criminal history. Fillet listed Sloan as the President and CEO of both CAC and Sweet Shoppes in the offering documents. Sloan was held out as the steward of the enterprise and the person integral to the success of the offering. In light of Fillet's admission that he knew in December 2007 of Sloan's stolen property conviction and his ongoing relationship with Sloan when Fillet drafted the offering documents and met with PM in 2008 to solicit PM's investment, we find that Sloan's criminal history was material and required disclosure to PM. *See Field*, 2008 FINRA Discip. LEXIS 63, at *30 n.22 (finding that legal actions filed by a state and the Commission against a bond underwriter and principal were material facts that required disclosure before selling the bonds to customers); *see also SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 66 (D. Conn. 1988) ("An indictment for mail fraud of the president and founder of the issuing corporation was a fact that any reasonable investor would have considered important in making the decision to invest in [the issuer]."); *Gallagher & Co.*, 50 S.E.C. 557, 564 & n.16 (1991) (finding that indictment for mail fraud of person essential to the issuer's success was a material fact requiring disclosure before selling the stock to investors), *aff'd*, 963 F.2d 385 (11th Cir. 1992); *cf. Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *11 n.9 (FINRA NAC Dec. 27, 2007) (finding criminal history to be material information in the context of a regulatory disclosure), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008). Because of Sloan's vital importance to the offering, the withholding of his criminal history rendered the offering documents materially misleading. Moreover, even Fillet himself viewed this information as important and testified that he told Sloan to disclose it to PM and FAO. *But see Justine Susan Fischer*, 53 S.E.C. 734, 741 & n.4 (1998) (holding that "[a] broker has responsibility for his own actions and cannot blame others for his own failings").

4. Fillet Acted with Scienter

We also find, by a preponderance of the evidence, that Fillet acted with scienter. Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter is established if a respondent acted intentionally or recklessly. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007); *Irfan Mohammed Amanat*, Exchange Act Release No. 54708, 2007 SEC LEXIS 2558, at *35 (Nov. 3, 2007), *aff'd*, 269 F. App'x 217 (3d Cir. 2008). Reckless conduct includes "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (internal quotation omitted); *see Meadows v. SEC*, 119 F.3d 1219, 1226 (5th Cir. 1997).

Given Fillet's intimate familiarity with the offering, Fillet was at least reckless in failing to ensure that the Term Sheet that he drafted, and was used in securities sales, represented

accurately material information regarding the status of CAC and Sweet Shoppes and Sloan's criminal past. Fillet testified that while conducting due diligence, he spoke with two officers of FAO, Schmults and the then-Chairman, and through these conversations, Fillet was led to believe that a licensing agreement would be executed. Fillet knew, however, when he drafted the Term Sheet that no licensing agreement between FAO and CAC/Sweet Shoppes had been consummated at that time. Fillet also knew from his due diligence that CAC and Sweet Shoppes were not operating companies. Fillet was aware when he drafted the Term Sheet and when he met with PM that Sloan planned to use the Term Sheet to solicit investors to finance the offering. Fillet worked with Sloan to orchestrate PM's investment in the offering, including by making available to Sloan the inaccurate Term Sheet. Indeed, Fillet did nothing to prevent PM from subsequently receiving the Term Sheet containing Fillet's misstatements. We construe the fact that Fillet took no steps to mark the Term Sheet as "draft" or to ensure that Sloan did not provide it to prospective investors as further evidence of Fillet's recklessness. *See Robert Tretiak*, 56 S.E.C. 209, 224-25 (2003). Fillet, moreover, admitted that he knew of Sloan's criminal history and did not disclose it to PM or include it in the CAC and Sweet Shoppes offering documents. We find that with respect to this omission, scienter is satisfied because Fillet "had actual knowledge of the material information." *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004); *Fenstermacher v. Philadelphia Nat'l Bank*, 493 F.2d 333, 340 (3d Cir. 1974); *see also Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 SEC LEXIS 687, at *39 (Mar. 19, 2003) (finding scienter established when representative was aware of material information and failed to make appropriate disclosures to customers), *aff'd*, 75 F. App'x 320 (5th Cir. 2003); *Field*, 2008 FINRA Discip. LEXIS 63, at *33-34 (same).

5. FINRA's Antifraud Rule

While we find that Fillet was the maker of the misstatements under the Supreme Court's *Janus* decision and Exchange Act Rule 10b-5(b) above, FINRA's antifraud rule language under Rule 2120 does not require that we find Fillet to be the "maker." NASD Rule 2120 generally has been construed as similar to Exchange Act Section 10(b) and Exchange Act Rule 10b-5.[11] *See Dep't of Enforcement v. Kesner*, Complaint No. 2005001729501, 2010 FINRA Discip. LEXIS 2, at *19 n.23 (FINRA NAC Feb. 10, 2010); *Mkt. Regulation Comm. v. Shaughnessy*, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NASD NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998). But generally similar does not mean an exact duplicate. A careful examination of the respective texts at issue reveals that FINRA's antifraud rule captures a broader range of activity than Rule 10b-5(b). Rule 2120 prohibits members from effecting any transaction in, or inducing the purchase or sale of, any security "*by means of* any manipulative, deceptive or other fraudulent device or contrivance." (Emphasis added.) The Supreme Court based its holding in *Janus* on the verb "make," a word contained in the text of Exchange Act Rule 10b-5(b) but absent from Rule 2120. The text of Rule 2120 instead relies on "by means

[11] NASD Rule 2120 was renumbered in the FINRA consolidated Rulebook and is now codified as FINRA Rule 2020. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008). The rule is otherwise unchanged.

of," in parallel to the text of Section 17(a)(2) of the Securities Act of 1933 ("Securities Act").[12] Thus, the language of Rule 2120 is critically different than the language found in Rule 10b-5(b).[13] *See, e.g.*, *Abbondonte*, 2006 SEC LEXIS 23, at *36-37 (setting forth differing elements of Exchange Act Rule 10b-5(b) and NASD Rule 2120). In a related context, courts have ruled that the antifraud provisions of the Exchange Act and the Securities Act have different scopes. *Accord SEC v. Stoker*, 865 F. Supp. 2d 457, 465(S.D.N.Y. 2012) (comparing language of Rule 10b-5 and Section 17(a)(2) and determining that Section 17(a)'s language to obtain money or property "by means of" an untrue statement plainly covers a broader range of activity than Rule 10b-5's "make"); *Daifotis*, 2011 U.S. Dist. LEXIS 83872, at *14-15 (comparing the texts of Rule 10b-5 and Section 17(a) and finding important that "the word 'make,' which is the very thing the Supreme Court was interpreting in *Janus*, is absent from the operative language in Section 17(a)"). Thus, under Rule 2120, Fillet is liable if he induced the purchase or sale of a security through the "use" of a false statement, even if it was made by another.

As we have discussed above, Fillet as a broker had a duty not to mislead PM in connection with the CAC and Sweet Shoppes offering. Fillet violated this duty. Fillet was an active participant in inducing PM to invest in the CAC/Sweet Shoppes offering of securities. Fillet drafted the fraudulent Term Sheet that PM received. Fillet was retained as placement agent to find investors and raise money for the offering. Consistent with that obligation, he attended the January 16, 2008 meeting with Sloan for the purpose of pitching the CAC/Sweet Shoppes offering to PM. Fillet knew many of the material facts that were represented to PM at the meeting were inaccurate. He further knew that the Term Sheet contained untrue statements and he purposely withheld from PM his knowledge of Sloan's criminal past. Fillet, acting with scienter, induced PM's purchase of a security by means of fraud and deception, in violation of NASD Rule 2120.

* * * * *

Fillet engaged in fraud, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2 when he recklessly misrepresented and failed to disclose material information to PM.[14]

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[12] Section 17(a)(2) of the Securities Act makes it unlawful in the offer or sale of securities "to obtain money or property by means of any untrue statement" or omission of a material fact.

[13] In contrast to Exchange Act Rule 10b-5, private actions are unavailable under Rule 2120. This further supports our conclusion that *Janus* is not dispositive as to Rule 2120 actions. *Cf. SEC v. Daifotis*, No. C 11-00137 WHA, 2011 U.S. Dist. LEXIS 83872, at *14-15 (N.D. Cal. Aug. 1, 2011) ("*Janus*'s stringent reading of the word "make" followed from the Court's prior decisions limiting the scope of implied private rights of action under Rule 10b-5 . . . . The same rationale does not apply in the context of Section 17(a) because there is already no implied private right of action for Section 17(a) claims.").

[14] NASD Rule 0115 (now FINRA Rule 0140) makes all FINRA rules applicable both to FINRA members and all persons associated with FINRA members.

B. Fillet Falsified Firm Documents and Provided Them to FINRA

We affirm the Hearing Panel's finding that Fillet backdated variable annuity account documents for seven customers' transactions, resulting in false Firm records, and provided these false documents to FINRA.

NASD Rule 3110 requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 . . . ." In turn, Exchange Act Rules 17a-3 and 17a-4 require member firms to make and keep current certain books and records relating to their business activities. *See* 17 C.F.R. § 240.17a-3(a)(6)(i), § 240.17a-4(b)(1). Individuals may violate NASD Rules 3110 and 2110 when they fail to comply with Exchange Act Rules 17a-3 or 17a-4, or are otherwise responsible for creating and maintaining inaccurate books and records.[15] *See N. Woodward Fin. Corp.*, Exchange Act Release No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 14, 2009).

The evidence shows that Fillet falsified customer new account forms, applications, and acknowledgement forms related to 10 variable annuity transactions that Riderwood executed for seven customers and provided these falsified documents to FINRA. Fillet falsified the variable annuity documents by signing his name in those sections of the documents requiring his supervisory approval and then backdating the documents to make it appear that he had conducted a timely supervisory review. Fillet now admits that he backdated the customers' variable annuity documents, but contends that this conduct does not violate a FINRA rule. Backdating customer documents, which then causes a member firm to enter inaccurate information in its books or records, violates NASD Rule 3110 and also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.[16] *See, e.g.*, *Fox & Co. Inv., Inc.*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005) (finding that entering incorrect information in documents constitutes a violation of NASD Rules 3110 and 2110); *Dep't of Enforcement v. Cohen*, Complaint No. EAF0400630001, 2010 FINRA Discip. LEXIS 12, at *35-40 (FINRA NAC Aug. 18, 2010) (determining that backdating of purported review of variable annuity trades violated NASD Rules 3110 and 2110); *Dep't of Enforcement v. Prout*, Complaint

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[15] NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade." *Dep't of Enforcement v. Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *27 (FINRA NAC Apr. 30, 2008) (internal quotation omitted).

[16] "[V]iolations of federal securities laws and NASD Conduct Rules[ ] are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NASD NAC June 2, 2000).

No. C01990014, 2000 NASD Discip. LEXIS 18, at *2 (NASD NAC Dec. 18, 2000) (finding that entry of false dates of birth on three variable annuity applications violated NASD Rule 2110). Moreover, Fillet's providing of these false documents to a FINRA examiner is also conduct inconsistent with just and equitable principles of trade under NASD Rule 2110. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (determining that respondent engaged in conduct contrary to just and equitable principles of trade when he provided false and misleading information to FINRA); *Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table format).

In an effort to minimize his misconduct, Fillet argues that he acted without intent and that he was overburdened by his responsibilities at Riderwood. Violations of Rules 3110 and 2110, however, do not require proof of scienter.[17] *See Joseph G. Chiulli*, 54 S.E.C. 515, 522 (2000) ("Rule 3110 has no scienter requirement."); *Calvin David Fox*, 56 S.E.C. 1371, 1376 (2003) ("With respect to a charge that conduct was inconsistent with just and equitable principles of trade, [the Commission] has held that a self-regulatory organization need not find that the respondent acted with scienter, but must find that the respondent acted in bad faith or unethically."). The purported competing demands placed upon Fillet at the Firm do not excuse his disregard of his unequivocal obligation to provide accurate information to his Firm and to FINRA. As the Commission has stated, "[t]he entry of accurate information on official firm records is a predicate to the NASD's regulatory oversight of its members. It is critical that associated persons . . . comply with this basic requirement." *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996).

Accordingly, we find that Fillet violated NASD Rules 3110 and 2110.

V. Procedural Issues

Fillet raises several procedural issues and challenges the fairness of the proceedings below. He argues that he was denied due process by Enforcement's introduction of certain evidence. During his hearing testimony, Fillet stated that he prepared no documents relating to the CAC and Sweet Shoppes offering other than the Term Sheet, subscription agreement, and promissory notes. Enforcement introduced, for impeachment purposes, two exhibits that were admitted into evidence without objection. The first exhibit titled, "FAO Sweet Shoppes, Incorporated Business and Investment Summary," is dated February 2008, and bears Riderwood's name on the cover page. The second exhibit consists of a "Confidential Term Sheet" dated November 1, 2007, which pertains to the CAC private placement and identifies Riderwood as the "sole and exclusive marketing agent," and related subscription agreements, notes, and warrants signed by one investor, CB.[18] Upon seeing these documents at the hearing, Fillet admitted that he had prepared them. Enforcement properly used the documents for

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[17] For purposes of sanctions, however, we find that Fillet's backdating was intentional. *See infra* Part VI.B; s*ee, e.g.*, *Rooms*, 444 F.3d at 1214 (backdating was intentional and intended to deceive FINRA).

[18] These documents differ from those provided to PM.

impeachment purposes. In addition, FINRA Rule 9251 requires that Enforcement provide Fillet, for inspection and copying, the documents prepared or obtained in connection with Enforcement's investigation that led to the institution of disciplinary proceedings against him, or documents obtained pursuant to Rule 8210 after the complaint was filed. Rule 9251 allows Enforcement to withhold certain categories of evidence, but precludes it from withholding documents that contain "material exculpatory evidence." Enforcement represented that the documents were not obtained pursuant to a Rule 8210 request after discovery was made to Fillet. Moreover, we find no evidence that Enforcement withheld any exculpatory evidence or did not abide by its obligation to produce documents under Rule 9251.[19]

Fillet also alleges that the Hearing Panel was biased against him, which resulted in a denial of his due process. The Commission has stated that "bias by a hearing officer is disqualifying only when it stems from an extrajudicial source and results in a decision on the merits based on matters other than those gleaned from participation in a case." *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009) (internal quotations omitted), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). We find that the record evidence before us does not demonstrate bias on the part of the Hearing Panel. *See, e.g.*, *Robert Fitzpatrick*, 55 S.E.C. 419, 431-32 (2001) (finding no evidence of Hearing Panel bias and holding that there is no evidence that the Hearing Panel member formed an opinion in the case based on anything other than the evidence before it); *Dan Adlai Druz*, 52 S.E.C. 416, 429 (1995) (rejecting a "myriad of accusations of impropriety involving fraud, corruption, and collusion by the Chief Hearing Officer, the Exchange's Division of Enforcement, and [the respondent's firm]"), *aff'd*, 103 F.3d 112 (3d Cir. 1996). In addition, the NAC's de novo review of the record further ensures that the FINRA disciplinary proceedings are conducted fairly and without bias.[20] *Dep't of Enforcement v. Sathianathan*, Complaint No. C9B030076, 2006 NASD Discip. LEXIS

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[19] Fillet argues that letters written on PM's behalf to the Commission, SIPC, and the attorneys general of three states regarding the CAC and Sweet Shoppes offering were not admitted into the record. Fillet argues that this evidence should have been admitted because it shows that PM "will go to improper lengths to secure repayment" of his investment and the letters were written "solely in an attempt to strike back" at Fillet. Contrary to Fillet's assertion, the Hearing Officer admitted the exhibits containing the letters to the Commission and to SIPC into evidence. The letters also reflect that Fillet was copied on the letters at the time they were sent. The record is silent regarding other letters other than PM's testimony that he sent a letter to the New York district attorney and state attorney general. Fillet had ample opportunity to offer evidence at the hearing and could have offered these letters then.

[20] To the extent that Fillet is asserting a constitutional challenge, multiple federal courts have held that constitutional protections are inapplicable to FINRA proceedings. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (noting that the Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violation of constitutional rights by the government, not private actors); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (finding that NASD is not a state actor, and constitutional requirements generally do not apply to it).

3, at *51 (NASD NAC Feb. 21, 2006), *aff'd*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572 (Nov. 8, 2006); *see also Dep't of Enforcement v. Dunbar*, Complaint No. C07050050, 2008 FINRA Discip. LEXIS 18, at *33 (FINRA NAC May 20, 2008) (holding that the NAC's de novo review cures alleged Hearing Panel prejudice).

The record demonstrates that, both before the Hearing Panel and on appeal, Fillet has been given multiple opportunities to present his case. The Hearing Panel provided Fillet with the opportunity to testify, adduce evidence, and cross-examine witnesses. *See, e.g.*, *E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 2005 SEC LEXIS 764, at *10 (Apr. 6, 2005) (rejecting claim that NASD denied respondent due process where "NASD conducted a hearing on the record at which Applicant was given the opportunity to confront and cross-examine adverse witnesses and to present Applicant's own case and witnesses").

VI. Sanctions

The Hearing Panel suspended Fillet for six months and fined him $10,000 for the fraud. The Hearing Panel concurrently suspended Fillet for two years and fined him an additional $10,000 for backdating customer documents and providing these documents to FINRA. We modify these sanctions in part.

A. Fraud

The FINRA Sanction Guidelines ("Guidelines") for intentional or reckless misrepresentations and omissions of material facts recommend a fine of $10,000 to $100,000, and a suspension of 10 business days to two years.[21] In an egregious case, the Guidelines recommend a bar.[22] For the reasons discussed below, we determine that Fillet's misconduct was serious, but not egregious. Enforcement in its cross appeal agrees with this characterization, but argues that Fillet should be suspended for 18 months.[23] Enforcement contends that a six-month suspension does not account adequately for the degree of seriousness demonstrated by Fillet's misconduct. We agree.

The Guidelines for misrepresentations and omissions of material facts advise that adjudicators consider the "Principal Considerations in Determining Sanctions."[24] We find that several of these considerations apply to Fillet's misconduct and serve to aggravate his sanctions.

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21 *FINRA Sanction Guidelines* 88 (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

22 *Id.*

23 Enforcement does not challenge the Hearing Panel's fine or determination regarding restitution.

24 *Id.* at 6-7 (Principal Considerations in Determining Sanctions), 88.

Fillet recklessly misrepresented and omitted important information in offering documents that he knew would be used to persuade potential investors to purchase units in the CAC and Sweet Shoppes offering.[25] Fillet moreover failed to make an effort to prevent Sloan from disseminating the Term Sheet to PM. Once Fillet became aware that PM had received the Term Sheet, Fillet made no attempt to clarify for PM that the statements contained therein were subject to contingencies. In effect, Fillet placed his interests in marketing the offering above the interests of investors. As a result, PM could not make an informed investment decision and accurately assess whether an investment in CAC and Sweet Shoppes was in his best interest. Indeed, PM testified that he would not have invested in the offering had he known the true status of CAC/Sweet Shoppes and Sloan's criminal past. Fillet, as a broker associating himself with this offering, flouted the high standards that FINRA expects of its members, including the obligation that he deal fairly with PM. *See FINRA Regulatory Notice 10-22*, 2010 FINRA LEXIS 43; *see also* Rule 2110 and IM-2310-2. PM's testimony illustrates the significance that a broker brings to an offering such as this. PM believed Fillet was participating in the offering to "add credibility" to Sloan, and through Fillet's involvement, PM understood that the statements made about the issuers rested on solid ground.

We also find aggravating that Fillet's misconduct was a factor in PM's losses.[26] Furthermore, Fillet has not accepted responsibility for or otherwise acknowledged his misconduct related to the CAC and Sweet Shoppes offering.[27] Throughout the course of this proceeding, Fillet repeatedly has attempted to shift the blame for his own actions to Sloan and PM.[28]

In favor of mitigation, Fillet argues that PM had access to information about the offering because PM was an attorney and a broker, and PM had an established relationship with FAO's then-current CEO Schmults. We acknowledge that PM had direct contact with Schmults, and Schmults was the person who first made PM aware of the new venture. The fact that PM may have had access to Schmults and been a knowledgeable investor, however, does not provide Fillet with a "license to make fraudulent representations" or otherwise mislead PM. *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987).

Fillet also argues that neither he nor Riderwood received compensation from PM's "loan to Mr. Sloan." "The absence of monetary gain . . . is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally." *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 & n.25 (Feb. 24, 2012) (internal quotations omitted). In any event, Fillet had a financial interest in the success of the offering. Fillet testified that Riderwood received fees of $20,000 to $30,000 from Sloan pursuant to the

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25 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

26 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 11).

27 *See id.* (Principal Considerations in Determining Sanctions, No. 6).

28 For example, Fillet faults PM for not investigating Sloan's background himself.

engagement agreement.[29] Fillet, through Riderwood, also had the potential for additional monetary gain under the engagement agreement, including 5% of the outstanding and voting common shares of CAC within 10 days of the closing of the transaction and a percentage of the gross proceeds raised in the offering.[30]

We determine that, under the circumstances of this case, an 18-month suspension and $10,000 fine are appropriately remedial.[31]

B. Falsifying Firm Documents and Providing Them to FINRA

Fillet's backdating of Firm documents and providing these false documents to FINRA exemplifies an ethical breach of the utmost seriousness. *See Rooms*, 444 F.3d at 1214. Fillet's misconduct reflects on his ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public. *See James A. Goetz*, 53 S.E.C. 472, 477 (1998). In determining the appropriate sanctions, we consult both the Guidelines for recordkeeping violations and falsification of records. The recordkeeping Guidelines in relevant part recommend imposing a fine of $1,000 to $10,000 and suspending the responsible individual for up to 30 business days.[32] In egregious cases, these Guidelines recommend imposing a fine of $10,000 to $100,000, and a lengthier suspension (up to two years) or barring the responsible individual.[33] For falsification of records, the Guidelines recommend a fine of $5,000 to $100,000 and consideration of a suspension of up to two years or a bar in egregious cases.[34] We find that Fillet's misconduct was egregious.

Both of the Guidelines for recordkeeping violations and the falsification of records recommend that we consider the nature of the documents and inaccuracies.[35] The facts relevant

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29 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

30 *Id.*

31 The Hearing Panel declined to order restitution to PM because it was not clear that Fillet was the proximate cause of PM's losses. *See id.* at 4 ("Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss proximately caused by a respondent's misconduct."). Proximate causation "is normally understood to require a direct relation between conduct alleged and injury asserted." *Siegel v. SEC*, 592 F.3d 147, 159 (D.C. Cir. 2010). We agree that the record in this case does not support ordering restitution.

32 *Guidelines*, at 29.

33 *Id.*

34 *Id.* at 37.

35 *Id.* at 29, 37.

to these considerations serve to aggravate Fillet's misconduct. The documents that Fillet backdated were important customer records, including new account forms for annuity purchases and acknowledgment forms related to exchanges of one annuity contract for another. While we acknowledge Fillet's testimony that an initial suitability review of these transactions occurred by the registered representative, Fillet conducted no supervisory review or approval of these proposed transactions at the time they were contemplated. Fillet both failed to perform a supervisory review and covered up his failure to supervise. His actions deprived the Firm of its ability to detect and correct the lack of supervision. Recordkeeping rules are the "keystone of the surveillance of brokers and dealers," and Fillet's misinformation undermined the accuracy of the Firm's records. *See Edward J. Mawod*, 46 S.E.C. 865, 873 n.39 (1977).

In an effort to minimize his misconduct, Fillet contends that his backdating was close in time, "meaning weeks and not years or even months," to when the variable contracts were written. The record shows otherwise. The majority of the forms reflect that the customers executed the documents in December 2007, April 2008, or May 2008.[36] Fillet signed and backdated the documents months later during FINRA's on-site examination of the Firm in July 2008.

We also find aggravating that Fillet's backdating involved multiple customers, transactions, and sets of documents.[37] While we acknowledge that variable annuity trading accounted for a minimal portion of the Firm's business, seven customers were nonetheless deprived of necessary supervisory protections related to their 10 transactions in this case.

Fillet claims that he did not act intentionally. His actions, however, show otherwise.[38] The backdating was purposefully designed to deceive FINRA and serves to aggravate substantially the sanctions here. Falsifying documents is a prime example of misconduct that adversely reflects on a person's ability to comply with regulatory requirements. *See, e.g., Dep't of Enforcement v. Taylor*, Complaint No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22-23 (NASD NAC Feb. 27, 2007).

Although Fillet acknowledged at the hearing that he backdated the documents, we must weigh that candor against the fact that he denied the backdating during the initial phases of FINRA's investigation. Fillet was not truthful in his responses to FINRA staff's examination report and in his on-the-record investigative testimony. Fillet made a deliberate decision to provide the backdated documents to FINRA staff, initially denied the backdating to FINRA, and gave false testimony to FINRA during the proceedings below in an attempt to mask his misconduct. Providing false information in an effort to minimize one's own responsibility is the antithesis of upholding high standards of commercial honor. *See Dist. Bus. Conduct Comm. v.*

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36 One set of documents reflect that the customer executed the forms in June 2008.

37 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8 & 18).

38 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

Pelaez, Complaint No. C07960003, 1997 NASD Discip. LEXIS 34, at * 13-14 (NASD NBCC May 22, 1997). We therefore consider aggravating Fillet's initial inclinations to conceal his misconduct.[39]

We also have considered Fillet's contention that several mitigating factors exist. He argues that he has a clean disciplinary history and his backdating did not result in his pecuniary gain or harm to the Firm's customers. While the existence of a disciplinary history is an aggravating factor when determining appropriate sanctions, its absence is not mitigating because a registered person should not be rewarded for acting, as he should, in accordance with FINRA rules. *See, e.g.*, *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006). Furthermore, although the evidence does not demonstrate that Fillet's backdating of the customers' documents resulted in his pecuniary gain or customer loss, it potentially could have. This militates against considering lack of customer harm and pecuniary gain as mitigating. *See PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (holding that the lack of direct benefit to a violator or harm to a customer is not mitigating); *Braff*, 2012 SEC LEXIS 620, at *26.

Fillet also argues in favor of mitigation that no disciplinary action was taken against the branch office manager of the office from which the variable annuity forms came. Any action or inaction against the branch office manager has no bearing on the gravity of Fillet's misconduct. *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding."), *aff'd*, 168 F.3d 478 (3d Cir. 1998). Moreover, FINRA's investigation of Fillet, and the filing of disciplinary charges against him, represent legitimate regulatory exercises in furtherance of investor protection. *See* 15 U.S.C. § 78o-3; *see also Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion.").

Equally unavailing is Fillet's reliance on the fact that "there were no claims of improper action or arbitration made by any of the" customers. FINRA's authority to enforce its rules "is independent of a customer's decision not to complain." *Maximo Justo Guevara*, 54 S.E.C. 655, 664 & n.18 (2000), *aff'd*, 47 F. App'x 198 (3d Cir. 2002).

Fillet intentionally falsified Riderwood's records to suit his own needs when FINRA requested the documents and passed these documents off to FINRA as authentic. "Falsifying documents is dishonest and suggests that [Fillet is] willing to bend the rules where regulation is concerned to suit [his] own needs . . . ." *Cohen*, 2010 FINRA Discip. LEXIS 12, at *64-65. We find that Fillet's actions were egregious and call for significant sanctions. Accordingly, we suspend Fillet for two years and fine him $10,000 for backdating documents, which caused Riderwood's inaccurate books and records, and providing those falsified records to FINRA.

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39 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12).

VII. Conclusion

We find that Fillet made material misrepresentations and omissions, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2. We also find that Fillet falsified Firm records, which caused his Firm's inaccurate books and records, and provided these records to FINRA, in violation of NASD Rules 3110 and 2110. Accordingly, we suspend Fillet for 18 months and fine him $10,000 for the fraud violation and impose a separate two-year suspension and additional $10,000 fine for falsifying his Firm's records and providing them to FINRA. We modify the Hearing Panel's order of concurrent suspensions. We order instead that Fillet serve the suspensions consecutively, which serves to protect the public from two fundamentally different types of harms that occurred in this this case. *See Siegel*, 592 F.3d at 157. We also affirm the Hearing Panel's order that Fillet pay $2,584.65 in hearing costs.[40]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith
Senior Vice President and Corporate Secretary

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[40] We also have considered and reject without discussion all other arguments of the parties.

Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.