BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Louis Ottimo

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding File No. 3-17930

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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August 14, 2017

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I. INTRODUCTION

Louis Ottimo was a general securities representative of a FINRA member firm and key principal of an issuer who defrauded investors by omitting material information from his biography in the issuer's private placement memorandum ("PPM"). In early 2012, Ottimo created a fund for firm customers who wanted to buy pre-IPO Facebook shares. As the chief executive officer and co-managing member of the fund, Ottimo controlled all investment decisions made on behalf the fund, including determining how to acquire Facebook shares in a Dutch auction and whether to invest in other companies. Thus, disclosure regarding Ottimo's business expertise and leadership was important. Indeed, the fund's PPM warned investors that they were "relying solely on the investment acumen" of Ottimo as the fund manager and that no person should invest in the fund unless he or she was willing to entrust to Ottimo all aspects of the fund's management.

Nonetheless, in a section of the PPM called "The Manager," Ottimo included a biography he drafted that omitted material negative information about the two companies he ran before

establishing the fund—Jet One Jets, Inc. ("Jet One Jets") and Wheatley Capital Corporation ("Wheatley"). It is undisputed that Jet One Jets and Wheatley were unsuccessful companies that each suffered substantial net losses and eventually filed for bankruptcy. Yet Ottimo failed to disclose this negative information despite having firsthand knowledge of these events. In fact, Ottimo's PPM biography only contained positive, and no negative, statements about his previous business experience.

FINRA's National Adjudicatory Council ("NAC") found that Ottimo's omissions of negative information in his biography were fraudulent, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. The NAC found that Ottimo deprived investors of their right to receive full and complete material disclosure in connection with their purchases of securities—fundamental rights that the antifraud provisions under the federal securities laws and FINRA rules are designed to protect. For this severe misconduct, the NAC barred Ottimo.

The NAC also found, and Ottimo does not contest, that he blatantly disregarded his reporting obligations in violation of FINRA rules when, over the course of four years, Ottimo was the subject of seven unsatisfied tax liens, six civil judgments, and Wheatley's bankruptcy that he failed to disclose or disclose timely on his Uniform Application for Securities Industry Registration or Transfer ("Form U4"). The NAC assessed, but did not impose in light of the bar, a $25,000 fine and a two-year suspension in all capacities against Ottimo for his Form U4 violations.

The NAC's findings of violations are fully supported by a preponderance of evidence in the record and the sanctions are neither excessive nor oppressive. As explained more fully in this brief, the Commission should reject Ottimo's primary arguments on appeal that full

disclosure about Jet One Jets' and Wheatley's adverse financial condition was not material and that he relied on his counsel's advice with respect to the disclosures in his PPM biography. We respectfully ask the Commission to follow well established case precedent and affirm the NAC's findings of violations and the sanctions it imposed.

II. STATEMENT OF FACTS

A. Ottimo Led Two Companies That Filed for Bankruptcy

Ottimo has been in the securities industry since 1995. RP 7, 1204, 3074, 6015, 6364.[1] From March 2009 to October 2012, Ottimo was a general securities representative at EKN Financial Services Inc. ("EKN"), a registered broker-dealer that was owned by Ottimo's father. RP 2314, 3075, 6014, 6364.[2]

Immediately prior to his association with EKN and the events at issue in this case, Ottimo was a business owner for approximately 10 years. RP 1204. He was the co-owner of Jet One Jets, a company that arranged private jet charters, from April 2006 to July 2008. RP 25, 2312, 3075, 6371. Ottimo was also the owner and president of Wheatley, a company that handled back-office operations for EKN, from April 2001 to April 2006. RP 2313, 3075, 6015.[3] Under

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1 References to "RP" are to the pages in the certified record filed by FINRA in this matter.

2 FINRA expelled EKN in October 2012. RP 6364. Ottimo thereafter was associated with Laidlaw & Company as a general securities representative for one year. RP 7, 3075. He then joined Avenir Financial Group as a general securities representative in October 2013. RP 6, 3068. Within four months of his employment, Avenir discharged Ottimo for, among other things, job abandonment and misrepresenting an existing business, potential business, and accounts under his management. RP 3065. Currently, Ottimo is not associated with a FINRA member. RP 3068, 6364.

3 Although FINRA's Central Registration Depository ("CRD"®) provides that Ottimo ended his employment at Wheatley in April 2006, Ottimo admitted Wheatley remained in existence beyond 2006 as a limited purpose entity "with Mr. Ottimo as its President." RP 6130. From January 1999 to April 2001, Ottimo owned another business, North Pacific Capital, LLC, which was a FINRA Office of Supervisory Jurisdiction of Tasin & Company, Inc., a registered broker-dealer. RP 3070, 3790.

Ottimo's leadership, neither Jet One Jets nor Wheatley had financial success; rather, they both filed for bankruptcy in 2010, reporting substantial losses and large outstanding liabilities.

1. Jet One Jets' Unsuccessful History

Jet One Jets never made a profit and had significant net operating losses. RP 26, 160, 2365, 4955-92, 6018. Indeed, within one year of its establishment, Jet One Jets reported a net loss of approximately $600,000 on its 2006 income tax return and had no taxable income in 2007 and 2008. RP 2365, 2367, 2672, 4955-92, 6018.

Moreover, in March 2008, the Department of Transportation ("DOT") issued a consent order against Jet One Jets, finding that it engaged in unfair and deceptive practices in violation of statutory licensing requirements for air carriers. RP 5025-29. Specifically, the DOT found that Jet One Jets' "[i]nternet website and print advertisements contained statements and omissions that, when considered together, would lead the public to conclude erroneously but reasonably that [Jet One Jets] is a direct air carrier with operational control over flights." RP 1143-44, 5026, 6366. For this violation, Jet One Jets was fined $60,000. RP 5025.[4]

Jet One Jets ceased operations in July 2008, but not before obtaining more than $1 million from private investors—all of whom lost their principal investments. RP 1731, 2374-75, 5059, 6018.[5] In August 2010, Jet One Jets filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of New York, reporting assets of less than $50,000 and liabilities between $100,000 and $500,000. RP 5019.

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[4] Ottimo testified at the hearing that the DOT's fine was later reduced to approximately $1,500 - $2,500. RP 2362-63.

[5] Nineteen investors entered into bridge loan notes with Jet One Jets that paid a 12 percent annual interest rate return. RP 2374, 5059.

2. Wheatley's Unsuccessful History %

Ottimo founded Wheatley in 2001 to serve as a pass-through entity to pay certain operational expenses on behalf of EKN. RP 22, 158, 2317. Although Wheatley's main source of revenue came from billing EKN for its services, at some point Wheatley stopped billing EKN and the business started to decline in 2008. RP 2316-19. Under Ottimo's leadership, Wheatley filed for bankruptcy in April 2010 in the U.S. Bankruptcy for the Eastern District of New York, reporting zero revenues in 2008, 2009, and 2010, and nearly $1.4 million in outstanding liabilities. RP 22, 158, 1731, 2320, 3737-56, 6019, 6179.[6]

B. Ottimo Created First Secondary Market Fund LLC

Not long after Ottimo's unsuccessful ventures with Jet One Jets and Wheatley, in February 2012, he created First Secondary Market Fund LLC ("Fund"). The Fund was organized as a special purpose vehicle created to acquire securities of social media companies such as Facebook Inc. ("Facebook"), Twitter, Inc., or other privately held companies in the secondary market before their initial public offerings ("IPO").[7] RP 23, 159, 4639-40, 5894, 6014-15, 6364.

Shares in the Fund were sold in reliance on Section 4(2) of the Securities Act of 1933 ("Securities Act") and Regulation D solely to "accredited investors," as defined in Rule 501(a) of

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[6] In a sworn affidavit to the bankruptcy court, Ottimo represented that Wheatley had not prepared a balance sheet, statement of operations, cash flow statement or federal tax return for the past three years and had no reported income or expenses. RP 5599-5600. Wheatley's bankruptcy petition identified two pending lawsuits by creditors, including one by Wheatley's landlord that was seeking eviction. RP 3752. The bankruptcy petition was dismissed on August 2, 2010. RP 3765-66.

[7] The purpose of the Fund was substantially broader than characterized by Ottimo in his opening brief. Applicant Br. at 14-15, 17-18.

Regulation D under the Securities Act, or "qualified clients," as defined in Rule 205-3 under the Investment Advisers Act of 1940.[8] RP 1214, 4640, 4663, 5606-07, 6365.

From March 6 to April 10, 2012, the Fund raised $3.76 million in sales to 20 investors, all of whom were EKN customers.[9] RP 24, 380, 4847, 4849, 6016, 6365. The Fund retained EKN as its placement agent and Ottimo personally solicited and sold $500,000 of Fund interests to two investors, earning $30,000 in commissions.[10] RP 24, 160, 1727, 4640, 6016. The Fund's proceeds were used to primarily purchase pre-IPO shares of Facebook stock through SecondMarket, Inc., an online trading platform that hosted Dutch auctions in the private market for pre-IPO Facebook shares. RP 24, 380, 2733, 6365.

C. Investors Relied on Ottimo's Business Expertise to Manage the Fund

The Fund was managed by First Secondary Managers ("FSM"), a limited liability company operated out of EKN's offices. RP 23-24, 1820, 2351, 2353, 4640, 6014, 6365. Ottimo was FSM's majority owner (85%), co-managing member, and chief executive officer. RP 23-24, 1820, 2351, 2732, 6014-15, 6365.[11] The Fund was a newly established company with no previous operations or performance history and investing in the Fund was considered "speculative," involving "significant risks." RP 4648-49, 4657. Consequently, the Fund's

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8 17 C.F.R. § 230.501(a); 17 C.F.R. § 275.205-3(d).

9 The NAC decision inadvertently stated that 21 investors purchased shares in the Fund. RP 6365. The same investor, RM, invested in the Fund on two separate occasions. *See* RP 4849. This immaterial error has no impact on the NAC's findings or assessment of sanctions.

10 Ottimo also earned an additional $82,276 in management fees. RP 1727.

11 FSM had only two owners. The Fund was also co-managed by NL, who served as the chief operating officer, minority owner (15%), and EKN's financial and operations principal, until she resigned from her position in August 2012—approximately six months after the Fund's creation. RP 1733, 2729, 6015, 6365.

offering documents made clear that purchasers of the Fund were investing in Ottimo's business expertise, as the Fund's manager, to accomplish the Fund's investment objectives. RP 4647.

Solicitations for Fund investors were made via a PPM dated February 29, 2012 and the PPM clearly defined Ottimo's role at the Fund. RP 24, 380, 4639-4742, 6016. As Fund manager, Ottimo had exclusive discretion and control over all investment decisions for the Fund, including when and how shares were obtained for the Fund's portfolio. RP 24, 159, 1734, 2352, 4640, 6015, 6365. Specifically, Ottimo controlled: (1) the receipt and use of investor funds; (2) determining which Dutch auction to register with in order to acquire pre-IPO shares on the secondary market;[12] (3) gaining online access to the Dutch auction's website; (4) determining the minimum investment amount and pricing for which to enter a Dutch auction bid;[13] and (5) handling all administrative functions of the Fund, such as opening bank and securities accounts. RP 2390-94.

As the PPM explained, one notable risk factor to investing in the Fund was that investors had no right to take part in the management of the Fund. RP 4661. Investors instead had to relinquish all of their rights and consent with respect to their investment and solely rely on Ottimo's expertise as the Fund's manager. *See* RP 4647, 4660-61 (emphasizing that investors were "relying solely on the investment acumen of the officers of the Manager" (i.e., Ottimo) and

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[12] A Dutch auction is a public offering auction structure in which the price of the offering is set after taking in all bids and determining the highest price at which the total offering can be sold. *See* "What is a Dutch Auction?", http://www.investopedia.com/terms/d/dutchauction.asp (last visited Aug. 11, 2017).

[13] Contrary to Ottimo's assertion in his brief that he, along with NL, assisted with determining the auction bid price, Applicant Br. at 4, the auction bidding process was not a joint effort. NL testified that she did not have any involvement with the Dutch auctions that the Fund participated in and that Ottimo solely managed the mechanics of the Dutch auction process in obtaining pre-IPO shares on behalf of the Fund. RP 2731-32.

stating that no person should invest in the Fund unless such person was willing to entrust all aspects of the Fund's management to the Manager). Because the PPM required investors to base their investment decisions on their own assessment and knowledge of the Fund and its management, RP 4647, Ottimo's biography in the PPM that described his professional history and business background was integral to such a decision.

D. The Fund Retained Legal Counsel to Draft the Fund PPM

At or around February 2012, Ottimo—on behalf of the Fund—hired legal counsel to assist with the Fund's organization and offering documents, including the drafting the Fund's PPM. RP 24, 159, 383-84, 398, 783-893, 2734, 5867. The law firm's retainer agreement defined its scope of representation and expressly stated that its legal counsel and assistance was based upon the information that Ottimo provided on the Fund's behalf as the client. RP 5867-70. In pertinent part, the retainer agreement read as follows:

> To enable the Firm effectively to render these services, you [Ottimo] agree to fully and accurately disclose to us all facts that may be relevant to the matter or that the Firm may otherwise request, and to keep the Firm apprised of developments relating to the matter. RP 5868.

The law firm requested background information on Ottimo, his father, and any other person who would be involved in the investment decisions of the Fund. RP 5893-96. From this request, the law firm discovered that both Ottimo and his father had a "colorful past"—meaning that they both had disciplinary history as reported in BrokerCheck.[14] RP 5893.

The law firm also requested that Ottimo provide a biography for the Fund's PPM. RP 5893. Ottimo provided the law firm with the following biography, stating in relevant part:

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[14] BrokerCheck is a free online tool that enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives. *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770, at *1 n.1 (Sept. 30, 2016); http://brokercheck.finra.org.

> Louis graduated from the University of Maryland in 1987 with a Bachelor of Science degree in Financial Studies. After several years in a family transportation business, Louis passed his Series 7 and Series 63 security licenses in 1995.
>
> He founded North Pacific Capital in 1996, which owned an Office of Supervisory broker dealer. Under his control the branch office grew to over $25 million in annual sales with up to 100 Registered Representatives.
>
> Louis founded Wheatley Capital in 2001, which maintained an operating agreement with EKN Financial Services through 2008.
>
> Louis co-founded Jet One Jets in 2006 with his brother Anthony Ottimo and successfully negotiated an exclusive reseller Agreement with American Express to handle the Jet One pre-paid card. Jet One grew to 18 million in revenues inside approximately 18 months.
>
> In 2009, Louis became a Registered Representative with EKN Financial Services, Inc. where he maintains retail clients.

RP 5897.

Ottimo testified that his biography was intended to disclose "the growth of companies and my management experience." *See* RP 2382-83. The law firm provided no legal advice or guidance about the contents of the biography. RP 2736. When Ottimo drafted his biography and provided it to the law firm, he did not provide any additional information regarding the Jet One Jets and Wheatley businesses other than what was stated in his biography.[15] The law firm neither knew nor had any reason to believe that Ottimo withheld negative information about the financial performance and bankruptcies of Jet One Jets and Wheatley, or the DOT's regulatory action against Jet One Jets. RP 2376-77, 6030. Consequently, the law firm did not advise Ottimo to exclude this information from his PPM biography. In addition, Ottimo admitted that

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[15] *See, e.g.*, RP 398-400, 2376-77 (Ottimo testifying: "I didn't provide [counsel] with any information but the statement that appears in the biography section" . . . No, I didn't give them any other information.").

he never *sought* legal advice from the law firm on what level of information concerning his background that should be disclosed in his biography. RP 2376-77.

E. . Ottimo Omitted Bankruptcies, Investor Losses, a Consent Order, and other Negative Information From His Biography in the PPM

Ottimo described his previous business experience in a section of the PPM entitled "The Manager," which read as follows:

> **Louis Ottimo – Chief Executive Officer**
>
> Louis Ottimo is the Chief Executive Officer of the Manager. In such capacity, Mr. Ottimo is authorized to manage the Manager to effect the objectives and purposes of the [Fund]. Mr. Ottimo has been a registered representative of EKN, where he maintains retail clients, since 2009. Mr. Ottimo currently serves on the board of directors of Bsafe Electrix, Inc. Previously, Mr. Ottimo co-founded Jet One Jets in April 2006 and successfully negotiated an exclusive reseller Agreement with American Express to handle the Jet One Jets pre-paid card. Jet One Jets grew to $18 million in revenues inside approximately 18 months. In April 2001, Mr. Ottimo founded Wheatley Capital, Inc. and was its president until 2011. He also founded North Pacific Capital, LLC in 1996, which was an Office of Supervisory Jurisdiction of Tasin & Company, Inc., a registered broker-dealer. Under his ownership the branch office grew to over $25 million in annual sales with up to 100 Registered Representatives.
>
> Mr. Ottimo graduated from the University of Maryland in 1987 with a Bachelor of Science degree in Financial Studies. He has passed the FINRA Series 7 and Series 63 exams.

RP 4650.

The PPM biography, tracking the original biography provided by Ottimo, disclosed only favorable information related to Ottimo's previous business experiences with Jet One Jets and Wheatley, but omitted important adverse facts about their financial condition and performance. RP 1726, 6366. Regarding Jet One Jets, Ottimo did not disclose to investors that, during its

entire existence, Jet One Jets suffered significant losses and never made a profit.[16] RP 25, 2372, 2384, 6366. Ottimo also did not disclose that the DOT issued a consent order against Jet One Jets for engaging in unfair and deceptive practices in violation of its statutory licensing requirements. RP 5025-30. His PPM biography failed to mention that, after investors invested more than $1 million in the company, Jet One Jets ceased operations in July 2008 and all of the investors lost their principal investments.[17] RP 2374-75, 5059. Ottimo also withheld the fact that, in August 2010, Jet One Jets filed a bankruptcy petition, which reported company assets of less than $50,000 and liabilities between $100,000 and $500,000. RP 5019-24.

Regarding Wheatley, Ottimo similarly failed to disclose in his biography that it had no operating revenues in 2008, 2009, and 2010. RP 2396, 3737-56, 5599-5600. He also omitted the fact that Wheatley filed for bankruptcy, reporting outstanding liabilities of nearly $1.4 million. RP 3737-56. None of these facts were stated in Ottimo's PPM biography or any other section of the Fund's offering documents that was provided to Fund investors.

F. & Ottimo Fails to Disclose Timely Unsatisfied Tax Liens, Civil Judgments, and Bankruptcy on Form U4

On appeal, Ottimo does not contest that he failed to disclose timely or accurately on his Form U4 seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing. RP 6, 17-23, 194, 1739. Ottimo's seven unreported tax liens totaled over $226,000, ranging in individual amounts from $7,000 to $66,000. RP 1740. His unreported civil judgments totaled $444,000, ranging in individual amounts from $7,000 to $300,000. RP 1740. When Wheatley

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[16] In 2006, Jet One Jets reported losses of $569,964 on its federal income tax return. RP 4963. While Jet One Jets did not file tax returns for 2007 and 2008, Ottimo testified during an on-the-record interview that the company had no taxable income for those tax years. RP 2365-67.

[17] None of the Jet One Jets investors thereafter invested in the Fund. RP 2375.

filed for bankruptcy in April 2010, Ottimo was required to amend his Form U4 to report the bankruptcy as the company's president, which he also failed to do. RP 1740.

From January 15, 2010 to June 27, 2011, there were seven tax liens issued against Ottimo by the Internal Revenue Service ("IRS") and the New York State Department of Taxation and Finance ("NYSDT"). RP 10-17, 1740, 3537-92. For 11 months, the IRS sent notices by certified mail informing Ottimo of his five unsatisfied tax liens that totaled $160,129. RP 3537-72, 3577-88. The IRS imposed these liens because Ottimo failed to pay personal income taxes for years 2005, 2006, 2007, 2008, and 2009. RP 3537-72, 3577-88, 2077-86, 2090-93. The NYSDT sent Ottimo written notices by first-class mail informing him of two unsatisfied tax liens totaling $32,994 for his failure to pay his state personal income taxes for years 2006, 2008, and 2009. RP 2086-88, 2095-97, 3573-76.

Following is a list of Ottimo's outstanding tax liens at issue:[18]

No.	Issued By	Date Issued	Amount	Tax Year	Form U4 Filing Date
1	IRS	January 15, 2010	$6,990.29	2005	September 13, 2010
2	IRS	January 15, 2010	$35,674.93	2006	September 13, 2010
3	IRS	February 26, 2010	$44,486.84	2006 2007	September 13, 2010
4	IRS	April 23, 2010	$66,035.05	2008	September 13, 2010
5	NYSDT	April 27, 2010	$14,534.77	2008	September 13, 2010
6	NYSDT	June 27, 2011	$18,459.81	2006 2009	April 19, 2012
7	IRS	November 18, 2010	$42,618.71	2009	June 23, 2011

Question 14.M of Form U4 specifically asks whether an associated person has any unsatisfied judgments or liens. *See e.g.*, RP 3777. Ottimo acknowledged that he knew that,

[18] RP 3537-92.

within 30 days of receiving notice of the tax liens, he was required to update his Form U4 and report the tax liens. RP 2447. Yet, he failed to do so in a timely manner. Ottimo did not update his Form U4 to disclose the first five issued tax liens until September 13, 2010. RP 4047-72. He did not report the November 18, 2010 IRS tax lien until June 23, 2011. RP 4410-E. And he did not report the June 27, 2011 NYSDT tax lien until April 19, 2012. RP 4629.

From March 2008 to May 2011, Ottimo was the subject of six civil judgments. RP 3617-3718. When Ottimo filed his initial Form U4 as an EKN representative, he reported one judgment timely but with an incorrect judgment amount and date. RP 3767-82. For the remaining five judgments, Ottimo either did not report the judgments on his Form U4 or failed to report them in a timely manner.

- On March 3, 2008, Shelvin Plaza Associates, LLC obtained a judgment against Ottimo, Wheatley, and EKN's president, holding them jointly and severally liable for $161,740.73 of unpaid rent. When Ottimo filed his initial Form U4 on January 9, 2009, he disclosed the Shelvin judgment, but he inaccurately reported the amount of the judgment as $70,240.06 and the filing date as November 19, 2007. RP 3781. On February 23, 2009, the judgment was revised to $81,982.66. RP 3191-3200. On September 13, 2010—more than a year after the revised judgment was issued—Ottimo amended the Shelvin judgment amount, still reporting the earlier filing date of November 19, 2007. RP 4047-72.

- On October 2, 2008, a court entered a judgment in favor of creditor LM against Ottimo and Jet One Jets in the amount of $2,211.80. When Ottimo filed his initial Form U4 on January 9, 2009, he did not report the LM judgment. RP 3767-82. In fact, Ottimo subsequently filed 16 Form U4 amendments without disclosing the LM judgment until he reported it on November 11, 2010—over two years later. RP 4099-4125.

- On December 18, 2008, a court entered a default judgment against Ottimo in favor of creditor Stairworld Inc. in the amount of $6,791.40. RP 3619-20. Stairworld sent a copy of the judgment to Ottimo on January 13, 2009. RP 3621-22. Ottimo amended his Form U4 19 times after issuance of the judgment but did not report the Stairworld judgment until March 28, 2011—more than two years later. RP 4259-4312.

- On January 21, 2010, the parties entered into a stipulation of settlement whereby Ottimo, Wheatley, and EKN agreed to pay $300,000 to their landlord, Lake Park

135 Crossways Park Drive, LLC. RP 3661-70. On April 7, 2010, the court entered a money judgment against Ottimo and Wheatley in favor of Lake Park in the amount of $300,031.80. RP 3659-70. Ottimo did not amend his Form U4 to disclose the Lake Park judgment until May 19, 2011. RP 4339-65.

- ù On March 9, 2009, Hamilton Equity Group, LLC obtained a judgment against Ottimo and Wheatley in the amount of $108,832.94. RP 3671-72. Ottimo satisfied the Hamilton Equity judgment, and the court issued a Satisfaction of Judgment on May 17, 2010, approximately one year later, but he failed to report the Hamilton Equity judgment while it was outstanding on his Form U4 within the requisite 30 days. RP 3671-72.

- ù On June 4, 2009, the court entered a judgment in favor of creditor Bainton McCarthy, LLC against EKN, Ottimo, his brother, his father, and others in the amount of $36,590.15. RP 3675-78. Although the court vacated the Bainton McCarthy judgment on September 9, 2009, Ottimo filed four Form U4 amendments between June and August 2009 and never disclosed the judgment on his Form U4. RP 3675-78.

Question 14.K of Form U4 asks whether an associated person, or an organization that one has exercised control over, has filed a bankruptcy petition within the past 10 years. *See e.g.*, RP 3777. For two years, Ottimo failed to updated his Form U4 to report the April 27, 2010 Wheatley bankruptcy. RP 2321-25, 6026. Ottimo signed and submitted the bankruptcy petition, so he undisputedly knew about it. RP 2319-21, 2412, 3732. He also admitted at the hearing that pursuant to Question 14.K, the Wheatley bankruptcy was required to be reported. RP 2324-25. Still, Ottimo did not timely file an amended Form U4 to disclose the bankruptcy. Ottimo admitted that he amended his Form U4 *22 times* before finally reporting the Wheatley bankruptcy petition on April 19, 2012. RP 2323.

III. PROCEDURAL BACKGROUND

On August 22, 2013, FINRA's Department of Enforcement filed a three-cause complaint against Ottimo. RP 1-34. After a four-day hearing, a FINRA Hearing Panel found that Ottimo intentionally failed to disclose material information in his personal biography that was included in offering documents for the sale of securities, in violation of Exchange Act Section 10(b),

Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. RP 6035.[19] The Hearing Panel also found that Ottimo willfully failed to disclose or disclose timely seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing on his Form U4, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. RP 6036-37. For his fraudulent omissions, the Hearing Panel barred Ottimo from associating with a FINRA member in any capacity. RP 6034. For Ottimo's Form U4 violations, the Panel assessed, but did not impose in light of his bar, a two-year suspension in all capacities and a $25,000 fine. RP 6035.

Ottimo appealed the Hearing Panel's decision to the NAC. In a decision dated March 15, 2017, the NAC affirmed the Hearing Panel's liability findings and sanctions. RP 6363-80. The NAC found that Ottimo fraudulently omitted material facts in connection with the sales of securities, in violation of the antifraud provisions of the Exchange Act and FINRA Rules. RP 6371. The NAC also found that Ottimo's violation of Exchange Act Section 10(b) and Rule 10b-5 was willful and thus he was subject to statutory disqualification.[20] Specifically, the NAC found that—given his position of trust and authority as the Fund's manager—the negative facts regarding Ottimo's prior business experience with Jet One Jets and Wheatley would have been considered material information to a reasonable investor contemplating investing in the Fund. RP 6028. The NAC concluded that Ottimo's failure to include full disclosure about the financial

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[19] In light of its fraud finding under Section 10(b), the Hearing Panel dismissed the alternative cause of action that Ottimo's omissions violated Sections 17(a)(2) and (3) of the Securities Act. RP 6035. The NAC affirmed the Hearing Panel's decision in this regard. RP 6371, n.8.

[20] Enforcement alleged, but the Hearing Panel did not include a finding, that Ottimo willfully violated Exchange Act Section 10(b) and Rule 10b-5. The NAC modified the Hearing Panel's findings in this respect and found that Ottimo willfully violated the federal securities laws when he, of his own volition, omitted material information related to Jet One Jets and Wheatley. RP 6371-72, n.9.

condition of these companies made the statements in his existing PPM biography misleading. RP 6371. The NAC rejected Ottimo's argument that his omissions were merely negligent and instead found that Ottimo knew, or was reckless in not knowing, that his biography in the PPM that was used to solicit investors failed to include material information about two companies that he ran that were unsuccessful. RP 6370-71. The NAC rejected Ottimo's argument that the eventual dismissal of Wheatley's bankruptcy and reduction of Jet One Jets' fine by the DOT somehow absolved his duty to disclose all material information in his PPM biography. RP 6371. The NAC also found that Ottimo willfully failed to amend, or timely amend, his Form U4 to report his outstanding tax liens (seven), judgments (six), and the Wheatley bankruptcy filing, in violation of FINRA rules.[21] RP 6374-75.

In affirming the Hearing Panel's sanctions, the NAC found it aggravating that Ottimo intentionally omitted negative information from his PPM biography, which impacted the Fund's entire offering period and that, despite Ottimo's admission that he never informed the law firm of the material omissions, he continually blamed others for his misconduct. RP 6376-77. The NAC determined that Ottimo's reliance on counsel's advice defense was unsupported by the record. RP 6377. Specifically, the NAC found that there was no evidence that Ottimo disclosed all of the negative information about Jet One Jets and Wheatley to the law firm or that he sought any legal advice about whether he could omit the negative information from his biography. RP 6377-78. Finding that no factors of mitigation existed to warrant a lesser sanction, the NAC barred Ottimo from the securities industry for his fraud violation. RP 6376-77. The NAC also found that Ottimo's Form U4 violations were egregious and accordingly assessed a $25,000 fine

[21] Ottimo did not challenge the Hearing Panel's findings of Form U4 violations before the NAC. RP 6364. Because the NAC found that Ottimo's Form U4 violations were willful, he was subject to statutory disqualification. RP 6380.

and two-year suspension against him in all capacities. RP 6379. In light of the bar, however, the NAC did not impose the additional assessed sanctions. RP 6379. Ottimo appealed the NAC's decision to the Commission.

IV. ARGUMENT

The record overwhelmingly supports the NAC's findings that Ottimo committed fraud when he omitted material facts about his business background in the Fund's PPM that was distributed to investors.[22] The antifraud provisions under the securities laws make it unlawful for Ottimo to fraudulently omit material facts in connection with the purchase or sale of a security. They also create an affirmative statutory duty for securities participants to provide the full truth when they undertake to make disclosures in selling securities.

Ottimo's misconduct satisfied all of the necessary fraud elements. The omitted negative information regarding Jet One Jets and Wheatley was material because, as the Fund's manager with plenary control over the Fund's proceeds, a reasonable investor would have wanted to know about Ottimo's professional history and previous business expertise. Ottimo's recent failures with Jet One Jets and Wheatley were crucial pieces of his business background, yet he chose to disclose to investors only positive information concerning these entities.

The record also establishes that Ottimo acted with the requisite level of scienter. Ottimo intentionally or recklessly omitted material negative information about Jet One Jets and Wheatley in the PPM that was used to sell securities to the investing public. Ottimo knew firsthand that he previously led these two failed businesses, but he only told *half* the story in the statements made in his PPM biography. Instead of disclosing material facts that Jet One Jets

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[22] Ottimo's Form U4 violations remain unchallenged and the record shows that Ottimo violated FINRA rules when he undisputedly failed to update and disclose timely his Form U4 to report numerous unsatisfied tax liens, judgments, and Wheatley's bankruptcy. The Commission should affirm these findings and affirm the sanctions assessed for this misconduct.

suffered substantial net losses, never made a profit, and ultimately filed for bankruptcy, the biography touted Ottimo as an owner of a company that *grew* to $18 million in revenues. Similarly, instead of disclosing that Wheatley lacked revenues, had significant outstanding liabilities, and eventually filed for bankruptcy, Ottimo chose to only state that he was the founder and president of Wheatley. Ottimo's failure to disclose all pertinent facts about the true financial condition of Jet One Jets and Wheatley rendered his PPM biography deceptively incomplete and misleading to investors.

The NAC appropriately barred Ottimo for his fraud violation—a severe sanction reflecting the egregiousness of Ottimo's fraudulent misconduct and remedially fitting in order to prevent future misconduct for the protection of investors. Ottimo has offered no legitimate reason to disturb the NAC's findings or sanctions, and the Commission should therefore dismiss this proceeding and affirm the NAC's decision in all respects.[23]

A. Ottimo Fraudulently Omitted Material Facts When Selling Securities

The NAC correctly found that Ottimo omitted material facts about his business background in his biography in the Fund's PPM that was distributed to investors, and his omissions violated the antifraud provisions of the Exchange Act and FINRA Rules. The Commission should affirm these findings.

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 prohibit the use, in connection with the purchase or sale of any security, of any fraudulent and deceptive acts and practices. *See* 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5. A preponderance of the evidence

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[23] Ottimo has requested oral argument in connection with his application for review and has mischaracterized FINRA's position. FINRA believes that the issues raised in this application can be determined sufficiently on the basis of the record and the briefs filed by the parties, and therefore opposes Ottimo's request pursuant to Rule 451(a) of the Commission's Rules of Practice. 17 C.F.R. § 201.451(a).

established that Ottimo's misconduct satisfied all of the fraud elements under the federal securities laws. Specifically, Ottimo: (1) made an omission of a material fact; (2) with scienter; (3) using any means or instrumentality of interstate commerce, the mails or any national securities exchange facility; (4) in connection with the purchase or sale of a security. *See Grandon v. Merrill Lynch & Co. Inc.*, 147 F.3d 184, 189 (2d Cir. 1998).[24]

Ottimo's fraudulent omissions also violated FINRA's antifraud rule, FINRA Rule 2020, which similar to Exchange Act Section 10(b) and Rule 10b-5, prohibits members from effecting or inducing in purchases and sales of securities by deceptive means. Conduct that violates the Commission's or FINRA's rules, including the antifraud rules, also violates FINRA Rule 2010, which requires associated persons to observe high standards of commercial honor and just and equitable principles of trade. *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *14-15 (Mar. 31, 2016), *appeal docketed sub nom.*, *Harris v. SEC*, No. 16-1739 (2d Cir. May 31, 2016).

1. Ottimo's Omissions of Fact Were Material

As the NAC held, the negative information about Jet One Jets and Wheatley that Ottimo omitted from his PPM biography was material. Fraud under Section 10(b) of the Exchange Act is committed when an individual, in connection with the purchase or sale of a security and acting with scienter, omits a "material" fact despite a duty to speak. *See Bernard G. McGee*, Exchange

[24] Ottimo does not dispute that his misconduct involved using means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, and his misconduct was in connection with the purchase or sale of a security. *See* Section 10(b) and 10b-5; 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Nor does he dispute the NAC's finding that his violation of Exchange Act Section 10(b) and Rule 10b-5 was willful, and thus he is subject to statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(D); *Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000) (explaining that a willful violation of the securities laws means that the violator knew what he was doing when he committed the violative act). The Commission should sustain the NAC's decision with regard to these findings.

Act Release No. 80314, 2017 SEC LEXIS 987, at *17 (Mar. 27, 2017), *appeal docketed*, No. 17-1240 (2d Cir. Apr. 26, 2017). The Supreme Court has held that an omission is considered material when "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

The question of materiality is not dependent on the respondent's subjective opinion of what is material; but is an objective standard that is determinant on whether "a reasonable investor would consider [the] omitted information important in making an investment decision." *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980). A finding of materiality also does not require proof that the omitted fact would have caused a reasonable investor to change his mind and not invest; but only that there was a substantial likelihood that the disclosed fact would have had actual significance in the deliberations of an investment decision. *See TSC Indus., Inc. v. Northway Inc.*, 426 U.S. 438, 449 (1976); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) ("The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.").

It is undisputed that Ottimo had a statutory duty to disclose all material facts in connection with any statements he made in the offer and sale of the Fund. *See Chiarella v. United States*, 445 U.S. 222, 227 (1980) (holding that "[an] affirmative duty to disclose material information. . . has been traditionally imposed on corporate 'insiders,' particularly officers, directors, or controlling stockholders"); *Kunzweiler v. Zero.Net, Inc.*, No. 3:00-CV-2553-P, 2002 U.S. Dist. LEXIS 12080, at *32 (N. D. Tex. July 3, 2002) (holding that Rule 10b-5 creates an affirmative statutory duty to provide "the full truth when a defendant undertakes to make a statement in the first place").

The NAC correctly found that Ottimo's failure to include important facts about Jet One Jets' and Wheatley's financial losses, bankruptcy proceedings, and Jet One Jets' DOT regulatory action rendered his statements in the PPM biography incomplete and constituted material omissions. As the courts and the Commission have previously held, negative information such as bankruptcies, adverse regulatory actions, and financial losses, are facts that a reasonable investor would attach importance to when deciding to invest in a new venture. *See Carriba Air*, 681 F.2d at 1323 (finding omissions in the prospectus regarding affiliations of key principals with a bankrupt company and other failed associated businesses material); *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1303 (M.D. Fla. 2007) (finding the omission of regulatory cease and desist orders against respondent and his previous business "material" under the antifraud provisions of the federal securities laws); *Leaddog Capital Mkts., LLC*, Initial Decisions Release No. 468, 2012 SEC LEXIS 2918, at *42-43 (Sept. 14, 2012) (finding it material when respondent's biography in the PPM omitted negative business affiliations with "disgraced" firms that were expelled or ceased operations).[25]

Furthermore, as the Fund's manager, Ottimo held a position of trust and authority, and in accordance with the PPM, the Fund's success or failure was clearly contingent upon "the investment acumen of the officers of the Manager." *See* RP 4647; *Thomas J. Fittin, Jr.*, 50 S.E.C. 544, 546 n.3 (1991) (finding that "[i]nformation relating to those who are responsible for

[25] Before the Commission, Ottimo argues that *Carriba Air* and *Leaddog* are distinguishable because *Leaddog* involved a "traditional" hedge fund and the previous failed business in *Carriba Air* concerned the same type of business as the issuer. Applicant's Br. at 16. Ottimo's arguments are without merit. The *Carriba Air* and *Leaddog* cases stand for the proposition that it is material when respondents, in connection with selling securities, omit negative facts about their previous businesses ventures in the disclosure documents. The Commission's findings of fraud in *Leaddog* did not turn on the type of investment vehicle that was sold; nor was it dispositive in *Carriba* that one of the respondent's previous failed business was the same business type as the issuer.

the success or failure of the enterprise is clearly material."). Because all decisions regarding the Fund would be in the sole discretion of Ottimo as the Fund's manager, investors were warned to base their investment decision on their own "assessment, review and knowledge" of Ottimo as the Fund's manager. RP 4641, 4660. *Cf. Brian Prendergast*, 55 S.E.C. 289, 302 (2001) (finding that a person's record of success in connection with the sale of private investment funds is deemed material information because one's "financial acumen is a fact that would be important to a potential investor."). The PPM further advised potential investors to not invest in the Fund unless "such party [was] willing to entrust all aspects of the [Fund's] management to the Manager." RP 4661.

Without question, based on Ottimo's position at the Fund, the PPM biography which described his expertise was "of the utmost importance" and his prior business experience in running companies—whether positive or negative—was material information that a reasonable investor would want to know in evaluating whether or not to invest in the Fund. *Reliance Financial Advisors, LLC*, Initial Decisions Release No. 941, 2016 SEC LEXIS 87, at *46 (Jan. 11, 2016) (finding that the PPM's description of a principal manager of the fund and his relevant business experience was material). A reasonable investor would have wanted to know that Ottimo led two companies that were never profitable and eventually went bankrupt, and one of his previous businesses, Jet One Jets was fined for unfair and deceptive practices. Had Ottimo disclosed this negative information, it would have certainly "altered the total mix of information available" in the PPM. *Levinson*, 485 U.S. at 231-32. Ottimo's omission of these negative but important facts deprived investors of the opportunity to ascertain for themselves the extent to which the Fund could be well run and whether Ottimo could accomplish the Fund's goals.

Ottimo's brief raises several unpersuasive arguments that his omissions were not material, all of which the Commission should reject. For instance, Ottimo argues that his experience with Jet One Jets was not material considering the limited scope of the Fund and his duties. Applicant Br. at 15. He asserts that his biography statements were factually accurate and investors were only interested in his ability to purchase Facebook stock, rather than managing a fund portfolio or running a company. Applicant Br. at 15. The record, however, does not support his assertions.

As previously explained, the PPM emphasized Ottimo's broad discretion and control as the Fund's manager. Ottimo was not simply tasked with purchasing Facebook stock. Rather, he controlled *all* aspects of the Fund's operations and investment proceeds, including when and how to buy Facebook, or other social media, shares. RP 4693 (stating, "The Manager will have the sole, full and exclusive right, power and authority on behalf and in the name of the [Fund] to carry out any and all of the objectives and purposes of the [Fund]."). Specifically, Ottimo solely determined which Dutch auction to register with and the amount and pricing of any auction bid. RP 4693-94. He also determined whether and when any distributions of the Fund would be made to investors.[26] *See* RP 4691. In short, the Fund was organized to give Ottimo unfettered control over its operations and use of the invested funds (for which he paid ongoing management fees). Given this, statements in the Fund's PPM regarding Ottimo's business background and his ability to successfully manage the Fund would have been considered material to an investor in the Fund.

The evidence demonstrates that the testimony of one investor, WS, contradicts Ottimo's assertion that his management of the Fund was of no importance to investors. WS testified that

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[26] As of March 2013, no distributions were made to the Fund investors. RP 1896-97, 5067.

he initially thought he was purchasing Facebook stock, but did not know that he had purchased interests in a Fund where "I would not have direct control of specific stocks, and someone else was in control of it and making decisions pertaining to the stock." RP 1952. This was a problem for WS, who ultimately complained about his investment.[27] WS testified that, had he fully understood that his investment was purchasing interests in the Fund, he likely would not have invested. RP 1968-69. In addition, WS testified that Ottimo's background as the Fund's manager given this type of investment was material to him. RP 1967-68. When asked at the hearing whether WS would deem it important prior to investing in the Fund that Jet One Jets (1) had not been profitable during its entire existence, (2) filed for a bankruptcy, and (3) had been fined $60,000 by the DOT for unfair and deceptive practices, WS replied:

> Well, the last statement would in particular would be the most concern for me. . . . If there is any type of deception, illegal practices, or any of the above linked to the manager or CEO of the person I'm investing with, it *certainly would have given me hesitation to invest with those particular individuals*, and . . . I probably would have said, I'm not going to continue any investment with your firm.

RP 1967. [Emphasis added.]

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[27] *See* RP 1891-1900. In August 2012, FINRA staff informed Ottimo that it had made a preliminary determination to recommend disciplinary action against him based on his misleading biography. RP 6185. In November 2012, Ottimo sent letters to Fund investors stating that FINRA believed that his PPM biography did not include material information regarding Jet One Jets and Wheatley and thus was misleading. RP 4851-4928. Ottimo provided his view that the information was not material and asked the investors to sign the letter if they agreed that the additional information would have not had an impact on their decision to invest in the Fund. RP 6185. Some investors signed Ottimo's letter; others did not. RP 6185.

WS was an investor who did not sign Ottimo's letter and instead filed a complaint with FINRA. RP 1892. WS claimed that he was told by Ottimo and his EKN sales representative that if he did not sign Ottimo's letter, "he couldn't get his Facebook shares out of the Fund." RP 1892. A FINRA staff investigator testified that he spoke with six or seven Fund investors, who also received Ottimo's letter and were similarly told that unless they signed it, they could not get out the Fund. RP 1893.

WS's testimony further underscored how material Ottimo's omissions about the negative events of Jet One Jets and Wheatley were. Despite Ottimo's arguments to the contrary, Applicant Br. at 16, and similar to WS's testimony, a regulatory action such as the DOT action against Jet One Jets is material for purposes of fraud under Exchange Act Section 10(b). *See e.g., Kirkland*, 521 F. Supp. 2d at 1303 (finding the omission of regulatory cease and desist orders against respondent and his previous business "material" under the antifraud provisions of the federal securities laws).[28]

Ottimo's brief next argues that the letters that some Fund investors signed show that his omissions regarding Jet One Jets and Wheatley's negative financial condition were immaterial. Applicant Br. at 18-19; RP 4855-4928; *see also* Section IV.A.1, n.27 *supra*. For several reasons, Ottimo's letter to Fund investors is irrelevant. First, Ottimo sent his letter in November 2012, *well after* the offering had already closed and during FINRA's investigation of his potential violations. RP 6185. Further, investors had not yet received their Facebook shares and WS's complaint and testimony at the hearing suggested that he was signing the letter as a *quid pro quo* to receiving them. *See* RP 1892, 1983. In any event, the appropriate time for Ottimo to completely disclose all material information about Jet One Jets and Wheatley would have been *before* investors purchased in the Fund.

Second, Ottimo's letter to investors read less like a disclosure addendum for their benefit, and more like an argument to defend his case. For example, on page one, Ottimo explains that his letter provides "the reasons why neither I nor my legal counsel viewed this information as

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[28] Irrespective of how true each statement was in his PPM biography, Ottimo's selected disclosures that highlighted only positive information about his previous business experience gave investors the misleading impression that two companies he ran had no financial setbacks, investor losses, or a regulatory action against one of the them when he knew that was not the case.

material to your investment." RP 4856. He then states, "In my view, the [Wheatley] bankruptcy was quickly dismissed nearly two years prior to your investment in the completely unrelated Fund." RP 4852. He also argues: "I believe that my successes and failures in other business, including Jet One, have no relevance to my ability." RP 4853. Indeed, the standard of materiality is what a reasonable investor would deem material, and not what Ottimo thought to be material in connection with a FINRA investigation.

Third, Ottimo's letter to investors failed to disclose all of the material negative information at issue. His letter did not disclose that Wheatley had almost $1.4 million in liabilities outstanding at the time of its bankruptcy. RP 3737-56. While the letter provided that "The PPM said nothing about the profitability of Jet One," RP 4858, Ottimo still did not disclose that Jet One Jets never made a profit or the fact that its private investors lost all of their principal investments. He also never mentioned the DOT regulatory action against Jet One Jets in his letter. RP 5025-30. Indeed, with so many omitted facts in Ottimo's letter, it is unclear what purpose the letter served for investors in the Fund.

Ottimo's brief then asserts that any reasonable sophisticated investor would have clearly understood that his PPM biography was a summary not intended to provide a full financial picture of the companies that he referenced. Applicant Br. at 15. His assertion is unsupported both legally and factually. When purchasing securities pursuant to a PPM, investors—even sophisticated ones—should not have to perform guesswork or extensive research to discern whether the offering documents fully discloses all material information required not to make the statements therein misleading. *See Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 SEC LEXIS 3773, at *18 n.15 (Sept. 30, 2016) (finding that the investor's level of investment experience did not excuse respondent's failures to disclose material information); *David Henry*

Disraeli, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *27 (Dec. 21, 2007) (holding the sophistication of investors does not justify misleading them by omitting material disclosure); *Prendergast*, 55 S.E.C. at 302 ("Offering document disclosures must be clear and organized so that their significance is readily understood."). Further, the record shows that at least one sophisticated investor—WS—could not glean from Ottimo's PPM biography that Jet One Jets had filed for bankruptcy and was fined by the DOT for unfair and deceptive practices. *See* RP 1967. Had he known this fact, WS stated that he would not have invested. RP 1967. In sum, Ottimo's omissions were material.

Lastly, Ottimo argues that his description of Wheatley in the PPM biography provided "no indication as to whether Wheatley was a success or failure" and thus he did not disclose only positive information. Applicant Br. at 14. He further argues that Wheatley was "merely" a pass-through entity and therefore "the absence of revenues was irrelevant," and that given that Wheatley's bankruptcy was a "tactical procedural decision" to prevent the company from being evicted, it too was "immaterial." Applicant Br. at 14.

Ottimo's arguments are beside the point. The import of Ottimo's prior business experience—and his duty to disclose all material information related to it—had nothing to do with Wheatley's business purpose or strategic objectives. Ottimo's background as a key principal of two previous businesses that financially failed is information that a reasonable investor would have deemed significant in determining whether they could entrust their money in Ottimo to successfully manage the Fund. *Murphy*, 626 F.2d at 653 ("Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."). Similarly, a reasonable investor would have deemed Wheatley's bankruptcy, which occurred less than two years before the offering, relevant information to consider before

he or she decided to invest in the Fund. *See SEC v. Merchant Capital, LLC*, 483 F.3d 747, 771 (11th Cir. 2007) (finding that knowledge of respondent's previous bankruptcy clearly would have been helpful to a reasonable investor assessing the quality and extent of this experience).[29]

Moreover, the statement in the PPM that "Ottimo founded Wheatley Capital, Inc. and was its president until 2011" cannot be viewed in isolation. RP 4650. No reasonable investor could extract from this statement that Wheatley was a business that, under Ottimo's leadership, substantially declined and eventually filed for bankruptcy with almost $1.4 million in outstanding liabilities. RP 3737-56. Only providing his business titles while at Wheatley, while withholding pertinent information regarding Wheatley's dire financial condition, made Ottimo's PPM biography misleading.

For all of these reasons, the Commission should sustain the NAC's findings that Ottimo omitted material information from the PPM.

2. Ottimo Acted With Scienter

The record overwhelmingly supports the NAC's findings that Ottimo knew, or was reckless in not knowing, that the PPM biography omitted material facts about his prior businesses. Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007). It is established by showing either intentional or reckless misconduct. *See Alvin W. Gebhart, Jr.*,

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[29] Contrary to Ottimo's argument that only a brief description of his corporate affiliations "is all that is required on the Form U-4/BrokerCheck," Applicant Br. at 14, the Wheatley bankruptcy was equally important, and considered material information that was required to be disclosed on the Form U4, which Ottimo failed to do on a timely basis. Ottimo suggests that his biographical information should be viewed from the same perspective as the required disclosures on his BrokerCheck report. Applicant Br. at 18. This is another attempt to minimize his duty to provide material disclosure when selling securities to the public, and should be rejected. While both respectively provide investors with important information about registered individuals and company insiders, the type of information that is required to be disclosed are distinct because these disclosure sources serve different purposes.

Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *aff'd*, 595 F.3d 1034 (9th Cir. 2009).[30] Scienter is also established if the evidence demonstrates that a respondent had "actual knowledge" about the omitted material information. *See GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004) (quoting *Fenstermacher v. Phila. Nat'l Bank*, 493 F.2d 333, 340 (3d Cir. 1974)) ("It is certainly true that 'in a non-disclosure situation, any required element of scienter is satisfied where . . . the defendant had actual knowledge of the material information.'").

Ottimo undoubtedly possessed actual knowledge of the omitted negative information regarding Jet One Jets and Wheatley. He was the co-owner of Jet One Jets and the sole shareholder of Wheatley. RP 2312, 3075. He admitted that while he was its president, Wheatley had no reportable income for 2008, 2009, and 2010. RP 2396, 3737-56, 5599-5600. He admitted that, under his leadership, Jet One Jets had suffered financial losses and never made a profit and its investors lost all of their principal investments. RP 2364-67, 2375. He also knew about the DOT's regulatory action against Jet One Jets and admitted that he signed the bankruptcy petitions for both Jet One Jets and Wheatley. RP 2320. Despite knowing this unfavorable information, Ottimo omitted all of these facts when he drafted his biography to be included the PPM. RP 2376.

Ottimo admitted that he knew he was drafting his biography for the purpose of providing potential Fund investors with a description of his previous business experience. RP 2383. He conceded that all material disclosures in the PPM should have been "fair and balanced." RP

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[30] Recklessness is defined as "an act so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the [investor] to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 343 (D.C. Cir. 2003).

2379. Notwithstanding this inherent knowledge, Ottimo nonetheless decided to selectively disclose only positive information to make it deceptively appear that these companies were successful businesses when he knew they were not.

Based on the evidence, the NAC rightly concluded that Ottimo knew, or was reckless in not knowing, that omitting material information about his prior business experience in a PPM that was used to solicit investors ran the risk of misleading them. *See GSC Partners CDO Fund*, 368 F.3d at 239 (finding scienter through a reckless statement when the material omission presents a danger of misleading investors and is either known to the respondent or "is so obvious that the actor must have been aware of it"); *Carriba Air*, 681 F.2d at 1324 (finding scienter when respondent materially omitted disclosure in the prospectus about his involvement with a previous bankrupt airline and other failed business ventures); *Leaddog*, 2012 SEC LEXIS 2918, at *42-43 (finding omissions about respondent's negative business affiliations were "clearly intentional and intended to keep potential investors from learning information an investor might consider pejorative"). The Commission should affirm the NAC's findings.

On appeal, Ottimo attempts to dispute the NAC's finding of scienter by asserting that he relied on his counsel's advice. Applicant Br. 20-23. Ottimo previously raised this as an argument for mitigation of sanctions before the NAC, which the NAC rejected.[31] The

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[31] In his NAC appeal, Ottimo never raised reliance on the advice of counsel as an affirmative defense with respect to the Hearing Panel's liability findings. The Commission should therefore ignore Ottimo's suggestion that the NAC failed to address the defense in the liability section of its decision. Applicant Br. at 22. The NAC considered all of the elements of the Ottimo's reliance on counsel's advice defense when addressing the argument in its sanctions analysis. *See* RP 6377.

Further, on appeal Ottimo suggests that his counsel who represented him during the FINRA investigation had an inherent conflict of interest that "severely disadvantaged" him at the hearing because the law firm did not raise the reliance on counsel defense during FINRA's investigation. Applicant Br. at 9. He also suggests that Ottimo's counsel who represented him

Commission should likewise reject Ottimo's argument here because he fails to establish that he: (1) made complete disclosure of the relevant facts of the intended conduct to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel's advice. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994) (establishing the elements necessary to successfully assert a reliance on counsel defense).

First, there is no evidence that Ottimo completely disclosed to his counsel all relevant facts regarding the negative information that he intended to omit. Under the law firm's retainer agreement, the law firm relied upon Ottimo—as the Fund's manager—to provide all relevant information so that it could draft a PPM that complied with applicable securities rules and regulations. Indeed, the agreement provided that:

> To enable the Firm effectively to render these services, you agree to fully and accurately disclose to us all facts that may be relevant to the matter or that the Firm may otherwise request, and to keep the Firm apprised of the developments relating to the matter.

RP 5868.

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during the hearing provided inadequate representation. Applicant Br. at 9. Ottimo asserts that these facts "raise[d] troubling fairness issues with regard to the conduct of the underlying investigatory and disciplinary proceeding." Applicant Br. at 9. The Commission should reject these cursory allegations. While it is well established that there is no right to counsel in FINRA disciplinary proceedings, *see Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *49 (Nov. 9, 2012), any inherent conflict of interest by the law firm during FINRA's investigation was cured by Ottimo's new legal representation before the Hearing Panel and the NAC. Further, the record demonstrates that Ottimo requested and obtained a hearing at which, with the assistance of legal counsel, he was able to fully defend himself by presenting evidence and arguments in his favor, testifying, and cross-examining witnesses, and thus he was afforded a fair proceeding. *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *35 (Apr. 17, 2014) (finding that FINRA provided respondent with a fair proceeding consistent with the Exchange Act); *Tucker*, 2012 SEC LEXIS 3496, at *48-53 (finding that respondent's *pro se* status did not deprive him of a fair hearing).

Ottimo, however, failed to provide his lawyers with *any* information concerning the negative financial performance of Jet One Jets or Wheatley so they could determine whether such information should be included in his biography. Ottimo's argues generally that his counsel was well aware of his "background," Applicant Br. at 20, but he never informed the law firm of the entire truth about Jet One Jets' and Wheatley's financial condition before the PPM was finalized.[32] On the contrary, Ottimo admits that he gave the law firm no other information other than what was provided in his biography. RP 2376-77.

Ottimo asserts that the law firm provided no guidance on the content required for his biography. Applicant Br. at 21. But if Ottimo had questions about his disclosure obligations, he certainly could have asked his legal counsel. *See DBCC v. Kunz*, Complaint No. C3A960029, 1999 NASD Discip. LEXIS 20, at *38-39 (NASD NAC July 7, 1999) (rejecting the argument that because counsel is generally aware of the facts discussed, respondent could take the counsel's failure to require disclosure to mean it was not needed), *aff'd*, 55 S.EC. 551 (2002), *aff'd* 64 F. App'x 659 (10th Cir. 2003). Ultimately, it was Ottimo—and not the law firm—who was required to provide full disclosure of all facts necessary for his counsel to render adequate legal advice about the contents of his biography.[33]

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[32] Ottimo's brief points to time entries by the law firm to show that Ottimo's background was discussed. Applicant Br. at 10. Those time entries, however, do not state anything about discussions had, or legal advice given, regarding the statements Ottimo made in his biography about Jets One Jets and Wheatley.

[33] Ottimo emphasizes in his brief that he retained "the most prestigious and experienced" law firm to ensure that they drafted a PPM that was compliant with all applicable rules and regulations, and he "spared no expense in approving the generous compensation that was paid to the Law Firm for this work." Applicant Br. at 22-23. The competency of the law firm, its capability in advising on applicable securities laws, and the legal fees it received, are all irrelevant to Ottimo's reliance on counsel's advice defense because undisputedly Ottimo never fully disclosed to the law firm all relevant material facts related to Jet One Jets and Wheatley. In other words, the law firm cannot legally advise on information it was not privy to.

Second, there is no evidence that Ottimo sought the law firm's advice on whether he needed to disclose the omitted negative financial information concerning Jet One Jets and Wheatley in order to comply with applicable rules and regulations. Ottimo argues that the Wells submission submitted on his behalf by the law firm evidences that the law firm decided not include the negative information. Applicant Br. at 21; RP 5605-11. The Wells submission evidences no such thing and it never raised reliance on counsel's advice as a defense. RP 5605—11. The Wells submission is also notably silent on whether the law firm advised Ottimo to make *any* omissions to his biography, much less the negative information that related to Jet One Jets and Wheatley.[34] RP 5605-11. While Ottimo argues that his omissions were the "choices made by the Law Firm," he has yet to provide a shred of evidence that the law firm knew anything about the negative information at the time he drafted and submitted his biography or that he actually sought advice from the law firm on this point.[35]

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[34] The law firm billing statements described the legal services it rendered in connection with the Fund offering, including researching the Fund's formation, structure, and the trading of private placement securities, reviewing sample offering documents, and drafting the Fund's PPM. The billing statements provided no references, however, to research or advice it provided to Ottimo about the materiality of omitted negative information concerning Jet One Jets and Wheatley. RP 783-894.

Moreover, the discussion on the materiality of the omissions in the Wells submission—which mirrors the content of Ottimo's letter to investors—was asserted *well after* Ottimo had already used a defective PPM in the sale of securities. RP 5608-10. The Wells submission does not support Ottimo's contention that his counsel made decisions about the materiality of the omissions *before* his biography was included in the PPM. Indeed, Ottimo testified to the contrary: "I didn't provide [counsel] with any information but the statement that appears in the biography section. . . I didn't give [counsel] any other information."). RP 2377.

[35] The evidence contradicts Ottimo's assertion that the PPM biography was the work product of the law firm. Applicant Br. at 21. The record demonstrates that Ottimo drafted his own biography, the substance of which came from a pre-existing biography that Ottimo edited. RP 2381, 5897. Ottimo then submitted his draft biography to his counsel. RP 2381. While the law firm may have made technical edits and added one sentence regarding his board membership at Bsafe Electrix, the biography was Ottimo's—and not the law firm's—work product that

Third, Ottimo has yet to provide evidence that his counsel advised him to omit the negative information about Jet One Jets and Wheatley in his biography. Ottimo claims in his brief that the law firm saw Ottimo's 11 disclosure events in BrokerCheck and presumably found that these events were not material. Applicant Br. at 22. The disclosure events in BrokerCheck, however, related to Ottimo's disciplinary history—not Jet One Jets' or Wheatley's financial condition or the DOT regulatory action.[36] *See Kunz*, 1999 NASD Discip. LEXIS 20, at *38-40 (rejecting respondent's claim that his counsel was "generally aware" of the omitted facts and finding no evidence that he affirmatively sought his counsel's advice on whether the disclosure was appropriate). Ottimo has failed to prove that he reasonably relied on any advice given by his counsel to omit negative information about Jet One Jets and Wheatley from the PPM biography. Therefore the Commission should reject Ottimo's reliance on counsel argument.

Ottimo's additional arguments that he did not act with scienter lack merit. Applicant Br. at 23-24. Ottimo asserts, without evidence, that EKN's chief compliance officer was aware of his background. Other than notarizing the Wheatley bankruptcy petition, Ottimo provided no evidence that EKN's chief compliance officer knew any details regarding Wheatley's or Jet One Jets' financial condition or the DOT regulatory action. RP 2621, 2639. Regardless, it was Ottimo—and not EKN's chief compliance officer—who had the duty to disclose all material information in the Fund's PPM. Thus, Ottimo's assertions of what his firm's chief compliance

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Ottimo reviewed and approved, along with the entire PPM, before it was provided to investors. RP 24, 160, 4650, 5718, 5897, 6367. Regardless, Ottimo cannot shift his responsibility as an associated person to ensure compliance with the federal securities laws in drafting his PPM biography to his counsel. *See SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1315 n.28 (D.C. Cir. 1981) ("Compliance with federal securities laws cannot be avoided simply by retaining outside counsel to prepare required documents.") (citations omitted).

[36] *See* RP 3090 (showing that the Wheatley bankruptcy was not reported in CRD until April 2012).

officer knew is immaterial to the NAC's finding that he acted with scienter. Similarly, the Commission should reject Ottimo's argument that his co-manager, NL, reviewed his biography and "apparently had no issue with it." Applicant Br. at 24. NL's review of his biography is irrelevant in determining whether Ottimo acted intentionally or recklessly in omitting material information from his biography.[37]

Finally, Ottimo claims that he did not actually know that the PPM biography was misleading. Applicant Br. at 24. While FINRA must prove that Ottimo acted with scienter, it does not have to prove that Ottimo committed fraudulent acts while knowing that he was in violation of the law. *See Bos. Co. Inst. Inv., Inc.*, 1978 SEC LEXIS 2546, at *180-81, 184 (Sept. 1, 1978) (holding that respondents' knowledge that they were acting in contravention of law is not required to satisfy the scienter requirement). Indeed, Ottimo as the Fund's chief executive officer and manager had firsthand knowledge about Jet One Jets' and Wheatley's unfavorable condition and was in the best position to ensure that all material information was disclosed in his PPM biography. As the Commission has stated:

> [P]articipants in the industry must take responsibility for their compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements. Participation in the industry carries with it substantial responsibilities to the public who entrust their funds. Failure to satisfy these responsibilities cannot be excused by pointing the finger of blame at employees who do not have the authority to prevent the alleged violations.

Kirk A. Knapp, 51 S.E.C. 115, 134 (1992).

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[37] The Commission should also reject Ottimo's unsubstantiated assertion that much like Ottimo's biography, NL's biography contained summary references that omitted negative information. Applicant Br. at 24. Not only does Ottimo fail to present evidence that NL omitted material negative information from her biography, it is Ottimo's fraudulent misconduct—and not NL's—that is before the Commission. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *54-55 n.44 (Jan. 30, 2009) (rejecting respondent's contention that other advisors also engaged in misconduct and finding that FINRA disciplinary proceedings are treated as "an exercise of prosecutorial discretion").

It was Ottimo—and not his counsel, EKN's chief compliance officer, or NL—who had the duty to understand the securities laws and what was required of him, and to ensure that any statements he made in connection with the sale of securities to investors were true, complete, and not misleading. Ottimo failed in his duty, and the Commission should sustain the NAC's findings that he violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5.

B. The NAC Correctly Found That Ottimo's Fraudulent Omissions Violated FINRA Rules 2010 and 2020

The record also supports the NAC's findings that Ottimo omitted material facts in the Fund's PPM in connection with the sale of securities, in violation of FINRA Rules 2020 and 2010. "A violation of Exchange Act Section 10(b) also constitutes a violation of Rule 2020." *Scholander*, 2016 SEC LEXIS 1209, at *15. FINRA's antifraud rule, Rule 2020, "captures a broader range of conduct" and prohibits associated persons from effecting transactions in, or inducing purchases or sales of, securities by means of any manipulative, deceptive or other fraudulent device or contrivance. *Dep't of Enforcement v. Ortiz*, Complaint No. 2014041319201, 2017 FINRA Discip. LEXIS 5, at *22 (FINRA NAC Jan. 4, 2017).

As with Exchange Act Section 10(b) and Rule 10b-5, Ottimo violated FINRA Rule 2020 when he induced investors to purchase the Fund's securities through the use of a misleading PPM that he knew omitted material negative information about Jet One Jets and Wheatley. *See McGee*, 2017 SEC LEXIS 987, at *27-28 ("FINRA Rule 2020 protects investors by prohibiting the same conduct as Exchange Act Section 10(b) and Rule 10b-5.").

Ottimo also violated FINRA Rule 2010 when, in the conduct of his business of selling the Fund's securities, he failed to observe "high standards of commercial honor and just and

equitable principles of trade."[38] Because Ottimo violated the antifraud provisions of the federal securities laws and FINRA Rule 2020, the NAC correctly found that Ottimo's fraudulent misconduct also violated FINRA Rule 2010. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *13 n.3 (Sept. 30, 2016) ("It is well established that a violation of [a FINRA rule] is conduct inconsistent with just and equitable principles of trade and therefore is also a violation of FINRA Rule 2010.") (citation omitted); *Scholander*, 2016 SEC LEXIS 1209, at *14-15 (finding that fraudulent omissions in contravention of Section 10(b) of the Exchange Act and FINRA Rule 2010 also violates FINRA Rule 2010).

C., Ottimo Waived Raising a New Jurisdiction Argument on Appeal and FINRA's Jurisdiction Over Him is Well Established

Ottimo argues for the first time that FINRA lacked jurisdiction over him as a principal of FSM, and consequently, FINRA's action in this disciplinary proceeding can only regard "Ottimo's two sales to EKN customers as a registered representative," thereby reducing the scope of his fraud. Applicant Br. at 26-27. Not only has Ottimo waived FINRA's lack of jurisdiction as a defense, his attempt at limiting the scope of FINRA's jurisdiction over his fraudulent activity is baseless.

As a preliminary matter, Ottimo waived his jurisdiction argument by failing to raise it before the Hearing Panel or the NAC. *See Harry Gliksman*, 54 S.E.C. 471, 480 (1999) (finding that applicants before the Commission failed to preserve their objection to the introduction of evidence in the proceedings below). By not raising this argument below, Ottimo failed to ensure that there was briefing on the issue and analysis in the NAC's decision.

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[38] FINRA Rule 2010, which generally applies to FINRA members, is also applicable to associated persons. *See* FINRA Rule 0140(a).

Nevertheless, FINRA has personal jurisdiction over Ottimo because he was an associated person of a FINRA member, EKN, when he made his fraudulent omissions. Ottimo cannot dispute this conclusion.

FINRA's jurisdiction also thoroughly covers Ottimo's unlawful activities. First, FINRA has the authority to discipline Ottimo, as an associated person, for violating Section 10(b) of the Exchange Act or any other provision under the federal securities laws. *Accord Birkelbach v. SEC*, 751 F.3d 472, 475 (7th Cir. 2014) ("FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its members' compliance with federal securities laws, SEC regulations, and FINRA's own rules and regulations."); *see also* Exchange Act Section 15A(b)(2) and (7), 15 U.S.C. § 78*o*-3(b)(2) and (7). Ottimo's fraudulent activity included intentionally omitting negative, yet material, facts in an offering disclosure document used to solicit and sell securities to Fund investors, which violated the antifraud provisions of the Exchange Act and FINRA rules.

Second, FINRA more broadly has jurisdiction over Ottimo's misconduct pursuant to FINRA Rule 2010. Rule 2010 required Ottimo to employ high ethical standards of commercial honor and just and equitable principles of trade in the conduct of his business, including his business activities as a principal of FSM. Under Rule 2010, FINRA's enforcement powers expand over Ottimo's entire business-related conduct, and not just his sales to two investors. *See Wilshire Disc. Sec., Inc.*, 51 S.E.C. 547, 550 (1993) (rejecting the argument that respondent's misconduct in his capacity as an official of a corporate issuer, rather than as a broker-dealer, lied outside of FINRA's jurisdiction). The Commission should therefore uphold the long-standing principle that FINRA's just and equitable principles of trade rule broadly covers a variety of business-related conduct, even if it does not involve a securities-related transaction. *See Stephen*

Grivas, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *16-17 (Mar. 29, 2016) (finding respondent violated FINRA Rule 2010 because his business-related conduct—conversion of money as the investment fund's manager—reflected a failure to observe the high standards of commercial honor required of registered persons); *DWS Sec. Corp.*, 51 S.E.C. 814, 822 (1993) (rejecting respondents' arguments that NASD had no authority to oversee its entrepreneurial activities which they viewed as separate from their actions as broker-dealer professionals).

Third, FINRA's scope of authority covers Ottimo's violation under FINRA Rule 2020, which broadly applies to *any inducement* of a purchase or sale of securities made by deceptive means.[39] *See e.g. Michael H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *20, 29-32 (May 27, 2015) (finding respondent induced the purchase of securities by using a false and misleading term sheet, in violation of NASD Rule 2120). As an associated person, Ottimo incurred the duty pursuant to FINRA Rule 2020 not to engage in the sale of securities through fraudulent means (i.e, disseminating a PPM that contained material omissions of fact). In sum, Ottimo's fraudulent activity was within FINRA's jurisdiction.

D. The NAC's Findings of Form U4 Violations are Unchallenged

The record established that Ottimo willfully failed to timely disclose seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing on his Form U4, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. Similar to his appeal before the NAC, Ottimo does not contest these findings before the Commission. The Commission should affirm the NAC's findings.

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[39] The evidence provides that Ottimo solicited at least one other potential investor to invest in the Fund besides the two investors to whom he sold securities. *See* RP 1952-53 (WS testifying that once his designative registered representative started pressuring him to invest, "then he also involved Mr. Ottimo.").

The FINRA By-Laws require that associated persons applying for registration with FINRA provide "such . . . reasonable information with respect to the applicant as [FINRA] may require" and further states that such applications "shall be kept current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment." *See* Article V, Section 2 of FINRA's By-Laws. FINRA Rule 1122, and its predecessor NASD IM-1000-1, prohibits associated persons from filing or failing to correct registration information that is incomplete or inaccurate so as to be misleading.[40] These provisions are intended to ensure that the Form U4 contains accurate, up-to-date information so that regulators, employers, and members of the public "have all material, current information about the securities professional with whom they are dealing." *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *17-19 (Oct. 20, 2011).[41]

The NAC undisputedly found that Ottimo violated FINRA rules by failing to amend, or timely amend, his Form U4 to report seven tax liens, six judgments, and a bankruptcy filing in accordance with FINRA rules. Ottimo admitted at the hearing that he was aware of his outstanding tax liens, and he was aware of the judgments through communications with the parties, the courts, his counsel and FINRA. RP 2447, 2452, 2456, 2461, 2511, 2572, 2577, 6032. Ottimo signed and submitted the bankruptcy petition, so he undoubtedly knew about it. He also admitted at the hearing that, pursuant to Question 14.K, the Wheatley bankruptcy was required to

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[40] FINRA Rule 1122 became effective on August 17, 2009, superseding NASD IM-1000-1 without substantive changes at issue here. Therefore, NASD IM-1000-1 applies to Ottimo's conduct before August 17, 2009 and FINRA Rule 1122 is applicable to his conduct thereafter. *See FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96 (June 2009).

[41] A failure to update the Form U4 as required also violates FINRA Rule 2010. *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. 2011028502101, 2016 FINRA Discip. LEXIS 35, at *35 (FINRA NAC July 19, 2016) (finding that respondent's failure to update his Form U4 on a timely basis to reflect an unsatisfied judgment violated FINRA Rules 1122 and 2010).

be reported on his Form U4. RP 2324-25. The NAC correctly found that Ottimo failed to disclose or timely disclose required reportable information on his Form U4, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. The NAC also properly found that Ottimo's outstanding tax liens, judgments and bankruptcy filing were material and his reporting deficiencies were willful, which subjects him to statutory disqualification.[42] The NAC's findings remain uncontested before the Commission. The Commission should affirm these findings.

E. The NAC's Sanctions are Consistent With the Sanction Guidelines and Neither Excessive or Oppressive

In accordance with Section 19(e)(2) of the Exchange Act, the Commission should sustain FINRA's sanctions if they are neither excessive or oppressive and do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e)(2); *Scholander*, 2016 SEC LEXIS 1209, at *35. In assessing sanctions, the NAC consulted the Guidelines—the benchmark for the Commission's sanctions review.[43] As discussed in its decision, the NAC carefully considered the sanctions under the applicable guidelines. The NAC also considered any principal considerations, including aggravating or mitigating factors. Finding that Ottimo's arguments for lesser sanctions were unpersuasive, the NAC properly concluded that the resulting sanctions for Ottimo's violations were remedially appropriate given the gravity of his misconduct. The Commission should affirm the NAC's sanctions in all respects.

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[42] Pursuant to Section 3(a)(39)(F) of the Exchange Act, a person is subject to statutory disqualification from the securities industry if such person has willfully made or caused to be made in any application to be associated with a member of a self-regulatory organization any statement or omission which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact that is required to be stated therein. 15 U.S.C. § 78c(a)(39)(F).

[43] *FINRA Sanction Guidelines*, (2016 ed.), *available at* http://www.finra.org/sites/default/files/2016_Sanction_Guidelines.pdf.

1. The NAC's Bar for Ottimo's Fraud Violation is Warranted

The NAC barred Ottimo for his fraudulent omissions in the Fund's PPM. The Commission should sustain the NAC's bar.

For intentional or reckless material omissions, the Guidelines recommend that adjudicators "strongly consider" a bar when no mitigating circumstances predominate. In evaluating appropriate sanctions, the NAC found several aggravating factors and no mitigating ones. Ottimo recklessly made material omissions of fact in a disclosure document that investors relied upon in order to make informed decisions about investing in the Fund. Ottimo's misconduct was not an inadvertent or negligent mistake, but a deliberate decision.[44] Ottimo drafted his own biography with no input or guidance from others because he chose not to seek it. He admittedly knew about the negative outcomes of the Jet One Jets and Wheatley businesses. It is also evident from the record that the success of the Fund was based solely upon Ottimo's business management expertise. Yet over the course of several weeks, the Fund raised almost $4 million in sales of securities to multiple investors with the use of a defective PPM. Even worse, Ottimo gained monetarily from his misconduct, personally earning $82,276 in management fees and $30,000 in commissions from investors unaware of Ottimo's problematic histories with Jet One Jets and Wheatley.[45]

Moreover, Ottimo drafted his own biography that omitted the material information, never informed the law firm of his material omissions, and approved the misleading statements that appeared in his PPM biography. Ottimo, however, continues to blame his legal counsel for his

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[44] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13); *Scholander*, 2016 SEC LEXIS 1209, at *36-37 (finding intentional, or at least reckless, fraudulent omissions of material fact also aggravating for purposes of determining sanctions).

[45] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

failure to disclose material omissions in the PPM rather than accepting responsibility for his misdeeds.[46] As the Commission has previously held, "attempts to shift blame are additional indicia of [a respondent's] failure to take responsibility for his actions." *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 SEC LEXIS 3413, at *51 n.84 (Sept. 9, 2016) (citing *vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 SEC LEXIS 2216, at *54 (July 2, 2010)).

Because Ottimo has yet to express acknowledgment of his wrongdoing, the NAC correctly found that there was a propensity for future wrongdoing in this case. *See* Guidelines, at 2 (providing that, for the protection of investors, disciplinary sanctions should be tailored to deter future misconduct); *Fillet*, 2016 SEC LEXIS 3773, at *18 n.16 (finding that respondents "refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future"); *Cohen*, 2016 SEC LEXIS 3413, at *51 (holding that respondent's "attempt to blame others for his misconduct by asserting that he acted on the 'advice of counsel' undermines the sincerity of his assurances against future violation."). Accordingly, the NAC appropriately concluded that these aggravating factors weighed heavily in favor of imposing the severest sanction under the federal securities laws and barring Ottimo. *Scholander*, 2016 SEC LEXIS 1209, at *36-37 (barring respondent and holding that fraud violations are "especially serious and subject to the severest of sanctions").

Ottimo's arguments for mitigation fail. Applicant Br. 27-28. As discussed earlier, Ottimo's purported reliance on counsel's advice is not proven by the record and therefore it should not be given any weight against the imposed bar. Indeed, the record contains no evidence that Ottimo satisfied a single element necessary to successfully assert such a defense.

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[46] *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

In arguing that he acted negligently, rather than intentionally or recklessly, Ottimo downplays the evidentiary record and the seriousness of his misconduct. Ottimo's fraudulent omissions were not careless or inadvertent. Rather, Ottimo acted with a high degree of scienter, or at the minimum, extreme recklessness, when he failed to disclose complete information in his PPM biography about his previous businesses. Ottimo had firsthand knowledge about Jet One Jets' and Wheatley's unfavorable financial condition and other adverse information. He knew or should have known that of interest to investors would be his previous business experience, which Ottimo admitted was the reason why he included his biography in the PPM. *See* RP 2382-83 (Ottimo testifying that his biography was intended to disclose "the growth of companies and my management experience").

Nonetheless, Ottimo independently decided to omit any adverse information about his past business experience from his biography. With nearly twenty years of professional and industry experience, Ottimo knew or should have known that spotlighting only positive information and failing to disclose all material information in an offering document would violate antifraud provisions of the federal securities laws and FINRA rules. The NAC properly concluded that Ottimo's choice to not include any negative information in his personal biography in the PPM constituted intentional fraudulent conduct or, at the minimum, reckless misconduct. *See Prendergast*, 55 S.E.C. at 313 (finding a bar the appropriate sanction for respondent's use of a fraudulently misleading PPM).

Lastly, the investors' level of sophistication is not mitigating. Ottimo had a duty under the federal securities laws and FINRA rules to disclose all material information in connection with a securities offering to every investor, regardless of their level of sophistication. *See Fillet*, 2016 SEC LEXIS 3773, at *18 n.15 (finding that the investor's level of investment experience

did not avail respondent's fraudulent omissions and is not mitigating). Moreover, "the fact that a customer may have suffered no loss or made money does not excuse the serious fraud shown." *Mark E. O'Leary*, 43 S.E.C. 842, 850 (1968) (citation omitted). Barring Ottimo for his intentional or reckless fraud violation is the appropriate remedial sanction. The Commission should sustain the NAC's imposed bar.

2. ^ The NAC's Assessed Sanctions for Ottimo's Form U4 Violations are Appropriate

Ottimo does not argue that the NAC's sanctions assessed for his willful violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws—a $25,000 fine and a two-year suspension—are excessive or oppressive, and the record fully supports that such sanctions are appropriate. For Form U4 violations by individuals, the Guidelines recommend a fine ranging between $2,500 and $73,000 and a suspension in any or all capacities of five to 30 business days.[47] For egregious cases, the Guidelines instruct us to consider a longer suspension of up to two years, or a bar.[48] The principal considerations in determining an appropriate sanction for a Form U4 violation are: (1) the nature and significance of information at issue; (2) whether the failure resulted in a statutory disqualified individual becoming associated with or remaining with a firm; and (3) whether the misconduct resulted in any harm to any other person or entity.[49]

Over the course of three years, Ottimo failed to disclose or disclose timely multiple reportable events concerning unsatisfied tax liens, civil judgments, and a bankruptcy on his Form U4. His repeated reporting failures of significant financial events reflect a blatant disregard of

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47 *See id.* at 69.

48 *See id.* at 70.

49 *See id.* at 69.

FINRA rules. RP 6379. Ottimo's reporting deficiencies involved important information related to his financial condition. His failure to keep his Form U4 current deprived the investing public and "potential employing firms and regulators of significant information concerning [his] financial condition" over a substantial period of time. *Ortiz*, 2017 FINRA Discip. LEXIS 5, at *39. Finding Ottimo's misconduct egregious, the NAC determined that assessing a $25,000 fine and two-year suspension in all capacities against Ottimo was appropriate. The Commission should affirm the NAC's assessed sanctions, which are appropriately remedial for Ottimo's severe reporting deficiencies and well within the Guidelines.

V. CONCLUSION

In contravention of the antifraud provisions of the Exchange Act and FINRA rules, Ottimo ignored his unequivocal duty as a securities professional to disclose all material information in his personal biography that was included in offering documents for the sale of securities. Ottimo also willfully failed to disclose or disclose timely on his Form U4 material information related to his numerous unsatisfied tax liens, judgments, and a bankruptcy filing, in violation of FINRA rules. The evidence of Ottimo's misconduct is abundant and unequivocal. The bar imposed by the NAC for Ottimo's fraudulent misconduct is fully supported by the record and entirely appropriate under the facts and circumstances of this case. The Commission therefore should dismiss the application for review, sustain FINRA's disciplinary action, and affirm the sanctions it imposed.

Respectfully submitted,

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Dated: August 14, 2017

CERTIFICATE OF COMPLIANCE

I, Lisa Jones Toms, certify that the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17930) complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 12,980 words.

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August 14, 2017

CERTIFICATE OF SERVICE

I, Lisa Jones Toms, certify that on this 14th day of August 2017, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review (File No. 3-17930) to be sent via messenger to:

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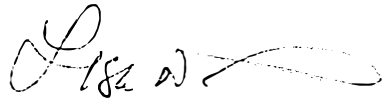
Service was made on the Securities and Exchange Commission by messenger and on the Applicant by overnight delivery service and electronic mail due to the distance between the offices of FINRA and the Applicant.



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