

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 79018 / September 30, 2016

Admin. Proc. File No. 3-15601r

In the Matter of the Application of

MITCHELL H. FILLET

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDINGS

Material Misstatements and Failure to Disclose Material Information
Conduct Inconsistent with Just and Equitable Principles of Trade

On remand for reconsideration of sanctions, former general securities representative and principal of former member firm was suspended by registered securities association for 12 months and fined \$10,000. *Held*, sanctions imposed by association are *sustained*.

APPEARANCES:

Mitchell H. Fillet, pro se.

Alan Lawhead, Colleen E. Durbin, and Jennifer C. Brooks for FINRA.

Appeal filed: April 14, 2016
Last brief received: July 27, 2016

Mitchell H. Fillet, a former general securities representative and principal of The Riderwood Group Inc. ("Riderwood" or the "Firm"), formerly a FINRA member firm, appeals from FINRA disciplinary action. In a May 27, 2015 opinion,¹ we sustained FINRA's findings

¹ *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780 (May 27, 2015).

that Fillet induced the purchase of a security by means of material misstatements and failed to disclose material information to an investor in violation of NASD Rules 2120 and 2110 and IM-2310-2.² We also sustained FINRA's findings that Fillet's failure to disclose material information violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(a) and (c) thereunder.³ But we found that FINRA failed to establish that Fillet violated Exchange Act Rule 10b-5(b),⁴ and we dismissed those findings of violation. As a result, we set aside the sanctions FINRA imposed and remanded for it to reconsider the sanctions.⁵

On remand, FINRA imposed a 12-month suspension and \$10,000 fine for the violations that we sustained. FINRA found that Fillet's misconduct was serious and accompanied by numerous aggravating factors. We sustain the sanctions FINRA imposed on remand.

I. BACKGROUND

FINRA's fraud allegations arise out of Fillet's communications to an investor concerning a private placement offering. Fillet drafted a term sheet for the offering that contained material misstatements, and he discussed the offering with an investor without disclosing to the investor material information about the offering. The investor lost the \$150,000 he invested.

A. Fillet drafted a term sheet for a private placement offering that contained material misstatements.

This case concerns a private placement offering by FAO Sweet Shoppes, Inc. ("Sweet Shoppes") and Catering Acquisition Corp. ("CAC"), two shell companies run by Allan Sloan ("Sloan"), their principal and founder. Sloan formed Sweet Shoppes to operate a retail café that would sell toys, food, and party facilities in close alignment with and under a "global license" from FAO Schwarz, Inc. ("FAO"), the national toy retailer. Sloan formed CAC to acquire food service companies to produce and supply food for the Sweet Shoppes cafés.

In June 2007, Sloan hired Riderwood to provide CAC with "advisory, investment banking, and placement services" for CAC's "acquisition of a series of food-related enterprises." Fillet executed an engagement agreement (the "Engagement Agreement") on Riderwood's

² Since the time of the misconduct, FINRA has renamed NASD Rules 2120 and 2110 as FINRA Rules 2020 and 2010, respectively, without substantive change, and IM-2310-2 has been subsumed within the supplementary material to FINRA Rule 2110. *Order Approving FINRA's Adoption of Certain FINRA Rules in the Consolidated Rulebook*, 73 Fed. Reg. 57,174 (Oct. 1, 2008). We apply the rules and regulations in effect at the time of the alleged misconduct.

³ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(a) and (c).

⁴ 17 C.F.R. § 240.10b-5(b).

⁵ Our May 27 opinion also sustained FINRA's findings that Fillet violated NASD Conduct Rules 3110 and 2110 by falsifying Riderwood records and providing the falsified records to FINRA during an examination. We also sustained the two-year suspension that FINRA imposed for that misconduct. Those findings and the two-year suspension are not at issue in this appeal.

behalf. The Engagement Agreement provided that Riderwood would conduct due diligence, draft transactional documents, identify prospective investors, and act as a placement agent for CAC's securities offering. According to Fillet, CAC paid Riderwood a total of \$20,000 to \$30,000 for its services. Riderwood also had the ability, under the Engagement Agreement, to earn five percent of the outstanding and voting common shares of CAC within ten days of the closing of any offering and a percentage of the gross proceeds raised in the offering.

Fillet drafted various documents for the Sweet Shoppes/CAC offering, including a Confidential Term Sheet (the "Term Sheet"). According to the Term Sheet, the offering totaled \$3,000,000 and consisted of twenty investment units at \$150,000 per unit. The Term Sheet identified Riderwood as the "sole marketing agent," Fillet as a person to contact for the offering, and Sloan as the CEO for both issuers in the offering.

It is undisputed that the Term Sheet that Fillet drafted contained misrepresentations. The Term Sheet stated that CAC "was founded in 2007 to create a vertically-integrated, brand name food service company that started in New York City but became national in scope." It also stated that Sweet Shoppes "is closely aligned with FAO" and operates under "a global license from FAO Schwarz and the FAO Family Trust." Fillet conceded in his hearing testimony that CAC was neither an operating company with any assets nor "national in scope," and that Sweet Shoppes had not secured "a global license from FAO and FAO Family Trust."

B. Fillet communicated with a potential investor about the private placement offering without disclosing that Sloan had a criminal record.

The record shows that at least one person, PM, invested in the Sweet Shoppes/CAC offering. PM testified that he became interested in Sweet Shoppes/CAC through his friend Edward Schmults, then the CEO of FAO. According to PM, Schmults asked him to speak with Sloan in late 2007 about investing in Sweet Shoppes/CAC. Schmults described Sloan as an "experienced food [services] operator" who would be running Sweet Shoppes for FAO. After PM had several phone conversations with Sloan, Sloan invited him to meet with Fillet.

a. Fillet met with PM to discuss the private placement offering.

On January 16, 2008, Fillet and Sloan met with PM at his office. PM testified that although he had several subsequent telephone conversations with Fillet, this was the only time he met with Fillet in person. PM believed that Sloan arranged the meeting with Fillet because Fillet was an investment banker and would "add credibility to Sloan" and the investment. During the meeting, Fillet discussed the business plans of Sweet Shoppes and CAC, the terms of the offering, PM's qualifications as an accredited investor, and PM's potential investment of \$150,000. PM understood from his discussions with Sloan and Fillet that the Sweet Shoppes/CAC business venture was developing, that CAC was on the verge of acquiring a large catering business, and that "there already was a commissary, going business, . . . providing the food that would be used in the[] different [Sweet Shoppes stores]." PM was not given a copy of the Term Sheet at the January 16th meeting.

b. PM invested in the offering after receiving the Term Sheet.

PM received the Term Sheet along with other offering documents sometime between January 16 and February 21, 2008. But the record is unclear as to the exact date or the identity of the person who provided the Term Sheet to PM. PM could not recall who gave him the Term Sheet, testifying that the offering documents "were delivered to my office but I don't . . . remember anybody physically delivering them to me." Fillet has maintained that the Term Sheet and other offering documents he drafted were "just drafts," which he gave to Sloan and Sloan's lawyer to review. Fillet testified that he never gave PM the Term Sheet, stating that "I'm not really sure [who gave PM a copy] but it was not from Riderwood" because "[PM] had very little contact with Riderwood." Fillet acknowledged that he later became aware that the Term Sheet had been provided to PM, and there is no evidence that he sought to correct any of the statements in it. On February 21, 2008, PM returned a signed subscription agreement to Sloan and gave him a \$150,000 check that was payable to CAC and noted "re notes and warrants" in the memo portion of the check.

c. PM sought rescission after discovering Sloan's criminal history.

The Sweet Shoppes/CAC business venture unraveled in the months after PM invested. Sloan told PM that he could have his money back after PM voiced concerns about the deal to Sloan a few months after he invested. PM then spoke with Schmults, who informed PM that FAO had recently terminated its business arrangement with Sloan. When PM asked Schmults why, Schmults told him that he could not say but that PM could "Google Sloan and find out [for himself]." PM had one of his employees conduct a search of Sloan and discovered that Sloan had an extensive criminal and civil record and had been disbarred as an attorney.

Public records searches of Sloan (under "Alan Sloan" and aliases "Allen Sloan" and "Allan Gerald Slotnick") show two criminal convictions, disbarment, personal bankruptcy, and eighty-seven tax and judgment liens against him. Sloan was convicted and sentenced to one to three years' imprisonment in 1987 for submitting a false affidavit to a New York court. The State of New York disbarred him based on his 1987 conviction and for converting client funds, issuing bad checks, and refusing to return client funds. Sloan also was convicted for possession of stolen property (a rental car) in 2003 and sentenced to three to six years' imprisonment. None of Sloan's legal history was disclosed in the Term Sheet or any other offering document.

At FINRA's hearing, Fillet admitted that he knew about Sloan's 2003 criminal conviction. Fillet testified that he learned about the conviction in late 2007 while conducting his due diligence of CAC. According to Fillet, he did not disclose the information in the Term Sheet or directly to PM because he told Sloan to disclose it. Although there is no evidence that Fillet was aware of Sloan's other legal problems, the record demonstrates that the background search of Sloan by Riderwood was flawed. As Fillet concedes, the Firm searched only under the name "*Alan Sloan*" and not under Sloan's other aliases, even though "*Allan*" was used in the Engagement Agreement and "*Allen*" was the name listed on Sloan's 2003 conviction.

PM's discovery of Sloan's criminal past prompted him to seek rescission from Sloan and Fillet. Fillet disclaimed any responsibility for returning the funds, informing PM that he was only Sloan's agent and that PM had paid Sloan the money. According to PM, Sloan agreed to

reimburse him but on three separate occasions gave PM a check that bounced. PM testified that, had he known about Sloan's criminal past, he "never would have made this investment." PM never recovered any of his money. He filed a complaint with FINRA, prompting an investigation.

C. FINRA found that Fillet committed antifraud violations and imposed sanctions.

A FINRA Hearing Panel found that Fillet made material misrepresentations and misleading omissions in connection with his sale of securities in CAC and Sweet Shoppes in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2. The Hearing Panel suspended Fillet for 6 months and fined him \$10,000. On appeal, FINRA's National Adjudicatory Council ("NAC") affirmed the Hearing Panel's findings and sustained the \$10,000 fine, but increased the suspension from 6 to 18 months.

Fillet appealed to the Commission. We sustained FINRA's findings that Fillet violated NASD Rules 2120 and 2110 and IM-2310-2 by inducing the purchase of a security by means of the material misrepresentations in the Term Sheet that Fillet drafted. We also sustained FINRA's findings that Fillet's failure to disclose material information violated Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) thereunder. But we found that FINRA failed to establish that Fillet violated Exchange Act Rule 10b-5(b) because there was insufficient evidence in the record to determine who had the requisite "ultimate authority" over the misstatements in the Term Sheet to be considered the "maker" of the misstatements for purposes of Rule 10b-5(b).⁶ As a result, we dismissed this violation, set aside the sanctions FINRA imposed, and remanded for FINRA to reconsider the sanctions in light of the dismissed charges.

On remand, FINRA imposed a 12-month suspension and \$10,000 fine. This appeal followed.

II. ANALYSIS

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find it is "excessive or oppressive" or imposes an unnecessary or inappropriate burden on competition.⁷ As part of this review, we consider any aggravating or mitigating factors⁸ and

⁶ See *Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135, 142 (2011).

⁷ 15 U.S.C. § 78s(e)(2). Fillet does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

⁸ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007). FINRA's Sanction Guidelines (the "Guidelines") include a list of non-exhaustive aggravating and mitigating factors (*i.e.*, "Principal Considerations"), and state that, "as appropriate, Adjudicators should consider case-specific factors in addition to those listed." FINRA Sanction Guidelines at 6-7 (2011).

whether the sanctions FINRA imposed are remedial in nature and not punitive.⁹ We find the 12-month suspension and \$10,000 fine imposed on Fillet to be consistent with the statutory requirements and we sustain the imposition of these sanctions.¹⁰

FINRA's Sanction Guidelines for misrepresentations and omissions of a material fact recommend a fine of \$10,000 to \$100,000, and a suspension of 10 business days to two years.¹¹ The 12-month suspension and \$10,000 fine are well within these parameters.

We also agree with FINRA that Fillet acted recklessly and that this is an aggravating factor.¹² We have held that "[r]egistered representatives must not make repeated, reckless, and unfounded misstatements to their customers in connection with the sale of securities, and doing so warrants the imposition of significant sanctions."¹³ Fillet drafted the Term Sheet knowing that the descriptions of Sweet Shoppes and CAC were inaccurate because they were subject to contingencies that had not yet occurred. Yet he failed to use any cautionary language in the Term Sheet alerting investors to the contingencies. And he gave the Term Sheet to Sloan knowing that it contained misstatements without taking adequate precautions against its possible dissemination to investors. Once Fillet became aware that PM had received the Term Sheet, Fillet made no attempt to clarify for PM that the statements in the Term Sheet were subject to contingencies or otherwise to correct the misstatements. Under these circumstances, Fillet must have known of the risk that PM would be misled. Fillet's conduct raises serious concerns about his ability to meet his responsibilities as a securities professional in the future.

⁹ *Paz Sec., Inc.*, 494 F.3d at 1065; *see also* Guidelines at 2 ("Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.").

¹⁰ We reject Fillet's request that we "review once again" the May 27 opinion and dismiss the proceeding against him. Our May 27 opinion sustained FINRA's findings that Fillet committed fraud. The proceedings on remand concern only the appropriate sanctions for those violations.

Fillet reiterates in his reply brief his request that the Commission "re-examine all of FINRA's allegations." Although Fillet's reply brief was due on August 12, he did not file it until August 29 and did not move for leave to file his brief late or provide a reason for the late filing. We therefore find that his reply brief is untimely. In any case, Fillet's reply brief only challenges FINRA's findings of liability. As discussed above, the Commission addressed FINRA's findings of liability in its May 27 opinion. Fillet does not argue in his reply brief that the sanctions FINRA imposed for the violations the Commission sustained are excessive or oppressive.

¹¹ Guidelines at 88. Although we are not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

¹² Guidelines at 7 (Principal Consideration No. 13).

¹³ *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 WL 3652429, at *8 (Nov. 4, 2009), *petition denied*, 416 F. App'x 95 (2nd Cir. 2011).

Fillet further acted recklessly in concealing Sloan's criminal history. Fillet knew that Sloan was a convicted felon and concealed this material fact from PM. Fillet was aware of Sloan's conviction before the offering commenced, but he failed to disclose this information to PM at their meeting on January 16, in telephone conversations with PM, or in the Term Sheet. Although Fillet was not aware of Sloan's other legal problems, he was reckless in conducting a background search only under the name "Alan Sloan," even though "Allan" was used in the Engagement Agreement and "Allen" was the name listed on Sloan's 2003 conviction. The importance of disclosing Sloan's criminal history is underscored by FAO's termination of its business relationship with Sloan once it discovered his criminal past.

FINRA found additional aggravating factors that supported the sanctions it imposed, and we agree that the record supports these aggravating circumstances. One additional aggravating factor FINRA found was that Fillet's misconduct resulted in PM's losses. Fillet induced PM's investment in CAC/Sweet Shoppes by drafting the Term Sheet containing material misstatements and failing to disclose Sloan's criminal history. Fillet's misconduct resulted in PM's loss of his \$150,000 investment. Fillet contends that he knew "nothing about" PM's investment "until well after the funds had been disbursed by [PM]." But Fillet knew that PM received the Term Sheet containing material misstatements that he drafted and that he had discussed the investment with PM without disclosing Sloan's criminal history. Fillet's misconduct resulted in PM's losses regardless of when he found out about PM's investment.

FINRA determined that Fillet's potential for financial gain was another aggravating factor.¹⁴ Fillet admitted that Riderwood received \$20,000-\$30,000 from Sloan pursuant to the Engagement Agreement. The Engagement Agreement also provided that Riderwood would receive a percentage of the gross profits raised in the offering. Fillet argues that Riderwood did not "receive any percentage of" PM's investment in the offering. But the misleading Term Sheet and withholding of damaging information about Sloan increased the likelihood that PM and others would invest in the offering and thereby increase Fillet's compensation.

Another factor FINRA found to be aggravating is Fillet's refusal to accept responsibility for or otherwise acknowledged his misconduct. Fillet continues to assert that his conduct was not fraudulent and that he should not be sanctioned. He also repeatedly has attempted to shift blame for his misconduct onto others. He faults PM, the victim of his fraud, for not investigating Sloan's background and for filing a complaint with FINRA rather than seeking redress through arbitration. And although Fillet argues that PM was an experienced investor who had direct contact with Schmults, these facts do not excuse Fillet's misstatements and failures to disclose

¹⁴ Guidelines at 7 (Principal Consideration No. 17).

material information.¹⁵ Fillet's refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future.¹⁶

Finally, we find Fillet's claims challenging the fairness of the proceeding to be meritless. Fillet claims that FINRA "created a predictable outcome of affirmation of all of the charges and penalties against [him] by tasking the lawyer who originally drafted the last appeal to the [NAC] to review his own opinion . . . instead of recusing himself." But FINRA did not affirm the suspension on remand; rather, it reviewed the record and reduced the suspension to 12 months. And the NAC, not a FINRA attorney, issued FINRA's decision. There is no merit to Fillet's claim that he has been harmed by "FINRA's constant use of the Internet to damage Fillet's life through the utilization of a well-executed cyber bullying campaign." To the extent he is referring to information in FINRA's online BrokerCheck database, BrokerCheck fulfills FINRA's obligation under the Exchange Act to provide registration information to the public.¹⁷

We therefore conclude that the 12-month suspension and \$10,000 fine FINRA imposed is neither excessive nor oppressive and is necessary and in the public interest.¹⁸ By inducing the purchase of a security by means of material misrepresentations and failing to disclose material information, Fillet has demonstrated his inability to meet the high standards expected of

¹⁵ See *Lester Kuznetz*, Exchange Act Release No. 23525, 1986 WL 625417, at *3 (Aug. 12, 1986) (stating that a customer's investment experience does not give a representative "license to make fraudulent representations"), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987).

¹⁶ See, e.g., *Robert Conway*, Exchange Act Release No. 70833, 2013 WL 5960703, at *11 (Nov. 7, 2013) (finding that applicants' "continued refusal to acknowledge any wrongdoing is a troubling indication that they either misunderstand their regulatory obligations or hold those obligations in contempt"); *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *14 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future"); *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *21 (Jan. 30, 2009) ("We agree with FINRA the Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public.").

¹⁷ See Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), 75 Fed. Reg. 41,254, 41258 & n.65 (July 15, 2010).

¹⁸ We affirm FINRA's order that Fillet serve the 12-month suspension for fraud consecutively with the two-year suspension for falsifying Riderwood records (*see supra* note 5) because the violations involve different types of misconduct and raise separate public interest concerns. See *Siegel v. SEC*, 592 F.3d 147, 157-58 (D.C. Cir. 2010) (affirming consecutive suspensions where the violations involved different types of misconduct).

persons associated with FINRA members and the obligation to deal fairly with investors. The suspension and fine will encourage Fillet to make complete and accurate disclosures in the future and will emphasize to others the importance of dealing fairly with investors.

An appropriate order will issue.¹⁹

By the Commission (Chairman WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

¹⁹ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79018 / September 30, 2016

Admin. Proc. File No. 3-15601r

In the Matter of the Application of

MITCHELL H. FILLET

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the sanctions imposed by FINRA on Mitchell H. Fillet are
SUSTAINED.

By the Commission.

Brent J. Fields
Secretary