

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 95141 / June 22, 2022

Admin. Proc. File No. 3-17930r

In the Matter of the Application of

LOUIS OTTIMO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY
PROCEEDING

On remand for reconsideration of sanctions, FINRA barred former registered representative of former FINRA member firm from association with any FINRA member in all capacities. *Held*, sanction FINRA imposed is *sustained*.

APPEARANCES:

Robert Knuts of Sher Tremonte LLP, for Louis Ottimo

Alan Lawhead, Andrew Love, and Lisa Jones Toms for FINRA

Appeal filed: April 27, 2020
Last brief received: July 30, 2020

Louis Ottimo, a former registered representative with EKN Financial Services Inc., a former FINRA member firm, seeks review of a bar FINRA imposed. In a June 28, 2018 opinion,¹ we sustained FINRA’s findings that Ottimo failed timely and accurately to update his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) to reflect unsatisfied tax liens, judgments, and a bankruptcy filing in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA’s By-Laws. We also sustained FINRA’s finding that he fraudulently omitted information about his work with a company called Jet One Jets, Inc., from his biography in a private placement memorandum (“PPM”) in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. But we set aside FINRA’s finding that he also fraudulently omitted information about his work with another company, Wheatley Capital Corporation, from his biography in the private placement memorandum. As a result, we set aside the unitary sanction that FINRA imposed for the fraud violations and remanded for it to determine the appropriate sanction for the portion of the fraud violations we sustained.

On remand, FINRA concluded that the fraud violations we sustained warranted barring Ottimo from association with any FINRA member firm in all capacities.² The only issue before us now is whether to sustain that bar. For the reasons that follow, we sustain FINRA’s sanction.

I. Background

A. Ottimo failed to timely and accurately update his Form U4.

When Ottimo joined EKN—after a period of not being associated with a FINRA member firm—he was required to file a Form U4, which is used to register associated persons of FINRA member firms. FINRA rules required Ottimo to keep his Form U4 “current at all times,” which meant he had to update his Form U4 within 30 days of “learning of the facts or circumstances giving rise to” the need to amend the form.³ Question 14.M of Form U4 asks whether an associated person has any unsatisfied judgments or liens, and question 14.K asks whether an associated person, or an organization that one has exercised control over, has filed a bankruptcy petition within the past 10 years. After joining EKN, Ottimo repeatedly failed to timely and accurately report (or, in some cases, report at all) information on his Form U4 related to seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing.

B. Ottimo omitted information about his management of Jet One Jets and Wheatley Capital in a private placement memorandum given to investors in a fund.

In early 2012, while working at EKN, Ottimo created First Secondary Market Fund LLC (the “Fund”). The Fund was a special purpose vehicle with the primary purpose of purchasing shares of Facebook Inc. in the secondary market before its initial public offering. Ottimo

¹ *Louis Ottimo*, Exchange Act Release No. 83555, 2018 WL 3155025 (June 28, 2018).

² As in its first opinion, FINRA also assessed a two-year suspension in all capacities and \$25,000 fine for the Form U4 violations, but in light of the bar for the fraud did not impose them.

³ FINRA By-Laws Article V, Section 2(c).

assisted in drafting the PPM to solicit interests in the Fund. Between March 6, 2012 and April 10, 2012, EKN registered representatives sold interests in the Fund, raising \$3.76 million from approximately 20 investors. Ottimo personally sold \$500,000 of Fund interests to two EKN clients, for which he earned \$30,000 in commissions.

Ottimo created a separate entity, First Secondary Managers LLC (“FSM”), to manage the Fund. He owned 85% of FSM, was its CEO, and ultimately received \$82,276 in management fees. The Fund’s operating agreement gave FSM exclusive authority over the Fund’s operation. According to the PPM, FSM “ha[d] the sole discretion over all decisions regarding the investments of the [Fund].” Moreover, the PPM provided that Fund investors would not be given disclosure materials regarding Fund investments because they were “relying solely on the investment acumen of the officers of” FSM. The PPM also identified “reliance on [FSM]” as a “significant” risk factor, and advised that “no party should make any investment in the [Fund] unless such party is willing to entrust all aspects of the [Fund’s] management to” FSM.

In a section entitled “Manager,” the PPM provided biographical information about Ottimo, which he testified was intended to disclose his “management experience.” This included his experience at Jet One Jets, a company Ottimo and his brother founded in 2006, which brokered chartered airline flights and for which Ottimo served as CEO. About Ottimo’s experience with Jet One Jets, the PPM specifically stated the following:

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.

The PPM failed to disclose that Jet One Jets ceased operations in 2008, was never profitable, and eventually declared bankruptcy. Indeed, Ottimo acknowledged that he “lost hundreds of thousands of dollars as a result of the failure of Jet One’s business.” And outside investors, who invested more than \$1 million, lost all of their principal investment. In August 2010, Jet One Jets declared bankruptcy with estimated company assets of less than \$50,000 and liabilities between \$100,000 and \$500,000.⁴

Additionally, the U.S. Department of Transportation (“DOT”) issued a consent order against Jet One Jets in March 2008, with the company neither admitting nor denying the DOT’s findings. The DOT found that the company had committed “an unfair and deceptive practice” by engaging in air transportation without appropriate authorization, and it ordered Jet One Jets to cease and desist from further violations and imposed a \$60,000 fine. The PPM did not disclose the consent order.

⁴ Ottimo correctly notes that our prior opinion erred in stating that Ottimo had signed Jet One Jets’ bankruptcy petition—it was actually Ottimo’s brother that signed the petition. Nonetheless, in a September 2010 declaration filed after Jet One Jets’ bankruptcy petition was filed, Ottimo stated that he was at that time “a principal of Jet One Jets.”

The PPM also included information about Ottimo’s management of another company, Wheatley Capital, which handled back-office and related administrative operations for EKN. The PPM stated: “In April 2001, Mr. Ottimo founded Wheatley Capital, Inc. and was its president until 2011.” Like Jet One Jets, Wheatley Capital had declared bankruptcy in 2010, and the PPM failed to disclose this fact.

C. FINRA found Ottimo liable for fraud and other violations, and we affirmed in part, reversed in part, and remanded for a redetermination of sanctions.

In August 2013, FINRA’s Department of Enforcement brought charges against Ottimo for: (1) failing to disclose or timely disclose material facts on his Form U4 in violation of FINRA’s rules; and (2) making material misrepresentations and omitting material facts in the Fund’s PPM concerning his prior business experience at Jet One Jets and Wheatley Capital, in violation of antifraud provisions in both FINRA’s rules and the federal securities laws. FINRA ultimately affirmed a hearing panel’s decision that Ottimo had committed the alleged violations. For the fraud violations, FINRA barred Ottimo from association with any FINRA member in all capacities. For the Form U4 violations, it assessed—but in light of the bar did not impose—a \$25,000 fine and a two-year suspension in all capacities. FINRA also found that both the Form U4 violations and the fraud violations subjected Ottimo to a statutory disqualification.

After Ottimo appealed, we sustained FINRA’s findings of Form U4 violations, its findings of fraud with respect to Jet One Jets, and its findings that Ottimo was statutorily disqualified. Regarding the findings of fraud based on Ottimo’s statements in the PPM about Jet One Jets, we found that Ottimo’s positive statements were misleading by omission because “Jet One Jets had significant regulatory problems and, as Ottimo conceded, was a ‘failure’ that ultimately generated ‘no profitability’ and resulted in losses to investors of over \$1 million.”⁵

We further found that Ottimo’s statements and omissions about Jet One Jets were material because they “were clearly relevant to investors’ assessment of Ottimo’s management abilities, and [because] information about the company’s regulatory problems, significant losses, and eventual bankruptcy are all facts that a reasonable investor would want to consider in deciding whether to invest in a venture managed by Ottimo.”⁶ We rejected Ottimo’s argument that the Jet One Jets omissions were not material in light of identical form letters from most of the Fund’s investors that Ottimo introduced, stating that “additional information provided by Mr. Ottimo relating to his personal financial issues would have [had] no impact on my decision to invest in [the Fund] had they been disclosed as part of his biography in the PPM.”⁷ We noted that the “additional information” referenced in the letters did not include the adverse information omitted from Ottimo’s biography concerning his management of Jet One Jets, and also that the investors who executed them apparently did so “only because Ottimo pressured them.”⁸

⁵ *Ottimo*, 2018 WL 3155025, at *10.

⁶ *Id.*

⁷ *Id.* at 11.

⁸ *Id.* at 5.

We further found that Ottimo acted at least recklessly—and therefore with scienter—because he “had actual knowledge of the adverse information about Jet One Jets” and “must have known that his biography presented a substantial risk of misleading investors since it falsely gave the impression that Jet One Jets was a profitable business.”⁹ In finding that he acted recklessly, we rejected Ottimo’s claim that a reliance on counsel negated his scienter because we found that he failed to “satisfy any of the required elements” of such a defense.¹⁰ We found that Ottimo provided “no evidence that he specifically sought or received advice from [his counsel] about what he was required to disclose regarding his prior business experience,” and thus “[n]ot having received any advice on the topic, [he] could not have relied on that nonexistent advice.”¹¹

With respect to information in the PPM about Wheatley Capital, however, we found that the evidence did not support FINRA’s fraud finding. We found that “Ottimo’s failure to disclose Wheatley’s unprofitable history and bankruptcy filing” did not render the sentence in the PPM about Ottimo having formed Wheatley Capital materially misleading.¹² Accordingly, because “FINRA imposed a single sanction for all of its fraud findings,” we remanded for “FINRA to determine what sanctions are appropriate for the portion of the fraud violation we sustain[ed].”¹³

On remand, FINRA barred Ottimo from associating with any FINRA member in all capacities as a result of his fraudulent omission of material information about Jet One Jets from his biography in the PPM. Applying its Sanction Guidelines (“Guidelines”), FINRA determined that “the remaining fraud charges affirmed by the Commission are still of the utmost significance and warrant a bar from the securities industry.” For the Form U4 violations, as it did when the case was first before it, FINRA assessed a two-year suspension in all capacities and a \$25,000 fine, but in light of the bar did not impose the sanctions based on the Form U4 violations. Ottimo again appealed FINRA’s decision.

II. Analysis

Under Exchange Act Section 19(e)(2), we sustain FINRA sanctions unless we find that, giving due regard to the public interest and the protection of investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.¹⁴ Under this standard, we consider evidence of any aggravating or mitigating factors, as well as

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 13.

¹³ *Id.* at 14.

¹⁴ 15 U.S.C. § 78s(e)(2). Ottimo does not allege, nor does the record show, that the sanction imposed creates an unnecessary or inappropriate burden on competition.

whether the sanctions serve remedial rather than punitive purposes.¹⁵ Although they are not binding on us, the Guidelines serve as a benchmark in our review.¹⁶

For intentional or reckless fraud, misrepresentations, or material omissions of fact, the Guidelines direct FINRA to “[s]trongly consider barring an individual,” except where “mitigating factors predominate.”¹⁷ Applying the Guidelines’ principal considerations in determining an appropriate sanction, FINRA identified several aggravating factors related to Ottimo’s misconduct while at the same time finding that Ottimo’s arguments for mitigation “all lack[ed] merit.” Like FINRA, we find that aggravating factors predominate here and thus conclude that barring Ottimo is neither excessive nor oppressive and serves a remedial purpose.

A. Numerous aggravating factors support FINRA’s determination to bar Ottimo.

For the purpose of this appeal, Ottimo does not dispute the presence of certain aggravating factors FINRA identified in imposing a bar, including that he acted intentionally or recklessly¹⁸ and that he benefitted financially from his misconduct.¹⁹ We agree that these factors are present here and support the bar. In determining that Ottimo’s material omissions involved scienter, we previously found that he “was at least reckless in omitting materially adverse information about Jet One Jets from the PPM” because he “must have known that his biography presented a substantial risk of misleading investors.”²⁰ And Ottimo personally received \$30,000 in sales commissions as a registered representative for selling interests in the Fund with the use of the PPM and thereafter received \$82,276 in fees from investors for his management of the Fund.

Another aggravating factor that FINRA found is Ottimo’s conduct towards Fund investors following the initiation of FINRA’s investigation. In the wake of the investigation, Ottimo asked Fund investors to submit letters stating that had he provided “additional information . . . relating to his personal financial issues” it would have had “no impact” on their

¹⁵ See *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

¹⁶ See, e.g., *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013). On remand, FINRA applied the same version of the Sanction Guidelines that it had previously, see FINRA Sanction Guidelines (Oct. 2016) (“Sanction Guidelines”). This was the version in effect while this matter was previously pending before FINRA’s National Adjudicatory Council (“NAC”), see Sanction Guidelines, at 8 (“These guidelines are effective as of the date of publication, and apply to all disciplinary matters, including pending matters.”); see generally *infra* note 52.

¹⁷ Sanction Guidelines, at 87.

¹⁸ *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

¹⁹ *Id.* (Principal Considerations in Determining Sanctions, No. 17 (“Whether the respondent’s misconduct resulted in the potential for the respondent’s monetary or other gain.”)).

²⁰ *Ottimo*, 2018 WL 3155025, at *12.

decisions to invest.²¹ But as we found in our prior opinion, “investors appear to have signed the letter only because Ottimo pressured them”; the record indicates that they were concerned that, if they refused to sign the letters, they would not get their money back.²² Several investors told a FINRA investigator that they “felt coerced into signing” the letter, and “e-mails sent on Ottimo’s behalf show that investors were told that signing the letter was ‘needed’ for their shares to be deposited into their brokerage accounts.”²³ Ottimo also pressured “at least one investor to sign the letter by citing [Ottimo’s] authority under the Fund’s operating agreement to control the release of the underlying securities.”²⁴ We believe that Ottimo’s efforts to pressure his clients provide significant additional support for FINRA’s decision to impose a bar.²⁵

FINRA also found aggravating Ottimo’s refusal to accept responsibility and attempts to blame others for his misconduct.²⁶ According to Ottimo, FINRA is improperly punishing him for “his efforts to defend himself against the fraud charges.” But we need not find any refusal by Ottimo to accept responsibility or attempts by him to blame others to be aggravating to conclude that a bar is warranted here. As discussed above, the record establishes several aggravating factors.

B. We find no factors that mitigate Ottimo’s misconduct.

The Guidelines direct FINRA to strongly consider barring the respondent except where “mitigating factors predominate.”²⁷ At the least, Ottimo does not and cannot plausibly claim that acceptance of responsibility is a mitigating factor.²⁸ Ottimo raises further arguments in mitigation, but we find none of them convincing.

²¹ Ottimo’s request to investors was part of a letter he sent them that disclosed some additional information, but Ottimo’s “letter contained no reference to Jet One Jets never being profitable, declaring bankruptcy, and being subject to federal regulatory proceedings.” *Ottimo*, 2018 WL 3155025, at *11.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See Sanction Guidelines, at 6 (Principal Considerations in Determining Sanctions, No. 10) (“Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer.”).

²⁶ See *id.* (Principal Considerations in Determining Sanctions, No. 2) (“Whether an individual . . . accepted responsibility for and acknowledged the misconduct . . . prior to detection . . .”).

²⁷ See *supra* note 17.

²⁸ See, e.g., *Timothy S. Dembski*, Exchange Act Release No. 80306, 2017 WL 1103685, at *14 (Mar. 24, 2017) (“Dembski has not acknowledged the wrongful nature of his conduct and therefore cannot claim mitigation on this basis.”), *pet. denied*, 726 F. App’x 841 (2d Cir. 2018).

First, Ottimo argues that his reliance on counsel is a mitigating factor. Although Ottimo notes correctly that the Guidelines provide that a respondent’s “reasonable reliance on competent legal or accounting advice” is a relevant consideration,²⁹ we found explicitly in our prior opinion that Ottimo did not reasonably rely on the advice of counsel. We found not only was there “no evidence that Ottimo made a complete disclosure of the relevant facts to” his counsel, but also there was “no evidence that he specifically sought or received advice from [his counsel] about what he was required to disclose regarding his prior business experience.”³⁰ Ottimo has presented no basis for us to reconsider our conclusion. Because Ottimo did not receive “any advice on the topic, [he] could not have relied on that nonexistent advice.”³¹

Nevertheless, Ottimo contends that even if he “failed to meet the standard of proof required for a formal ‘advice of counsel’ defense” it should still be mitigating that he hired lawyers “in good faith and paid [them] substantial fees so that the Fund’s PPM fully complied with the Federal securities laws.” We have recognized that, under some circumstances, reasonable reliance on counsel may mitigate a violation for sanctions purposes even if it does not absolve the respondent of liability.³² But merely hiring counsel is not sufficient.³³ Rather, while we have found reliance on counsel to render a violation not egregious where there was evidence that counsel advised the respondent “regarding what needed to be done from a compliance . . . perspective and it was not unreasonable for [respondent] to rely on this advice,”³⁴ we have also held that a respondent cannot reasonably rely on counsel’s advice without having made a full disclosure to that counsel.³⁵ Here, Ottimo never specifically asked his counsel about the disclosure in the biography, never gave his counsel the information needed for counsel to opine

See generally West v. SEC, 641 F. App’x 27, 30 n.6 (2d Cir. 2016) (stating that “the lack of an aggravating factor . . . does not establish a mitigating factor”).

²⁹ Sanction Guidelines, at 6 (Principal Considerations in Determining Sanctions, No. 7).

³⁰ *Ottimo*, 2018 WL 3155025, at *12.

³¹ *Id.*

³² *William H. Murphy & Co.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *19 (Dec. 21, 2020) (finding reasonable reliance on counsel “relevant to the issue of sanctions” but not a defense to liability).

³³ *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *19 (Sept. 24, 2015) (rejecting applicants’ claim that the fact that they “retained securities counsel ‘to insure compliance with FINRA rules and to negotiate a selling agreement’” itself mitigated their violations because the record did not establish what was “discussed with the securities counsel ‘in the aspect of what was to be disclosed and what wasn’t to be disclosed’”).

³⁴ *Murphy & Co.*, 2020 WL 7496228, at *19.

³⁵ *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *11 (Nov. 14, 2008), *pet. denied*, 347 F. App’x 692 (2d Cir. 2009).

on the disclosure, and never received any advice upon which he could reasonably rely. As a result, we do not find Ottimo's purported reliance on counsel mitigating.³⁶

Second, Ottimo argues, citing a speech by a former director of the Division of Corporation Finance, that his omissions were less blameworthy because determining whether a fact is material and must be disclosed "can be a complex task."³⁷ Here, as we concluded previously, the omitted information was clearly material. The statements about Jet One Jets in the PPM were "clearly relevant to investors' assessment of Ottimo's management abilities," and the information about Jet One Jets' "regulatory problems, significant losses, and eventual bankruptcy" was something "that a reasonable investor would want to consider in deciding whether to invest in a venture managed by Ottimo."³⁸ Indeed, "Ottimo must have known that his biography presented a substantial risk of misleading investors" about his management of Jet One Jets.³⁹ The failure to disclose information so clearly relevant to investors is not mitigating.⁴⁰

Ottimo suggests in his brief that, in determining materiality in our prior opinion, we should have relied on "expert testimony or testimony from Fund investors that the omitted information would have been important to a reasonable investor considering an investment in the Fund." But expert testimony is not necessary for us to consider when determining materiality.⁴¹ And as we noted in our prior opinion, "the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective."⁴²

³⁶ *Id.* at *12 (rejecting claim that reliance on counsel mitigated applicant's violation where, due to "the lack of evidence about what Berger told his counsel, the record does not show that Berger reasonably relied and in good faith on [counsel's] advice").

³⁷ Keith F. Higgins, Dir., Div. of Corp. Fin., Secs. and Exch. Comm'n, Disclosure Effectiveness: Remarks Before the American Bar Association Business Law Section Spring Meeting (Apr. 11, 2014), <https://www.sec.gov/news/speech/2014-spch041114kfh>.

³⁸ *Ottimo*, 2018 WL 3155025, at *10.

³⁹ *Id.* at 12.

⁴⁰ *See SEC v. Merch. Capital, LLC*, 483 F.3d 747, 770-71 (11th Cir. 2007) (holding that the omission of information about a defendant's personal bankruptcy which "resulted from the failure of th[e] business of which he was CEO, and which he touted in the offering materials as related and as relevant experience" was material because it "clearly would have been helpful to a reasonable investor assessing the quality and extent of this experience").

⁴¹ *See Alexandre S. Clug*, Exchange Act Release No. 90385, 2020 WL 6585907, at *11 n.46 (Nov. 9, 2020) (rejecting argument that "the Division did not establish materiality because it 'did not call an expert to testify'" since "materiality need not be based on expert testimony").

⁴² *Ottimo*, 2018 WL 3155025, at *11 (quoting *Richmark Capital Corp.*, Securities Act Release No. 8333, 2003 WL 22570712, *5 (Nov. 7, 2003)).

Third, Ottimo contends that the fact that Fund investors did not lose money is mitigating. But we have consistently held that “the lack of customer harm is not mitigating.”⁴³ We also reject Ottimo’s argument that the fact that “[t]he affected customers were all sophisticated, accredited investors” is mitigating. There is no evidence in the record to support this contention, and in any case a customer’s sophistication is not a mitigating factor.⁴⁴ We have repeatedly held that both sophisticated and unsophisticated investors are entitled to protection against abuse under the securities laws.⁴⁵ Similarly without merit is Ottimo’s suggestion that the fact that his misconduct involved omissions rather than affirmative misrepresentations is mitigating.⁴⁶

Finally, Ottimo argues that the number, size, and duration of the transactions at issue are mitigating factors.⁴⁷ According to Ottimo, he did not engage in a “pattern of misconduct,” “[t]he time period that the PPM was used to raise funds” was short, and “[t]he number and size of the transactions at issue was extremely small.” But Ottimo and other EKN registered representatives used the PPM with the fraudulent omissions to sell \$3.76 million worth of interests in the Fund to around 20 investors throughout the Fund’s offering period. Fraudulent misconduct involving transactions totaling millions of dollars from a score of investors over a period of multiple weeks represents a significant risk to the public. Indeed, we have found similar misconduct to constitute aggravating factors.⁴⁸ At the least, the fact that Ottimo defrauded 20 investors in

⁴³ *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 WL 1324737, at *9 (Mar. 14, 2018); accord, e.g., *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *10 & n.63 (Mar. 31, 2016), *pet. denied sub nom. Harris v. SEC*, 712 F. App’x 46 (2d Cir. 2017).

⁴⁴ *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *13 (Jan. 9, 2015), *pet. denied*, 641 F. App’x 27 (2d Cir. 2016).

⁴⁵ *Id.*; cf. *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *7 (Dec. 21, 2007) (“[T]he sophistication of investors does not justify misleading them.”); *Dolphin & Bradbury, Inc.* Exchange Act Release No. 54143, 2006 WL 1976000, at *9 (July 13, 2006) (“[T]he protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated.”), *aff’d*, 512 F.3d 634 (D.C. Cir. 2008).

⁴⁶ See, e.g., *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, at *13-14 (Mar. 27, 2017) (sustaining FINRA’s imposition of a bar for fraudulent omissions), *pet. denied*, 733 F. App’x 571 (2d Cir. 2018).

⁴⁷ See Sanction Guidelines, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, & 18) (directing FINRA to consider “[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct,” “[w]hether the respondent engaged in the misconduct over an extended period of time,” and the “number, size, and character” of the transactions).

⁴⁸ See, e.g., *Scholander*, , 2016 WL 1255596, at *10 (sustaining a FINRA bar because of “several aggravating factors” including that applicants “sold nearly \$1 million” in securities to “42 customers”); *Mielke*, 2015 WL 5608531, at *4, *18-*19 (sustaining FINRA bars for unauthorized private securities transactions and agreeing that the sale of \$4.62 million in securities to 31 investors were aggravating factors); *Kirlin Secs. Inc.*, Exchange Act Release No. 61135, 2009 WL 4731652, at *18 (Dec. 10, 2009) (sustaining a FINRA bar and expulsion and

transactions totaling millions of dollars by repeatedly using a PPM that contained material omissions does not mitigate his misconduct or suggest that a bar is not warranted to protect the investing public.⁴⁹ And even if we were to consider the number, size, and duration of the transactions at issue in some sense mitigating rather than aggravating, the record establishes several other aggravating factors. We have no trouble concluding that aggravating rather than mitigating factors predominate.⁵⁰

C. Barring Ottimo is a necessary remedial measure in light of his misconduct.

Ottimo contends that his conduct did not constitute “egregious fraud” and that sustaining a bar in this proceeding would “authorize FINRA to impose a permanent bar in every disciplinary proceeding in which an associated person has been found liable on any ‘fraud’ charge, regardless of the character and severity of the underlying conduct.” But we have held repeatedly that conduct that violates the antifraud provisions of the federal securities laws is “especially serious” and should be remedied with a sanction fully commensurate with the threat such conduct poses to the public.⁵¹ Consistent with that view, FINRA’s Sanction Guidelines directed adjudicators to “[s]trongly consider barring an individual” in cases of “fraud, misrepresentations, or material omissions of fact” involving “[i]ntentional or [r]eckless [m]isconduct,” except where “mitigating factors predominate.”⁵² In this case, not only do

agreeing with FINRA that aggravating circumstances supported the sanctions including that the misconduct involved “more than 115 trades spanning a five-week period”); *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 WL 4936788, at *6, *12 (Nov. 14, 2008) (sustaining NASD bar and concluding that NASD appropriately considered aggravating the fact that applicants sold approximately \$2.4 million in securities to 45 customers based on reckless misrepresentations), *pet. denied*, 595 F.3d 1034 (9th Cir. 2010); *John P. Goldsworthy*, Exchange Act Release No. 45926, 2002 WL 987627, at *9 (May 15, 2002) (sustaining NASD bar, which was supported by a finding that “Goldsworthy had participated in securities transactions with twelve customers over a period of almost eight months”).

⁴⁹ Cf. *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *2, *20 (Jan. 30, 2009) (sustaining a FINRA bar for making unsuitable recommendations to twelve customers “between October 2001 and February 2002”), *pet. denied*, 416 F. App’x 142 (3d Cir. 2010).

⁵⁰ Cf. *Denise M. Olson*, Exchange Act Release No. 75838, 2015 WL 5172954, at *5 (Sept. 3, 2015) (giving “little weight” to mitigating factors in light of other aggravating considerations); *Gebhart*, 2008 WL 4936788, at *12 (noting that the “mitigating factors identified by [applicants] do not outweigh the aggravating circumstances present in this case”).

⁵¹ E.g., *Positron Corporation*, Exchange Act Release No. 74216, 2015 WL 470454, at *7 (Feb. 5, 2015).

⁵² Sanction Guidelines, at 87; see also FINRA Regulatory Notice 15-15 (May 12, 2015), <https://www.finra.org/rules-guidance/notices/15-15> (explaining that this guideline reinforces “the tenet that fraudulent conduct is unacceptable and warrants the imposition of strong sanctions.”). On remand before FINRA, Ottimo argued for the first time that the hearing panel should have applied an earlier version of the Sanction Guidelines that provided that a bar should be “considered” in “egregious cases.” As discussed above, see *supra* note 16, FINRA applied the

mitigating factors not predominate, but we find that aggravating factors do. Barring Ottimo does not suggest that FINRA may impose a bar in all cases in which a person is found liable for fraud.

Ottimo also contends, without citation to authority, that “[i]f a lesser sanction is sufficient, the imposition of a permanent bar is necessarily punitive and, therefore, improper.” But the D.C. Circuit has rejected the argument that we must state why a lesser sanction would be insufficient in order to justify a bar as remedial.⁵³ In any case, we find that a bar is necessary to protect the public from Ottimo’s demonstrated propensity for fraudulently omitting information material to prospective investors. Ottimo not only recklessly omitted such information here but then attempted to pressure investors into saying that had they known additional information about Ottimo it would not have mattered to them. In these circumstances, we find a bar warranted to remedy the risk that otherwise Ottimo would again defraud investors in the future.⁵⁴

As a result, barring Ottimo is not punitive. FINRA bars are not punitive where they are imposed “to protect the public.”⁵⁵ Given that aggravating factors predominate here and that Ottimo has failed to establish the presence of any mitigating factors, he has not shown that a sanction less than a bar would protect the public and would be appropriate for the serious fraud violation we have sustained.⁵⁶ Accordingly, we sustain the bar FINRA imposed on Ottimo. We

version of the guidelines in effect at the time the matter was first before the NAC, and we have held that FINRA properly applies the guidelines in effect while the matter is pending before it. *Meyers Assocs.*, Exchange Act Release No. 86193, 2019 WL 2593825, at *17 n.75 (June 24, 2019). Ottimo does not argue before us that FINRA applied the wrong version of the guidelines. In any event, in light of the aggravating factors discussed above, we find Ottimo’s misconduct to be egregious and would find a bar warranted under the earlier version of the guidelines.

⁵³ *PAZ Secs., Inc. v. SEC*, 566 F.3d 1172, 1176 (D.C. Cir. 2009).

⁵⁴ *McGee*, 2017 WL 1132115, at *13-14 (sustaining bar FINRA imposed on broker who failed to disclose material information to his customer and attempted to conceal his misconduct because bar would “protect the public by preventing [him] from defrauding other customers”).

⁵⁵ *Gopi Krishna Vungarala*, Exchange Act Release No. 90476, 2020 WL 6867617, at *15 (Nov. 20, 2020); *see also Saad v. SEC*, 980 F.3d 103, 107 (D.C. Cir. 2020) (rejecting the argument that the Supreme Court’s decision in *Kokesh v. SEC* means that FINRA bars are impermissibly punitive and may not be imposed).

⁵⁶ *See Vungarala*, 2020 WL 6867617, at *15 (“Although Vungarala challenges his liability and argues that imposing a bar is punitive, he does not raise any mitigating factors that suggest a sanction less than a bar should be imposed for the violations we have sustained.”).

conclude, with due regard for the public interest and the protection of investors, that the bar is not excessive or oppressive here but a necessary remedial measure.

An appropriate order will issue.⁵⁷

By the Commission (Chair GENSLER and Commissioners PEIRCE, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

⁵⁷ Because our decisional process would not be significantly aided by oral argument, Ottimo's motion for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 95141 / June 22, 2022

Admin. Proc. File No. 3-17930r

In the Matter of the Application of

LOUIS OTTIMO

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 bar FINRA imposed on Louis Ottimo is sustained.

By the Commission.

Vanessa A. Countryman
Secretary